

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

529

**KA 16-01122**

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH NEELY, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 20, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree and sexual misconduct.

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 attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]) and sexual misconduct (§ 130.20 [1]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently, and voluntarily waived his right to appeal (see *People v Woods*, 126 AD3d 1543, 1543 [4th Dept 2015], lv denied 27 NY3d 970 [2016]). Defendant further contends that the valid waiver of the right to appeal does not encompass his challenge to the severity of the sentence inasmuch as Supreme Court failed to advise him that he could be sentenced consecutively for his crimes. We reject that contention. The court could not have imposed the determinate sentence for attempted rape in the first degree to run consecutively to the definite sentence for sexual misconduct (see § 70.35; see generally *People v Abuhamra*, 107 AD3d 1630, 1631 [4th Dept 2013], lv denied 22 NY3d 1038 [2013]).

Entered: April 27, 2018

Mark W. Bennett  
Clerk of the Court