

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

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KA 20-01526

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GERALD L. SMITH, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 4, 2018. The judgment convicted defendant upon his plea of guilty of attempted burglary 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 burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his plea was involuntary. As a preliminary matter, we note that, even assuming, arguendo, that defendant's waiver of the right to appeal is valid, defendant's contention survives that waiver (*see People v Tchiyuka*, 169 AD3d 1398, 1398 [4th Dept 2019]). Nonetheless, defendant's contention relies on matters outside the record and thus is not properly before us on his direct appeal and must be pursued by way of a motion pursuant to CPL article 440 (*see generally People v Jackson*, 153 AD3d 1605, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court