

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

782

KA 24-01219

PRESENT: CURRAN, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DUSTIN A. LOVELAND, DEFENDANT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO, NEW YORK PROSECUTORS TRAINING INSTITUTE, ALBANY (KAREN FISHER MCGEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered July 16, 2024. The judgment convicted defendant, upon a guilty plea, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in setting the expiration date for the order of protection without "taking into account [the] jail time credit to which defendant is entitled" (*People v Mingo*, 38 AD3d 1270, 1271 [4th Dept 2007] [internal quotation marks omitted]; see *People v Boje*, 194 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *People v Coleman*, 145 AD3d 1641, 1642 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]). We agree. Although defendant failed to preserve that contention for our review (see *People v Nieves*, 2 NY3d 310, 315-317 [2004]), we exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify in the order of protection an expiration date in accordance with CPL 530.12 (5).

We conclude that the sentence is not unduly harsh or severe.