

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

1255

KA 16-01785

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TOMMY BRINSON, DEFENDANT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR DEFENDANT-APPELLANT.

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (TIMOTHY G. CHAPMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 5, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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 two counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant failed to preserve for our review his contention that County Court erred in considering improper factors in sentencing him (*see People v Garson*, 69 AD3d 650, 652 [2d Dept 2010], *lv denied and dismissed* 15 NY3d 750 [2010]), and we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Furthermore, defendant waived his contention that the court erred in sentencing him in the absence of an updated presentence report (*see People v Willie T.J.*, 101 AD3d 1626, 1627 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]). A preplea investigation report had been prepared within the preceding 12 months, and defendant explicitly waived the preparation of an updated presentence report (*see* CPL 390.20 [4] [a] [iii]; *People v Servey*, 96 AD3d 1428, 1429 [4th Dept 2012], *lv denied* 19 NY3d 1001 [2012]).

We reject defendant's challenge to the severity of the sentence. We note, however, that the certificate of conviction incorrectly reflects that the sentences imposed on all counts are to run concurrently with each other, and must therefore be amended to reflect that the sentences imposed on counts three and four are to run

concurrently with each other and consecutively to the sentences imposed on counts one and two (see *People v Mosley*, 55 AD3d 1371, 1372 [4th Dept 2008], *lv denied* 11 NY3d 856 [2008]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court