

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

831

KA 10-02153

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM F. CAREY, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered October 19, 2010. The judgment revoked defendant's sentence of shock probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant was convicted upon a plea of guilty of, inter alia, driving while intoxicated as a class E felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]) and was sentenced to a term of shock probation. He subsequently admitted that he violated a condition of probation and now appeals from a judgment revoking his sentence of shock probation and imposing a sentence of imprisonment. Defendant failed to preserve for our review his contention that County Court erred in failing to order an updated presentence report before sentencing him following the revocation of probation (see *People v Obbagy*, 56 AD3d 1223, lv denied 11 NY3d 928; *People v Pomales*, 37 AD3d 1098, lv denied 8 NY3d 949). In any event, that contention lacks merit. The declaration of delinquency and uniform court report "constituted the functional equivalent of an updated [presentence] report" (*People v Fairman*, 38 AD3d 1346, 1347, lv denied 9 NY3d 865; see *People v Somers*, 280 AD2d 925, lv denied 96 NY2d 806). Moreover, the same judge presided over both the original proceedings and the revocation proceedings, and thus "[t]he court was 'fully familiar with any changes in defendant's status, conduct or condition' since the original sentencing" (*People v Howard*, 254 AD2d 701, lv denied 93 NY2d 853; see *People v Perry*, 278 AD2d 933, lv denied 96 NY2d 866; cf. *People v Klinkowski*, 281 AD2d 972, lv denied 96 NY2d 831).

Defendant further contends that the court should have permitted him to withdraw his admission to the violation of probation because

the court never informed him that the sentence of imprisonment was an agreed-upon sentence and there is no indication in the record that defense counsel informed him of the terms of the agreement. To the extent that defendant's contention may be construed as a contention that his admission was not knowingly, voluntarily or intelligently entered, that contention is not preserved for our review and does not fall within the rare exception to the preservation requirement (see *People v Springstead*, 57 AD3d 1397, 1398, lv denied 12 NY3d 788; *People v Barra*, 45 AD3d 1393, 1393-1394, lv denied 10 NY3d 761; see generally *People v Lopez*, 71 NY2d 662, 666). Insofar as defendant contends that defense counsel failed to inform him of the terms of the agreement, that contention is based on material outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (see *People v Shorter*, 305 AD2d 1070, 1071, lv denied 100 NY2d 566). Finally, the sentence is not unduly harsh or severe.

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court