

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

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KA 09-00532

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT D. SECRIST, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, WEST VALLEY, FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered March 3, 2008. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and burglary in the second 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 murder in the second degree (Penal Law § 125.25 [1]) and burglary in the second degree (§ 140.25 [2]). Although defendant is correct that his challenge to the voluntariness of his plea survives his waiver of the right to appeal, defendant failed to preserve that challenge for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (see *People v Connolly*, 70 AD3d 1510, 1511). Contrary to the contention of defendant, his use of prescription medication does not bring this case within the narrow exception to the preservation doctrine inasmuch as " 'nothing in the plea allocution cast significant doubt on defendant's guilt or otherwise called into question the voluntariness of the plea' " (*People v Lopez*, 71 NY2d 662, 666). To the extent that the contention of defendant that he was denied effective assistance of counsel survives the plea and his waiver of the right to appeal (see *People v Santos*, 37 AD3d 1141, lv denied 8 NY3d 950), we conclude that it is without merit (see generally *People v Ford*, 86 NY2d 397, 404).