

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

926

KA 08-00625

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICKY RIZEK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered July 24, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree and attempted rape in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]) and attempted rape in the first degree (§§ 110.00, 130.35 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (§ 160.10 [1]). Contrary to the contention of defendant in both appeals, his waivers of the right to appeal were voluntarily, knowingly, and intelligently entered (see *People v Lopez*, 6 NY3d 248, 256; *People v Lococo*, 92 NY2d 825, 827). We conclude, however, that the waivers of the right to appeal do not encompass defendant's challenges to the severity of the sentence in each appeal because defendant waived his right to appeal before County Court advised him of the maximum sentence he could receive (see *People v Martinez*, 55 AD3d 1334, *lv denied* 11 NY3d 927; *People v Mingo*, 38 AD3d 1270). We nevertheless conclude that the sentence in each appeal is not unduly harsh or severe. Finally, the further contention of defendant in appeal No. 1 that he was denied effective assistance of counsel "does not survive his guilty plea or his waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Dean*, 48 AD3d 1244, 1245, *lv denied* 10 NY3d 839

[internal quotation marks omitted]).

Entered: July 2, 2009

Patricia L. Morgan
Clerk of the Court