

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

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KA 12-00795

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HENRY H. DONALDSON, JR., ALSO KNOWN AS PUDDIN,
DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),
FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (AMBER L. KERLING
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (M. William Boller, A.J.), rendered February 27, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the fourth 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 criminal sale of a controlled substance in the fourth degree (Penal Law §§ 110.00, 220.34 [1]). Initially, we agree with defendant that his waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; see *People v Doxey*, 112 AD3d 1364, 1364-1365; *People v Jones*, 107 AD3d 1589, 1589-1590, *lv denied* 21 NY3d 1075), and because the court "improperly conflated the rights automatically forfeited by operation of law as the consequence of a guilty plea with those rights voluntarily relinquished as the consequence of a waiver of the right to appeal" (*People v Daniels*, 68 AD3d 1711, 1712, *lv denied* 14 NY3d 887).

We reject defendant's further contention that the court violated CPL 430.10 in resentencing him as a second felony offender. Contrary to defendant's contention, " 'the trial court had the inherent power to correct an illegal sentence' over the defendant's objection where[, as here,] the corrected sentence fell within the range initially stated by the court" (*People v DeValle*, 94 NY2d 870, 871-872, quoting

People v Williams, 87 NY2d 1014, 1015, *rearg denied* 89 NY2d 861; *see People v Coble*, 17 AD3d 1165, 1165-1166, *lv denied* 5 NY3d 787). The initial sentence was illegal because the information available to the court and the parties established that defendant was a second felony drug offender, and the court therefore could not impose a one-year period of postrelease supervision (see Penal Law §§ 70.45 [2] [d]; 70.70 [3] [b] [ii]). Consequently, the People were required to file a predicate felony statement and the court, upon concluding that he had such a conviction, was required to sentence defendant as a second felony drug offender (see generally *People v Stubbs*, 96 AD3d 1448, 1450, *lv denied* 19 NY3d 1001; *People v Griffin*, 72 AD3d 1496, 1497).

Finally, to the extent that defendant's contention that he was denied effective assistance of counsel at sentencing survives his guilty plea, we conclude that it lacks merit (see *People v LaCroce*, 83 AD3d 1388, 1388, *lv denied* 17 NY3d 807). Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

We have considered defendant's remaining contentions and conclude that they lack merit.