

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

1240

**KA 11-02219**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER W. TESSITORE, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 3, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that the sentence is unduly harsh and severe and that the award of restitution is unlawful. Defendant's challenge to the severity of the sentence is encompassed by his valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Harris*, 94 AD3d 1484, 1485, *lv denied* 19 NY3d 961; *People v Gordon*, 89 AD3d 1466, 1466, *lv denied* 18 NY3d 957).

Defendant's challenge "to the amount of restitution is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement" (*People v Sweeney*, 4 AD3d 769, 770, *lv denied* 2 NY3d 807; *see People v Spencer*, 87 AD3d 1284, 1285). Defendant, however, failed to preserve his challenge to the restitution amount for our review inasmuch as he did not object to that amount at sentencing (*see People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889; *People v Hannig*, 68 AD3d 1779, 1780, *lv denied* 14 NY3d 801), and in any event he affirmatively waived his right to a restitution hearing (*see People v Huffman*, 288 AD2d 907, 908, *lv denied* 97 NY2d 755).

Entered: December 21, 2012

Frances E. Cafarell  
Clerk of the Court