

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

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KA 23-00791

PRESENT: CURRAN, J.P., MONTOUR, SMITH, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERNEST T. BURGESS, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEPHANIE M. STARE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered April 19, 2023. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Inasmuch as defendant's contention that he was denied effective assistance of counsel, i.e., his sole substantive contention on appeal, would survive even a valid waiver of the right to appeal to the same extent that such contention survives his plea, we need not address the validity of the waiver of the right to appeal (*see People v Shaw*, 222 AD3d 1401, 1401, 1403 [4th Dept 2023], *lv denied* 42 NY3d 930 [2024]). Defendant's contention survives his plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Miller*, 161 AD3d 1579, 1580 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018] [internal quotation marks omitted]). To the extent that defendant's contention survives his plea, we conclude that defendant received meaningful representation (*see Shaw*, 222 AD3d at 1403; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant received a favorable plea under which he procured the minimum sentence in light of his status as a second violent felony offender (*see* Penal Law §§ 70.04 [2], [3] [b]; 70.45 [2]), and defendant has not demonstrated "the absence of strategic or other legitimate explanations" for defense counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see Shaw*, 222 AD3d at 1403). Indeed, the record

establishes that defendant, after consulting with defense counsel about the terms of the plea offer and the likelihood of success on that part of his omnibus motion seeking to suppress evidence, made a strategic decision to forgo a suppression hearing and accept the plea offer in order to secure County Court's sentencing promise (*see Shaw*, 222 AD3d at 1403; *People v Granger*, 96 AD3d 1667, 1668 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]). We thus conclude that defendant was afforded meaningful representation inasmuch as he "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Phillips*, 221 AD3d 1501, 1502 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]).