2019 WL 208841
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., Respondent,
v.
Ramel SMITH, Appellant.

2014–07789
|
(Ind. No. 518/11)
|
Argued—October 4, 2018
|
January 16, 2019

Synopsis

Background: After Supreme Court, Queens County, Steven Paynter, J., denied that branch of defendant's omnibus motion which was to **suppress** physical evidence, defendant was convicted in the Supreme Court, James P. Griffin, J., of assault in the first degree, criminal possession of weapon in second degree, and criminal possession of weapon in the third degree, and he appealed.

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

[1] officers had reasonable suspicion of criminal activity, as required for stop, and

[2] evidence was legally sufficient to establish that the complainant sustained serious physical injury, as required for defendant's conviction for assault.

Affirmed.

West Headnotes (7)

[1] Searches and Seizures

Forcible stop is not permitted unless there is a reasonable suspicion that an individual is committing, has committed, or is about to commit a crime. U.S. Const. Amend. 4.

Cases that cite this headnote

[2] Searches and Seizures

Police officers initially had a founded suspicion that criminal activity was afoot, triggering common-law right of inquiry, based upon their observations of defendant and companion "huddled" together on a street in close proximity to location of a reported shooting, with no one else in vicinity, and defendant had his hand in his jacket as the police officers drove by the two men. U.S. Const. Amend. 4.

Cases that cite this headnote

[3] Searches and Seizures

Police officers had reasonable suspicion of criminal activity, as required for stop, when defendant and his companion started walking away at high rate of speed after police officers, who had returned to location of shooting, turned their vehicle back onto street, where defendant and his companion were standing, and officers observed defendant toss object into alleyway while walking away. U.S. Const. Amend. 4.

Cases that cite this headnote

[4] Searches and Seizures

Once police officers, who had reasonable suspicion of criminal activity, temporarily detained defendant, they possessed probable cause to arrest him based upon discovery that object that defendant tossed into alleyway, while walking away from police, was a gun. U.S. Const. Amend. 4.

Cases that cite this headnote

[5] Assault and Battery

Evidence was legally sufficient to establish that the complainant sustained a serious physical injury, as required for defendant's conviction for assault in first degree, and defendant's conviction was not against weight of the evidence. N.Y. Penal Law § 10.00(10).

Cases that cite this headnote

[6] Criminal Law

In fulfilling its responsibility to conduct independent review of the weight of the evidence, appellate court nevertheless must accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor. N.Y. CPL § 470.15(5).

Cases that cite this headnote

[7] Criminal Law

Fact that People's motion to compel defendant to submit to a buccal swab for DNA testing was untimely did not mean that admission of evidence concerning defendant's refusal to provide DNA sample warranted reversal; defendant did not suffer any prejudice by reason of the four-month delay, and error did not implicate defendant's constitutional rights. N.Y. CPL § 240.90.

Cases that cite this headnote

Appeal by the defendant from a judgment of the Supreme Court, Queens County (James P. Griffin, J.), rendered July 29, 2014, convicting him of assault in the first degree, criminal possession of a weapon in the second degree (two counts), and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Steven Paynter, J.), of that branch of the defendant's omnibus motion which was to **suppress** physical evidence.

Attorneys and Law Firms

Janet E. Sabel, New York, N.Y. (Paul Wiener of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Johnnette Traill, Ellen C. Abbot, and John F. McGoldrick of counsel), for respondent.

MARK C. DILLON, J.P., BETSY BARROS, ANGELA G. IANNACCI, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

***1** ORDERED that the judgment is affirmed.

[1] Contrary to the defendant's contention, the hearing court properly denied that branch of the defendant's omnibus motion which was to **suppress** physical evidence. "A forcible stop is not permitted unless there is a reasonable suspicion that an individual is committing, has committed, or is about to commit a crime" (*People v. Noble,* 154 A.D.3d 883, 884, 63 N.Y.S.3d 401). "Reasonable suspicion has been defined as 'that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand' " (*People v. Bowers,* 148 A.D.3d 1042, 1043, 50 N.Y.S.3d 138, quoting *People v. Martinez,* 80 N.Y.2d 444, 448, 591 N.Y.S.2d 823, 606 N.E.2d 951 [internal quotation marks omitted]).

[2] [3] [4] Here, police officers initially had a founded suspicion that criminal activity was afoot, triggering a common-law right of inquiry, based upon their observations of the defendant and a companion "huddled" together on a street in close proximity to the location of a reported shooting, with no one else in the vicinity, and that the defendant had "his hand in his jacket" as the police officers drove by the two men (*see People v. Baksh,* 125 A.D.3d 988, 989, 5 N.Y.S.3d 443; *People v. Davis,* 106 A.D.3d 144, 151, 963 N.Y.S.2d 48). The level of suspicion escalated to the level of reasonable suspicion when the defendant and his companion started walking away "at a high rate of speed" after the police officers, who had returned to the location of the shooting, turned their vehicle back onto the street where the defendant and his companion were standing, and the officers observed the defendant toss an

object into an alleyway while walking away (*see People v. Austin,* 100 A.D.3d 1010, 1011, 954 N.Y.S.2d 480; *People v. Jenkins,* 209 A.D.2d 164, 617 N.Y.S.2d 766). Once the police officers temporarily detained the defendant, they possessed probable cause to arrest him based upon the discovery that the thrown object was a gun (*see People v. LaFontant,* 46 A.D.3d 840, 842, 847 N.Y.S.2d 650; *People v. Jenkins,* 209 A.D.2d 164, 617 N.Y.S.2d 766). Accordingly, we agree with the hearing court's denial of that branch of the defendant's omnibus motion which was to **suppress** physical evidence.

[5] **[6]** Viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt of assault in the first degree beyond a reasonable doubt. Specifically, and contrary to the defendant's contention, the evidence was legally sufficient to establish that the complainant sustained a "serious physical injury" within the meaning of Penal Law § 10.00(10) (*see People v. Garland,* 155 A.D.3d 527, 528, 65 N.Y.S.3d 167, *affd* —— N.Y.3d ——, —— N.Y.S.3d ——, —— N.E.3d ——, 2018 N.Y. Slip Op. 07927 [2018]; *People v. Lindsay,* 131 A.D.3d 625, 626, 16 N.Y.S.3d 566). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v. Danielson,* 9 N.Y.3d 342, 849 N.Y.S.2d 480, 880 N.E.2d 1), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v. Mateo,* 2 N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt on the count of assault in the first degree was not against the weight of the evidence (*see People v. Danielson,* 9 N.Y.3d at 348, 849 N.Y.S.2d 480, 880 N.E.2d 1; *People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

***2** **[7]** As the defendant asserts, the People's motion to compel him to submit to a buccal swab for DNA testing was untimely pursuant to CPL 240.90, and the People failed to adequately explain the delay. However, the fact that the motion was untimely made does not mean that the admission of evidence concerning the defendant's refusal to provide a DNA sample warrants reversal, since the defendant did not suffer any prejudice by reason of the four-month delay (*see People v. Young,* 160 A.D.3d 1206, 1209, 75 N.Y.S.3d 645; *People v. Ruffell,* 55 A.D.3d 1271, 864 N.Y.S.2d 347) and the error did not implicate the defendant's constitutional rights (*see People v. Cox,* 161 A.D.3d 1100, 1101, 77 N.Y.S.3d 455; *People v. Vieweg,* 155 A.D.3d 1305, 1308, 65 N.Y.S.3d 275).

DILLON, J.P., BARROS, IANNACCI and CHRISTOPHER, JJ., concur.

All Citations

--- N.Y.S.3d ----, 2019 WL 208841, 2019 N.Y. Slip Op. 00314

End of Document