

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, THIRD DEPARTMENT**

People v. Burdo

2020 NY Slip Op 456 (App. Div. 2020) · No. 110024 · Decided January 23, 2020

SUMMARY

The Appellate Division, Third Department held that the defendant's appeal waiver was invalid because the record did not establish that he understood the waiver or that it was executed under appropriate circumstances. The court nevertheless affirmed the judgment, concluding that the agreed-upon concurrent 15-year sentences for first-degree burglary and first-degree robbery were not harsh or excessive.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Per curiam; Garry, P.J.; Lynch, J.; Devine, J.; Aarons, J.; Colangelo, J.
JURISDICTION	New York
DECIDED	January 23, 2020
DOCKET	110024
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from a judgment of the County Court of Clinton County convicting him, upon his guilty plea, of burglary in the first degree and robbery in the first degree and sentencing him as a second violent felony offender.
STANDARD OF REVIEW	The sentence was reviewed for whether it was harsh or excessive and whether extraordinary circumstances or an abuse of discretion warranted a reduction in the interest of justice.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Maurice Burdo v. The People of the State of New York

TOPICS

appellate procedure

plea bargaining

sentencing

criminal procedure

standard of review

PRACTICE AREAS

criminal procedure

appellate procedure

sentencing

plea bargaining

QUESTIONS PRESENTED

1. Whether the defendant's waiver of the right to appeal was valid and barred appellate review of the severity of his sentence.
2. Whether the agreed-upon sentence was harsh or excessive and warranted reduction in the interest of justice.

HOLDINGS

1. The appeal waiver was invalid because the record did not show that County Court advised defendant that the right to appeal was separate and distinct from the trial-related rights forfeited by pleading guilty or that defendant fully understood the consequences of the waiver; the written waiver also was not shown to have been signed in open court after consultation with counsel. Therefore, the waiver did not preclude defendant from challenging the severity of his sentence.
2. The sentence was not harsh or excessive, and no extraordinary circumstances or abuse of discretion warranted reducing it in the interest of justice.

KEY QUOTATIONS

“Initially, the People concede and we agree that the appeal waiver is invalid.”

“Accordingly, defendant is not precluded by the appeal waiver from challenging the severity of the sentence.”

“Nevertheless, we do not find that the sentence is either harsh or excessive.”

FACTUAL BACKGROUND

Defendant participated with a codefendant in a home invasion during which they threatened an elderly couple with a sharp metal instrument and stole money. Defendant pleaded guilty to burglary in the first degree and robbery in the first degree as part of a plea agreement. He had a lengthy criminal record involving violent offenses and parole violations and agreed to concurrent 15-year prison terms followed by five years of postrelease supervision.

PROCEDURAL HISTORY

Defendant was charged by indictment with various crimes arising from a home invasion. Pursuant to a plea agreement, he pleaded guilty to burglary in the first degree and robbery in the first degree, waived his right to appeal, and received concurrent prison terms of 15 years on each conviction followed by five years of postrelease supervision. The Appellate Division held the appeal waiver invalid but affirmed the judgment after declining to reduce the sentence.

DISPOSITION

affirmed

CASES CITED

- People v. Suddard, 164 AD3d 950, 951 (2018), lv denied 32 NY3d 1178 (2019)
- People v. Callender, 164 AD3d 962, 962 (2018)
- People v. Warren, 160 AD3d 1286, 1287 (2018)
- People v. Metayeo, 155 AD3d 1239, 1240 (2017)
- People v. French, 134 AD3d 1245, 1245-1246 (2015)
- People v. Kerwin, 117 AD3d 1097, 1098 (2014)

OPINION

PER CURIAM.

People v Burdo (2020 NY Slip Op 00456) People v Burdo 2020 NY Slip Op 00456 Decided on January 23, 2020 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: January 23, 2020 110024 [*1]The People of the State of New York, Respondent, vMaurice Burdo, Appellant.

Calendar Date: January 3, 2020 Before: Garry, P.J., Lynch, Devine, Aarons and Colangelo, JJ. Adam G. Parisi, Schenectady, for appellant. Andrew J. Wylie, District Attorney, Plattsburgh (Rebecca L. Fox of counsel), for respondent. Appeal from a judgment of the County Court of Clinton County (Bruno, J.), rendered November 30, 2017, convicting defendant upon his plea of guilty of the crimes of burglary in the first degree and robbery in the first degree.

Defendant was charged in an indictment with various crimes as a result of his participation in a home invasion during which he and a codefendant threatened an elderly couple with a sharp metal instrument and stole money.

In satisfaction thereof, he pleaded guilty to burglary in the first degree and robbery in the first degree, and was required to waive his right to appeal. In accordance with the terms of the plea agreement, he was sentenced as a second violent felony offender to concurrent prison terms of 15 years on each conviction followed by five years of postrelease supervision.

Defendant appeals. Initially, the People concede and we agree that the appeal waiver is invalid. The record does not disclose that County Court advised defendant that the right to appeal was separate and distinct from the other trial-related rights that he was forfeiting by pleading guilty or that he fully comprehended the consequences of the appeal waiver (see People v Suddard, 164 AD3d 950, 951 [2018], lv denied 32 NY3d 1178 [2019]; People v Callender, 164 AD3d 962, 962 [2018]).

Furthermore, although defendant executed a written waiver, the circumstances under which it was signed are not clear, as the record does not reflect that defendant signed the waiver in open court after conferring with counsel (see *People v Warren*, 160 AD3d 1286, 1287 [2018]; *People v Metayeo*, 155 AD3d 1239, 1240 [2017]).

Accordingly, defendant is not precluded by the appeal waiver from challenging the severity of the sentence. Nevertheless, we do not find that the sentence is either harsh or excessive. Defendant has a lengthy criminal record, characterized by violent criminal offenses and parole violations.

In view of this and the fact that defendant consented to the sentence as part of the plea agreement, we find no extraordinary circumstances or abuse of discretion warranting a reduction of the sentence in the interest of justice (see *People v Suddard*, 164 AD3d at 951; *People v French*, 134 AD3d 1245, 1245-1246 [2015]; *People v Kerwin*, 117 AD3d 1097, 1098 [2014]).

Garry, P.J., Lynch, Devine, Aarons and Colangelo, JJ., concur. ORDERED that the judgment is affirmed.