

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

D25755
Y/prt

_____AD3d_____

Argued - October 29, 2009

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2008-04489

DECISION & ORDER

The People, etc., respondent,
v Nicholas G. Kennedy, appellant.

(Ind. No. 2154/07)

Stephen N. Preziosi, Smithtown, N.Y., for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Michael J. Brennan of counsel),
for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Gazzillo, J.), rendered April 25, 2008, convicting him of criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree, criminal possession of marijuana in the fifth degree, failure to signal, and failure to display a lit headlamp, upon a jury verdict, and sentencing him to concurrent determinate terms of imprisonment of 8½ years for criminal possession of a controlled substance in the second degree, 7 years for criminal possession of a controlled substance in the third degree, 3 months for criminal possession of marijuana in the fifth degree, one day for failure to signal, and one day for failure to display a lit headlamp.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by reducing the determinate term of imprisonment of 8½ years imposed for criminal possession of a controlled substance in the second degree to a determinate term of imprisonment of 5 years, and by reducing the determinate term of imprisonment of 7 years imposed on the conviction of criminal possession of a controlled substance in the third degree to a determinate term of imprisonment of 3 years; as so modified, the judgment is affirmed.

Contrary to the defendant's contention, the grand jury proceeding did not fail to conform to the requirements of CPL article 190 to such a degree that the integrity thereof was

impaired, and, even if some of the testimony elicited was inadmissible, no prejudice to the defendant could have resulted therefrom (*see* CPL 210.20[1][c]; 210.35[5]; *People v Huston*, 88 NY2d 400, 409).

The trial court did not err in allowing the People to submit evidence of cocaine residue in the defendant's pants pocket. Contrary to the defendant's assertion, this evidence was not evidence of a separate uncharged crime (*cf. People v Resek*, 3 NY3d 385, 387; *People v Tosca*, 98 NY2d 660, 661), but, rather, was evidence that he possessed the cocaine with which he was charged with possessing in the present case.

The defendant's contention that an expert police witness's testimony invaded the jury's exclusive province of determining an ultimate fact issue in the case (*see People v Goodwine*, 177 AD2d 708, 709), is unpreserved for appellate review (*see* CPL 470.05[2]). In any event, even if the testimony was improper, its admission was harmless, as there was overwhelming evidence of the defendant's guilt, and no significant probability that the error contributed to his convictions (*see People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to the defendant's assertion, the assistant district attorney did not "dr[i]ve a key defense witness from the witness stand through intimidation" (*cf. Webb v Texas*, 409 US 95, 98; *People v Shapiro*, 50 NY2d 747, 760; *People v Ramos*, 63 AD2d 1009). Rather, the record shows that defense counsel chose not to call the witness to testify. Moreover, the Supreme Court properly conducted an inquiry to insure that the potential witness, who claimed that the narcotics were his, was aware of the possible legal consequences of giving testimony and of his privilege to refuse to testify (*see People v Siegel*, 87 NY2d 536, 543; *People v Lee*, 58 NY2d 773, 775). Furthermore, the extensive questioning by the potential witness's attorney was necessitated by the potential witness's mental illness.

The defendant contends that the prosecutor's summation deprived him of a fair trial. The challenged remarks, however, were responsive to defense counsel's opening and closing statements (*see People v Halm*, 81 NY2d 819, 821; *People v Molinaro*, 62 AD3d 724, 724-725). Furthermore, the prosecutor did not misstate the law with respect to the so-called automobile presumption (*see* Penal Law § 220.25).

The sentences imposed on the convictions for criminal possession of a controlled substance in the second degree and criminal possession of a controlled substance in the third degree were excessive to the extent indicated herein (*see People v Suitte*, 90 AD2d 80).

RIVERA, J.P., DICKERSON, HALL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court