

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

793

**KA 15-00471**

PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS R. OSWOLD, DEFENDANT-APPELLANT.

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ANDREA J. SCHOENEMAN, CONFLICT DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered February 11, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree and perjury 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 criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and perjury in the first degree (§ 210.15). Contrary to defendant's contention, we conclude that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Sanders*, 25 NY3d 337, 340-341), and thus defendant's challenge to the factual sufficiency of the plea allocution is encompassed by his waiver of the right to appeal (*see People v McCrea*, 140 AD3d 1655, 1655, *lv denied* 28 NY3d 933). Moreover, defendant failed to preserve that challenge for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665). In any event, "the plea allocution as a whole establishes that 'defendant understood the charges and made an intelligent decision to enter a plea' " (*People v Keitz*, 99 AD3d 1254, 1255, *lv denied* 20 NY3d 1012, *reconsideration denied* 21 NY3d 913, quoting *People v Goldstein*, 12 NY3d 295, 301). Defendant's challenge to the legal sufficiency of the evidence before the grand jury with respect to the perjury count does not survive the guilty plea (*see People v Gillett*, 105 AD3d 1444, 1445; *People v Lawrence*, 273 AD2d 805, 805, *lv denied* 95 NY2d 867), nor does his challenge to the sufficiency of the factual allegations in the indictment with respect to that count (*see People v Guerrero*, 28 NY3d 110, 116; *Lawrence*, 273 AD2d at 805; *People*

*v Holt*, 173 AD2d 644, 645).

Entered: June 9, 2017

Frances E. Cafarell  
Clerk of the Court