

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

626

**KA 18-00271**

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN K. REDAR, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC,  
SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER  
EAGGLESTON OF COUNSEL), FOR RESPONDENT.

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Appeal from a resentence of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 16, 2017. Defendant was resentenced upon his conviction of, inter alia, criminal sale of a controlled substance in the fifth degree.

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

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and, in appeal No. 1, he appeals from the resentence on that conviction. We note at the outset that, inasmuch as the sentence in appeal No. 2 was superseded by the resentence in appeal No. 1, the appeal from the judgment in appeal No. 2 insofar as it imposed sentence must be dismissed (*see People v Smith*, 187 AD3d 1652, 1656 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *People v Habberfield*, 187 AD3d 1673, 1673 [4th Dept 2020], *lv denied* 36 NY3d 973 [2020]). We otherwise affirm the judgment in appeal No. 2 and affirm the resentence in appeal No. 1.

Defendant failed to preserve for our review his contention in appeal No. 2 that his plea was not knowingly, intelligently, and voluntarily entered inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction pursuant to CPL article 440 (*see People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation doctrine (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *Sheppard*, 149 AD3d at 1569). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see*

CPL 470.15 [3] [c]; *People v Carlisle*, 120 AD3d 1607, 1608 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

Defendant's further contention in appeal No. 2 that he was denied effective assistance of counsel does not survive his guilty plea because he "failed to allege that he would have proceeded to trial absent counsel's alleged deficiencies and does not explain how those alleged deficiencies impacted his decision to enter a guilty plea" (*People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]; see generally *People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014]).

Finally, in appeal No. 1, we conclude that the resentencing is not unduly harsh or severe.

Entered: June 17, 2021

Mark W. Bennett  
Clerk of the Court