

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

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KA 17-00509

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GERALD MAY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 3, 2017. The judgment convicted defendant, upon his plea of guilty, of arson in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of arson in the fourth degree (Penal Law § 150.05 [1]), defendant contends that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. We reject that contention. The record establishes that defendant violated the plea agreement by lying to the probation department during the presentence investigation. "[B]ecause [Supreme Court] advised defendant of the maximum sentence that could be imposed upon [a violation of the plea agreement], 'the waiver by defendant of the right to appeal encompasses [his] further contention that the enhanced sentence is unduly harsh or severe' " (*People v VanDeViver*, 56 AD3d 1118, 1119 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]; *see People v Espino*, 279 AD2d 798, 800 [3d Dept 2001]; *cf. People v Johnson*, 14 NY3d 483, 487 [2010]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court