

2018 WL 4100892
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Appellant,
v.
Dellon KING, Respondent.

2017-05946

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6677/16

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Argued - April 27, 2018

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August 29, 2018

Attorneys and Law Firms

Eric Gonzalez, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Sholom J. Twersky of counsel), for appellant.

The Legal Aid Society, New York, N.Y. (Harold V. Ferguson, Jr., of counsel), for respondent.

WILLIAM F. MASTRO, J.P., MARK C. DILLON, FRANCESCA E. CONNOLLY, ANGELA G. IANNACCI, JJ.

DECISION & ORDER

*1 Appeal by the People from an order of the Supreme Court, Kings County (Miriam Cyrulnik, J.), dated March 24, 2017, which, after a hearing, granted those branches of the defendant's omnibus motion which were to suppress physical evidence and his statements to law enforcement officials.

ORDERED that the order is reversed, on the law, and those branches of the defendant's omnibus motion which were to suppress physical evidence and his statements to law enforcement officials are denied.

The defendant was charged with criminal possession of a firearm and criminal possession of a weapon in the second, third, and fourth degrees. In his omnibus motion, the defendant sought, inter alia, to suppress a gun recovered from a backpack by the police, as well as statements he

made to the police, as fruits of an unlawful seizure. After a hearing, the Supreme Court granted those branches of the defendant's omnibus motion. The People appeal.

There is no dispute that upon receiving a radio transmission of an anonymous tip that a man of a specific description wearing a black backpack and possessing a gun was traveling on the B6 bus toward Canarsie, the responding police officer had a common-law right of inquiry upon encountering the defendant exiting that bus and matching the description (see *People v. Moore*, 6 N.Y.3d 496, 498, 814 N.Y.S.2d 567, 847 N.E.2d 1141; *People v. Spencer*, 84 N.Y.2d 749, 753, 622 N.Y.S.2d 483, 646 N.E.2d 785; *People v. Hollman*, 79 N.Y.2d 181, 184, 581 N.Y.S.2d 619, 590 N.E.2d 204; *People v. Stewart*, 41 N.Y.2d 65, 69, 390 N.Y.S.2d 870, 359 N.E.2d 379; *People v. Abdul-Mateen*, 126 A.D.3d 986, 988, 4 N.Y.S.3d 310; *People v. Larmond*, 106 A.D.3d 934, 964 N.Y.S.2d 661; *People v. Smith*, 207 A.D.2d 759, 617 N.Y.S.2d 1; cf. *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254). The responding officer testified at the suppression hearing that he approached the defendant and asked something to the effect of, "Hey, what's up, man, you know, you got a second for the police?" The defendant's eyes widened, he appeared visibly nervous, and he started to back up. The defendant then thrust his right hand in his right pants pocket and refused to comply with the officer's command to remove it. These actions by the defendant escalated the encounter to justify the officer drawing his weapon, placing it across his own chest in a "depressed position," and attempting to forcibly remove the defendant's hand from his pocket as a self-protective measure (see *People v. Abdul-Mateen*, 126 A.D.3d at 988, 4 N.Y.S.3d 310; *People v. Wyatt*, 14 A.D.3d 441, 441-442, 788 N.Y.S.2d 362). Further, the defendant's subsequent flight, coupled with all of the other indicia of criminality, justified the police pursuit (see *People v. Moore*, 6 N.Y.3d at 500-501, 814 N.Y.S.2d 567, 847 N.E.2d 1141; *People v. Sierra*, 83 N.Y.2d 928, 929, 615 N.Y.S.2d 310, 638 N.E.2d 955; *People v. Johnson*, 207 A.D.2d 806, 616 N.Y.S.2d 542) and, ultimately, the recovery of a semi-automatic handgun from the defendant's backpack, which he abandoned in a nearby bodega (see *People v. White*, 153 A.D.3d 1369, 1370, 61 N.Y.S.3d 603; *People v. Lewis*, 137 A.D.3d 1057, 1057-1058, 26 N.Y.S.3d 711; *People v. Coleman*, 125 A.D.3d 879, 880, 3 N.Y.S.3d 130).

*2 Accordingly, the Supreme Court should have denied those branches of the defendant's omnibus motion

which were to **suppress** the handgun and his subsequent statements to the police after his lawful arrest.

All Citations

--- N.Y.S.3d ----, 2018 WL 4100892, 2018 N.Y. Slip Op. 05941

MASTRO, J.P., DILLON, CONNOLLY and **IANNACCI, JJ.**, concur.

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