

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

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KA 23-00945

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, SMITH, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PHILLIP OWENS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KAMAN BERLOVE LLP, ROCHESTER (BRYANNE L. JONES OF COUNSEL), FOR
DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II,
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 8, 2023. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed, the judgment is modified as a matter of discretion in the interest of justice and on the law by vacating the order of protection, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals 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]) and, in appeal No. 2, defendant appeals from a resentencing on that conviction.

We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentencing in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]; *People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]).

Defendant contends in appeal No. 1 that Supreme Court had no authority to issue an order of protection in favor of an individual who was neither a victim of nor a witness to the crime to which defendant pleaded guilty (*see CPL 530.13* [4] [a]; *People v Campbell*, 231 AD3d 1168, 1169 [2d Dept 2024], *lv denied* 42 NY3d 1052 [2024]; *People v Farrell*, 201 AD3d 1367, 1368 [4th Dept 2022]). Although defendant failed to preserve that contention for our review inasmuch as he did not object to the order of protection on that ground when it

was issued (see *People v Shampine*, 31 AD3d 1163, 1164 [4th Dept 2006]), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]; *People v Raduns*, 70 AD3d 1355, 1355 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010], *reconsideration denied* 15 NY3d 808 [2010]). We agree with defendant that the order of protection is invalid (see *Raduns*, 70 AD3d at 1355; *People v Creighton*, 298 AD2d 774, 776 [3d Dept 2002], *lv denied* 99 NY2d 613 [2003]), and we therefore modify the judgment in appeal No. 1 by vacating the order of protection (see *Raduns*, 70 AD3d at 1355).

We reject defendant's further contention that the court erred in refusing to entertain his pro se motion to withdraw his plea. Where, as here, a defendant is represented by defense counsel in a proceeding, "the decision to entertain [pro se] motions [filed by a represented defendant] lies within the sound discretion of the trial court" inasmuch as "a criminal defendant is not entitled to hybrid representation" (*People v Johnson*, 195 AD3d 1420, 1420-1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021] [internal quotation marks omitted]; see *People v Rodriguez*, 95 NY2d 497, 500 [2000]; *People v Fowler*, 136 AD3d 1395, 1395 [4th Dept 2016], *lv denied* 27 NY3d 996 [2016], *reconsideration denied* 27 NY3d 1132 [2016]). Here, we conclude that the court did not abuse its discretion in declining to hear defendant's pro se motion to withdraw his plea (see *Johnson*, 195 AD3d at 1421; *Fowler*, 136 AD3d at 1395).

In appeal No. 2, defendant contends, and the People correctly concede, that the court erred in resentencing defendant in absentia. A defendant has a right to be personally present at the time sentence is pronounced, including at resentencing (see CPL 380.40; *People v Estremera*, 30 NY3d 268, 271-273 [2017]; *People v Diefenbacher*, 21 AD3d 1293, 1295 [4th Dept 2005], *lv denied* 6 NY3d 775 [2006]). We therefore reverse the resentence, and we remit the matter to Supreme Court for further resentencing, at which time defendant must be afforded the opportunity to appear with counsel (see *Diefenbacher*, 21 AD3d at 1295).

We have considered defendant's remaining contentions in each appeal and conclude that they are without merit.