

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

88

**KA 13-00198**

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

---

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS J. DEMARCO, DEFENDANT-APPELLANT.

---

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Cattaraugus County Court (William H. Mountain, III, A.J.), rendered November 26, 2012. The judgment convicted defendant, upon his plea of guilty, of aggravated driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle 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, inter alia, aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [a]; 1193 [1] [c] [i]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution" that he was also waiving his right to appeal any issue concerning the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; see *People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 14, 2014

Frances E. Cafarell  
Clerk of the Court