

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

956

KA 19-00152

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSHUA ORTIZ, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered November 27, 2018. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of rape in the second degree (Penal Law § 130.30 [1]). As defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Here, the rights encompassed by defendant's purported waiver of the right to appeal "were mischaracterized during the oral colloquy and in [the] written form[] executed by defendant[], which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . . advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*People v Bisono*, 36 NY3d 1013, 1017-1018 [2020], quoting *People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; see *People v Montgomery*, 191 AD3d 1418, 1418-1419 [4th Dept 2021], *lv denied* 36 NY3d 1122 [2021]). We conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559; see *Montgomery*, 191 AD3d at 1419; *People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence (see *Montgomery*, 191 AD3d at 1419), we nevertheless conclude that the

sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court