

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

862

KA 23-00428

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EH KER LER JOHN, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL),
FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered November 15, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, *arguendo*, that defendant's waiver of the right to appeal is invalid (*see People v Spratt*, 239 AD3d 1325, 1325-1326 [4th Dept 2025], *lv denied* 44 NY3d 984 [2025]; *People v Lyon*, 227 AD3d 1521, 1522 [4th Dept 2024], *lv denied* 42 NY3d 928 [2024]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Resto*, 222 AD3d 1425, 1425 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see CPL 470.15* [6] [b]).

Defendant further contends that his sentence constitutes cruel and unusual punishment. Even assuming again, *arguendo*, that the waiver of the right to appeal is invalid and thus does not foreclose our review of that contention (*cf. People v Warner*, 167 AD3d 1492, 1493 [4th Dept 2018], *lv denied* 33 NY3d 955 [2019]; *People v Marshall*, 144 AD3d 1544, 1545 [4th Dept 2016]), we note that defendant failed to preserve it for our review (*see People v Thompson*, 206 AD3d 1708, 1710 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022]; *People v Pruitt*, 169

AD3d 1367, 1368 [4th Dept 2019]; *see generally People v Pena*, 28 NY3d 727, 730 [2017]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court