

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

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**KA 10-02204**

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH SANTOS, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered September 30, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [2]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. We agree with defendant that County Court failed to engage him in an adequate colloquy to ensure that his right to appeal was a knowing and voluntary choice (*see People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024). Nevertheless, on the merits, we perceive no basis to exercise our power to modify defendant's negotiated sentence of probation as a matter of discretion in the interest of justice (*see* CPL 470.15 [6]).

Entered: March 28, 2014

Frances E. Cafarell  
Clerk of the Court