

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D13015
C/mv

_____AD3d_____

Submitted - October 17, 2006

THOMAS A. ADAMS, J.P.
DAVID S. RITTER
WILLIAM F. MASTRO
ROBERT A. LIFSON, JJ.

2005-02791

DECISION & ORDER

The People, etc., respondent,
v Derrick Cane, appellant.

(Ind. No. 2953/03)

Lynn W. L. Fahey, New York, N.Y. (William Kastin of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Jeanette Lifschitz, and Jason Casero of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Latella, J.), rendered March 16, 2005, convicting him of 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 (Aloise, J.), of that branch of the defendant's omnibus motion which was to suppress a statement he made to law enforcement officials.

ORDERED that the judgment is affirmed.

The defendant contends that the hearing court erroneously found that he was not in custody at the time he made an inculpatory statement to the police in violation of his *Miranda* rights (*see Miranda v Arizona*, 384 US 436). However, the defendant waived immunity and testified before the grand jury that he had possession of the illegal weapon under circumstances negating innocent possession. Therefore, we find that the admission of the defendant's statement to the same effect was

a harmless error (*see People v McMillon*, 31 AD3d 136, *lv denied* 7 NY3d 815), since it merely tracked his grand jury testimony, which was received in evidence during trial.

ADAMS, J.P., RITTER, MASTRO and LIFSON, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court