

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

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KA 21-01002

PRESENT: LINDLEY, J.P., CURRAN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRIAN SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AXELLE LECOMTE
MATHEWSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF
COUNSEL), FOR RESPONDENT.

Appeal from a resentencing of the Supreme Court, Erie County
(Deborah A. Haendiges, J.), rendered May 24, 2021. Defendant was
resentenced upon his conviction of attempted rape in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed to
the extent defendant challenges the legality of the resentencing and the
resentencing is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment
convicting him upon his plea of guilty of attempted rape in the third
degree (Penal Law § 110.00, former § 130.25 [3]) and, in appeal No. 2,
he appeals from a resentencing on that conviction. Initially, we note
that defendant's contentions on appeal concern only the resentencing in
appeal No. 2, and we therefore dismiss the appeal from the judgment in
appeal No. 1 (see *People v Davis*, 186 AD3d 1073, 1073 [4th Dept 2020];
People v Loiz [appeal No. 2], 175 AD3d 872, 872-873 [4th Dept 2019];
People v Patterson, 128 AD3d 1377, 1377 [4th Dept 2015]).

With respect to appeal No. 2, we note, preliminarily, that
defendant's contentions would survive even a valid waiver of the right
to appeal (see *People v Seaberg*, 74 NY2d 1, 10 [1989]; *People v Lopez*,
151 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017];
People v Tate, 83 AD3d 1467, 1467 [4th Dept 2011]). Consequently, we
need not address the validity of the appeal waiver (see *People v*
Morse, 233 AD3d 1470, 1470 [4th Dept 2024]; *People v Morrison*, 216
AD3d 1430, 1431 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023]).
Defendant's challenge to the legality of the resentencing was rendered
moot inasmuch as he has served the sentence in its entirety (see
People v Dennis, 179 AD3d 1451, 1451 [4th Dept 2020]; *People v John*,
288 AD2d 848, 850 [4th Dept 2001], *lv denied* 97 NY2d 705 [2002];
People v Dukes, 156 AD2d 959, 960 [4th Dept 1989], *lv denied* 75 NY2d

918 [1990]), and we conclude that the exception to the mootness doctrine does not apply (see *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]) and therefore dismiss the appeal to that extent.

We note that the certificate of conviction erroneously states that defendant's sentence of probation was revoked because of a violation and must be amended to correctly state that the sentence of probation was vacated (see generally *People v Jones*, 224 AD3d 1348, 1353 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]; *People v Lewis*, 185 AD3d 1542, 1543 [4th Dept 2020], *lv denied* 35 NY3d 1114 [2020]). Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the resentence.