

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

752

**KA 19-01143**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES PHILLIPS, DEFENDANT-APPELLANT.

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MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 1, 2018. The judgment convicted defendant, upon his plea of guilty, of burglary in the first 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 burglary in the first degree (Penal Law § 140.30 [4]). We affirm.

Preliminarily, as defendant contends and as the People correctly concede, the record does not establish that defendant validly waived his right to appeal. County Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Shanks*, 37 NY3d 244, 253 [2021]; *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]).

Defendant next contends that his guilty plea should be vacated because his factual recitation did not affirmatively establish each and every element of the crime. Defendant failed to preserve for our review that challenge to the factual sufficiency of the allocution, and we conclude that this case does not fall within the rare exception to the preservation requirement (*see People v Barnes*, 206 AD3d 1713, 1715 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]; *see generally*

*People v Lopez*, 71 NY2d 662, 665-666 [1988]).

Finally, defendant contends that he was denied the right to effective assistance of counsel because, prior to his guilty plea, his attorney failed to obtain a ruling on that part of his omnibus motion seeking to suppress evidence. We reject that contention because defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v Liepke*, 184 AD3d 1109, 1110 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020] [internal quotation marks omitted]), and "the record establishes that defendant received 'an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Cato*, 199 AD3d 1388, 1390 [4th Dept 2021], quoting *People v Ford*, 86 NY2d 397, 404 [1995]).