

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

900

KA 09-02162

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES R. POLEUN, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 20, 2009. The judgment convicted defendant, upon his plea of guilty, of possessing a sexual performance by a child.

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 possessing a sexual performance by a child (Penal Law § 263.16). Contrary to defendant's contention, the record of the plea proceeding establishes that defendant understood that the waiver of the right to appeal was separate from his plea of guilty (*see People v Dillon*, 67 AD3d 1382). We conclude that his waiver of the right to appeal was knowingly, intelligently, and voluntarily entered, and that it encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256). Although the further contention of defendant that the plea was not voluntarily entered survives his waiver of the right to appeal, he failed to preserve that contention for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Diaz*, 62 AD3d 1252, *lv denied* 12 NY3d 924; *see also People v Burney*, 30 AD3d 1082, *amended on rearg* 32 AD3d 1366, *lv denied* 7 NY3d 866, 8 NY3d 844). In any event, that contention is lacking in merit. Although the People incorrectly informed defendant at the plea proceeding that he could be sentenced to a determinate term of incarceration of up to four years and a period of postrelease supervision of up to 10 years, County Court thereafter correctly advised defendant of his maximum sentencing exposure (*see People v Johnson*, 71 AD3d 1048), and the court properly sentenced defendant to an indeterminate term of incarceration without a period of postrelease supervision (*see*

generally Burney, 30 AD3d 1082).

Entered: July 2, 2010

Patricia L. Morgan
Clerk of the Court