

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

484

KA 12-00132

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH WASHINGTON, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RENÉ JUAREZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered April 13, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted assault 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 attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Defendant's challenge to the sufficiency of the CPL 400.21 notice is not preserved for our review (see *People v Pellegrino*, 60 NY2d 636, 637; *People v Butler*, 96 AD3d 1367, 1368, lv denied 20 NY3d 931). In any event, "defendant waived strict compliance with that statute by admitting the prior felony conviction in open court" (*Butler*, 96 AD3d at 1368; see *People v Guillory*, 98 AD3d 835, 836, lv denied 20 NY3d 932; *People v Perez*, 85 AD3d 1538, 1541). Defendant further contends that the People failed to submit sufficient documentation establishing the period of defendant's prior incarceration for purposes of the tolling provision of Penal Law § 70.06 (1) (b) (v). That contention is also unpreserved for our review (cf. *Butler*, 96 AD3d at 1368; see generally *People v Samms*, 95 NY2d 52, 57), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court