

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

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KA 20-00390

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL GAINEY, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 10, 2019. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon 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 attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Contrary to defendant's contention, County Court did not err in declining to grant him a "violent felony override." In fact, the court had no authority to do so (*see People v Jackson*, 136 AD3d 1056, 1057 [2d Dept 2016], *lv denied* 27 NY3d 1070 [2016]; *People v Burnice*, 129 AD3d 1498, 1499 [4th Dept 2015], *lv denied* 27 NY3d 993 [2016]; *People v Lynch*, 121 AD3d 717, 718-719 [2d Dept 2014], *lv denied* 24 NY3d 1086 [2014]). Moreover, to the extent that defendant sought a "court-generated document" to establish that his crime "did not involve: being armed with, the use of or threatened use of, or the possession with the intent to use unlawfully against another of, a deadly weapon or dangerous instrument or the infliction of a serious physical injury" (7 NYCRR 1900.4 [c] [1] [iv]), we note that the prosecutor recited those facts during the sentencing proceeding, and that the court was obligated to send "a certified copy of the stenographic minutes of the sentencing proceeding . . . to the person in charge of the institution to which . . . defendant [was] delivered within thirty days from the date such sentence was imposed" (CPL 380.70; *see generally* 7 NYCRR 1900.2, 1900.4).

In light of defendant's prior criminal history, which includes numerous convictions and several violations of probation spanning more than a decade, we conclude that the agreed-upon sentence is neither

unduly harsh nor severe.

Entered: June 11, 2021

Mark W. Bennett
Clerk of the Court