

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

571

KA 21-00784

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARCUS ST. DENIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered May 4, 2016. The judgment convicted defendant upon his plea of guilty of sexual abuse in the first 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 sexual abuse in the first degree (Penal Law § 130.65 [1]). We agree with defendant that his waiver of the right to appeal is invalid because Supreme Court's oral colloquy used overbroad language that mischaracterized the waiver as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *see People v DeMarco*, 191 AD3d 1428, 1428 [4th Dept 2021], *lv denied* 36 NY3d 1119 [2021]; *People v Shantz*, 186 AD3d 1076, 1077 [4th Dept 2020]). We nevertheless conclude that the sentence is not unduly harsh or severe. Finally, the certificate of conviction and the uniform sentence and commitment form incorrectly reflect that defendant was sentenced as a second felony offender and must be amended to reflect that he was sentenced as a second violent felony offender (*see People v Seymore*, 188 AD3d 1767, 1770 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]).

Entered: July 1, 2022

Ann Dillon Flynn
Clerk of the Court