

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 07-02487

PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN EDWARDS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered November 20, 2007. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and course of sexual conduct against a child in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]) and course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]). We agree with defendant that his waiver of the right to appeal was invalid because it is unclear on the record before us whether he "may have erroneously believed that the right to appeal is automatically extinguished upon entry of a guilty plea" (*People v Moyett*, 7 NY3d 892, 893). Although the waiver thus does not encompass defendant's challenge to the severity of the sentence (see generally *People v Lopez*, 6 NY3d 248, 256), we reject that challenge. "Defendant was sentenced in accordance with the plea bargain and should be bound by its terms" (*People v McGovern*, 265 AD2d 881, lv denied 94 NY2d 882; see *People v Lake*, 45 AD3d 1409, lv denied 10 NY3d 767). Finally, defendant failed to preserve for our review his contention that County Court failed to take into account the jail time credit to which he is entitled in determining the duration of the order of protection (see *People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court