

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

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KA 11-01061

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TRACY L. JONES, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 14, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted sexual abuse in the first 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 attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [1]). We agree with defendant that his waiver of the right to appeal is invalid. Supreme Court's "brief reference to the waiver of the right to appeal during the plea colloquy was insufficient to establish that the waiver was a knowing and voluntary choice" (*People v Littleton*, 62 AD3d 1267, 1268, lv denied 12 NY3d 926). Thus, defendant's challenge to the severity of the sentence and his contention regarding ineffective assistance of counsel are not encompassed by his waiver of the right to appeal. Nevertheless, we conclude that the sentence is not unduly harsh or severe. To the extent that defendant's contention that he was denied effective assistance of counsel with respect to sentencing is not forfeited by the plea (*see People v Shubert*, 83 AD3d 1577, 1578), it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: April 20, 2012

Frances E. Cafarell
Clerk of the Court