

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

773

**KA 08-00243**

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL HERNANDEZ, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 9, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree and burglary in the third 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 criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and burglary in the third degree (§ 140.20). As the People correctly concede, defendant's waiver of the right to appeal was not knowing and voluntary inasmuch as Supreme Court failed to explain that the waiver of the right to appeal is separate and distinct from the other rights that are forfeited by the plea (see *People v Lopez*, 6 NY3d 248, 256). Although defendant's jurisdictional challenge to the superior court information (SCI) survives the plea and, indeed, would have survived a valid waiver of the right to appeal (see *People v Heinig*, 21 AD3d 1297, lv denied 6 NY3d 813), we nevertheless reject that challenge. According to defendant, the SCI is jurisdictionally defective because he was not held for the action of a grand jury by the local criminal court as required by CPL 195.10 (1) (a). The record establishes that defendant was arraigned by the local criminal court and that the matter was adjourned for further proceedings. There is no indication in the record that a preliminary hearing was held, but the record does establish that Supreme Court was satisfied with the waiver of the indictment and executed an order to that effect. We thus "may presume that the matter was properly before that court" (*People v Chad S.*, 237 AD2d 986, lv denied 90 NY2d 856; see *People v Hurd*, 12 AD3d 1198, 1199, lv denied 4 NY3d 764). Finally, the sentence is not unduly

harsh or severe.

Entered: June 5, 2009

Patricia L. Morgan  
Clerk of the Court