

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

1119

KA 06-02143

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PHILLIP NELSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 28, 2006. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of rape in the second degree (Penal Law § 130.30 [1]), defendant contends that County Court abused its discretion in denying his motion to withdraw the plea based on defendant's claims of innocence and mistake. We conclude that defendant's contention is preserved for our review only insofar as it is based on defendant's protestations of innocence. Following the plea, defense counsel informed the court that defendant denied his guilt and that it was defense counsel's understanding that defendant wished to withdraw his plea. Contrary to the People's contention, we deem that statement sufficient to preserve for our review the contention of defendant with respect to his claim of innocence. We nevertheless reject that contention. "Here, defendant's belated and conclusory allegations of innocence in support of the motion are belied by the plea colloquy" (*People v Kimmons*, 39 AD3d 1180, 1180; see *People v Klein*, 11 AD3d 959).

With respect to defendant's claim of mistake, defendant contends that the court should have permitted him to withdraw his plea because, at the time he entered the plea, he was unaware that he would lose custody of his daughter as a consequence of the plea. Defendant failed to raise that claim at the time of his motion, however, and thus has not preserved it for our review (see generally *People v Mackey*, 77 NY2d 846; *People v Mesquite*, 234 AD2d 395, lv denied 89 NY2d 1013). We decline to exercise our power to review that claim as

a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court