

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

928

KA 11-02031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARAIN CRUZ, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered April 15, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband 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 promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea allocution was factually insufficient based on County Court's failure to obtain a waiver of the defense of mental disease or defect (see *People v Trapp*, 15 AD3d 916, lv denied 4 NY3d 891). Nothing in the plea allocution raised the possibility of that defense (cf. *People v Lopez*, 71 NY2d 662, 666-668; *People v Costanza*, 244 AD2d 988, 989), and defendant's contention therefore does not fall within the rare case exception to the preservation rule (see *Lopez*, 71 NY2d at 666).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court