164 A.D.3d 1637
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Willie STRONG, Defendant–Appellant.

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KA 15–01574
|
Entered: September 28, 2018

Synopsis

Background: Defendant was convicted in the County Court, Onondaga County, Thomas J. Miller, J., of criminal possession of a weapon, assault, and resisting arrest. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] evidence presented did not support defendant's contention that the shotgun was found in the possession of a specified passenger, and thus the automobile presumption's applied;

[2] absence of defendant at initial discussions of *Sandoval* hearing to determine admissibility of prior convictions did not require reversal;

[3] defense counsel's failure to introduce at the suppression hearing a photograph was not ineffective assistance of counsel; and

[4] reopening suppression hearing was not warranted.

Affirmed.

West Headnotes (6)

[1] Weapons
Constructive possession

The presence of a firearm in a private automobile, other than a stolen vehicle, is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except if such weapon, instrument or appliance is found upon the person of one of the occupants therein. N.Y. Penal Law § 265.15(3).

Cases that cite this headnote

[2] Weapons
Constructive possession

Evidence presented at criminal possession of a firearm trial did not support defendant's contention that the shotgun was found in the possession of a specified passenger in the vehicle other than defendant, and thus the automobile presumption's applicability was properly left to the trier of fact under an appropriate charge, where there was no evidence indicating whether it was defendant or his passenger who brought the gun into the van, and the evidence established, at most, that someone other than defendant handled the shotgun and disposed of it while defendant was driving the van.

Cases that cite this headnote

[3] Criminal Law
Absence of accused

Absence of defendant at initial discussions of *Sandoval* hearing to determine admissibility of prior convictions did not require reversal, since defendant was afforded a meaningful opportunity to participate at de novo hearing that was conducted in defendant's presence, and the court then issued a favorable ruling that was consistent with defendant's position at the de novo hearing.

Cases that cite this headnote

[4] Criminal Law
Suppression of evidence

Defense counsel's failure to introduce at the suppression hearing a photograph that allegedly disproved an officer's testimony that he saw the shotgun in plain view was not ineffective assistance of counsel, where the photograph did not contradict the officer's testimony because it did not depict the location of the shotgun shell at the time officer looked into the vehicle, but instead showed its location during the subsequent inventory search. U.S. Const. Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**
Rehearing or reopening

A suppression motion may be renewed upon a showing by the defendant that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion.

Cases that cite this headnote

[6] **Criminal Law**
Rehearing or reopening

Reopening suppression hearing was not warranted for photograph that allegedly disproved an officer's testimony at the hearing that he saw the shotgun shell in plain view, where the photograph was available at the time of the hearing.

Cases that cite this headnote

****291** Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 16, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, assault in the second degree and resisting arrest.

Attorneys and Law Firms

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WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

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

MEMORANDUM AND ORDER

***1637** It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]), assault in the second degree (§ 120.05[3]), and resisting arrest (§ 205.30). We affirm.

In September 2013, a police officer operating a marked patrol vehicle observed defendant driving a van with one inoperative headlight. The officer engaged his vehicle's overhead lights and siren and attempted to stop the van, but defendant refused to stop. Officers in two police vehicles pursued the van. During the pursuit, someone in the van threw a long, black object from the rear passenger door. Thereafter, the van slowed, and an unidentified man jumped out and fled. Defendant eventually stopped the van, exited it, and then held his hands in front of ***1638** his face in a boxing stance. When the officers attempted to place defendant in handcuffs, he flailed his arms violently. After the officers handcuffed defendant, one of the officers felt wrist pain; that officer was later diagnosed with a broken wrist. The officers recovered the black object that was thrown from the van, i.e., a 12–gauge shotgun, during the ensuing investigation and found a 12–gauge shotgun shell during an inventory search of the vehicle.

[1] **[2]** Defendant contends that County Court erred in instructing the jury on the automobile presumption because the evidence established that the weapon belonged ****292** to the passenger who fled the vehicle. We reject that contention. "[T]he presence of a firearm in a private automobile, other than a stolen vehicle, 'is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except ... if such weapon, instrument or appliance is found upon the person of one of the occupants therein' " (*People v. Lemmons,* 40 N.Y.2d

505, 509, 387 N.Y.S.2d 97, 354 N.E.2d 836 [1976], quoting Penal Law § 265.15[3]). Here, there was no evidence indicating whether it was defendant or his passenger who brought the shotgun into the van. The evidence established, at most, that someone other than defendant handled the shotgun and disposed of it while defendant was driving the van. We conclude that "there was no 'clearcut' evidence at trial that the shotgun was found in the possession of a specified passenger in the vehicle other than defendant ... [, and thus] the '[automobile] presumption's applicability [was] properly left to the trier of fact under an appropriate charge' " (*People v. Collins,* 105 A.D.3d 1378, 1379, 963 N.Y.S.2d 890 [4th Dept. 2013], *lv denied* 21 N.Y.3d 1003, 971 N.Y.S.2d 254, 993 N.E.2d 1276 [2013]; *cf. People v. Willingham,* 158 A.D.3d 1158, 1159, 70 N.Y.S.3d 644 [4th Dept. 2018]).

[3] Defendant further contends that the court committed reversible error when it conducted a *Sandoval* hearing in his absence (*see generally People v. Dokes,* 79 N.Y.2d 656, 658, 584 N.Y.S.2d 761, 595 N.E.2d 836 [1992]). We reject that contention as well. Although the record establishes that the court conducted off-the-record discussions with respect to the *Sandoval* issue with the prosecutor and defense counsel in defendant's absence, the court thereafter held a de novo hearing at which it afforded defendant a meaningful opportunity to participate (*see People v. Vargas,* 201 A.D.2d 963, 964, 607 N.Y.S.2d 829 [4th Dept. 1994], *lv denied* 83 N.Y.2d 859, 612 N.Y.S.2d 391, 634 N.E.2d 992 [1994]). The court then issued a favorable ruling that was consistent with defendant's position at the de novo hearing. "Because defendant was afforded an opportunity to participate at that de novo hearing, reversal is not required" (*People v. Bartell,* 234 A.D.2d 956, 956, 652 N.Y.S.2d 172 [4th Dept. 1996], *lv denied* 89 N.Y.2d 983, 656 N.Y.S.2d 742, 678 N.E.2d 1358 [1997]; *see* ***1639** *People v. Reid,* 117 A.D.3d 1448, 1449, 984 N.Y.S.2d 766 [4th Dept. 2014], *lv denied* 23 N.Y.3d 1041, 993 N.Y.S.2d 255, 17 N.E.3d 510 [2014]).

[4] **[5]** **[6]** Defendant also contends that he was denied effective assistance of counsel based on defense counsel's failure to introduce at the suppression hearing a photograph that allegedly disproved an officer's testimony at the hearing that he saw the shotgun shell in plain view. We reject that contention. Generally, defense counsel is not constitutionally ineffective where he or she overlooks a potentially useful piece of evidence, particularly where the evidence does not provide defendant with a completely dispositive defense (*see People v. Turner,* 5 N.Y.3d 476, 480–481, 806 N.Y.S.2d 154, 840 N.E.2d 123 [2005]). Here, the photograph did not contradict the officer's testimony because it did not depict the location of the shotgun shell at the time the officer looked into the vehicle, but instead showed its location during the subsequent inventory search. We also reject defendant's contention that defense counsel was ineffective in failing to move to reopen the suppression hearing based on that photograph. "A suppression motion may be renewed 'upon a showing by the defendant[ ] that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination ****293** of the motion' " (*People v. Smith,* 158 A.D.3d 1081, 1082, 70 N.Y.S.3d 307 [4th Dept. 2018], *lv denied* 31 N.Y.3d 1121, 81 N.Y.S.3d 381, 106 N.E.3d 764 [2018], quoting CPL 710.40[4]). Here, a motion to reopen the suppression hearing would have failed because the photographs were available at the time of the hearing.

Viewing the evidence in light of the elements of the crimes of assault in the second degree and resisting arrest as charged to the jury (*see People v. Danielson,* 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to those counts (*see generally People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]). Finally, the sentence is not unduly harsh or severe.

All Citations

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