SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

703

KA 22-01818

PRESENT: WHALEN, P.J., BANNISTER, SMITH, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTIS ANDERSON, JR., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 22, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We affirm.

Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We reject defendant's claim that his " 'waiver [of the right to appeal] is . . . invalid on the ground that [Supreme Court] did not specifically inform [him during the oral colloquy] that his general waiver of the right to appeal encompassed the court's suppression ruling[ ]' " (*People v Williams*, 237 AD3d 1581, 1582 [4th Dept 2025], *lv denied* 44 NY3d 985 [2025]; *see People v Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *People v Babagana*, 176 AD3d 1627, 1627 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019]). Defendant's valid waiver of the right to appeal thus encompasses his challenge to the court's suppression ruling (*see Edmonds*, 229 AD3d at 1278; *People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]).

To the extent that defendant contends that he received ineffective assistance of counsel because defense counsel did not

understand that the appeal waiver encompassed the suppression ruling, that contention involves matters outside the record on appeal and must be raised via a motion pursuant to CPL 440.10 (*see generally People v Kosmetatos*, 178 AD3d 1433, 1434 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]).

All concur except BANNISTER and DELCONTE, JJ., who concur in the result in the following memorandum: We concur in the result reached by the majority. In our view, however, the record does not establish that defendant knowingly and voluntarily waived an appellate challenge to the suppression ruling. We further conclude that defendant's challenge to the suppression ruling lacks merit.

It is well settled that our responsibility as an appellate court is to " 'oversee the process and to review the record to ensure that the defendant's waiver of the right to appeal reflects a knowing and voluntary choice' " (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020], quoting *People v Callahan*, 80 NY2d 273, 280 [1992]). We must look at "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background" of the defendant to determine whether the record demonstrates that the defendant understood the appeal waiver's consequences (*id.* at 559-560 [internal quotation marks omitted]). In other words, "[o]ur requisite analysis for determining the validity of the waiver remains focused on whether all the relevant circumstances reveal a knowing and voluntary waiver" (*id.* at 563).

Both the Court of Appeals and our Court have expressed that using the Model Colloquy to explain the consequences of the appeal waiver is the better practice (*see id.* at 567; *People v Seeman*, 188 AD3d 1670, 1670 [4th Dept 2020]; *see also* NY Model Colloquies, Waiver of Right to Appeal). In relevant part, the Model Colloquy provides defendants with the following information: "By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal with this court and the District Attorney within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error, [including a claimed error in the denial of your (*specify*, e.g., motion to suppress),] and to consider whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final. Do you understand?"

The prior version of the Model Colloquy included a footnote suggesting that courts specifically inform defendants about the waiver of appellate review of major aspects of their cases, such as the denial of a suppression motion (*see* NY Model Colloquies, Waiver of Right to Appeal, n 1). In light of the Court of Appeals' decision in *Thomas* (34 NY3d 545), however, the language of that footnote was moved to the body of the colloquy, as reflected in the quotation above (*see* NY Model Colloquies, Waiver of Right to Appeal, n 1). That change reflects how important it is for the courts, in certain circumstances, to identify for defendants the major aspects of their cases that will

be precluded from appellate review upon waiving the right to appeal (*see id.*; *see also id.* at n 3). The current version of the Model Colloquy further makes clear that there will be cases in which the court's failure to so advise a defendant may render the appeal waiver unknowing and involuntary with respect to that aspect of the defendant's case. Upon our review of the record in this case, we conclude that Supreme Court's failure to specifically inform defendant that an appeal waiver would preclude appellate review of the suppression ruling rendered the waiver unknowing and involuntary as to that issue.

By way of background, defendant's conviction of attempted criminal possession of a weapon in the second degree arises from an incident in which he brought a firearm into an apartment that he and a female guest were occupying pursuant to a short-term rental agreement through Airbnb. The owner of the property watched via a security camera as defendant carried the firearm into the apartment, which violated the rental terms. Consequently, the property owner called Airbnb to cancel defendant's reservation and then called the police for assistance ejecting defendant and the female guest. The police officers took defendant and the guest into custody outside of the apartment. The property owner then searched the apartment to ensure that no personal effects of defendant or the guest had been left behind. Hidden under the mattress in the bedroom, the property owner found the firearm that he had watched defendant bring into the apartment.

Defendant was thereafter indicted on a single count of criminal possession of a weapon in the second degree. He sought suppression of the firearm on the ground that it was obtained as a result of his unlawful arrest and an unlawful search of the apartment. The court refused to suppress the firearm, and defendant subsequently agreed to waive his right to appeal and entered a guilty plea to a reduced charge of attempted criminal possession of a weapon in the second degree.

At the plea proceeding, in explaining the scope of the appeal waiver to defendant, the court emphasized that "some things. . . are so important that we won't let you waive your right to appeal on those issues," and then, as outlined in the Model Colloquy, it gave three examples, namely, the court's jurisdiction, defendant's "competency . . . to plead guilty," and the legality of the sentence. The court then stated: "And there's some others, okay?" However, the court never articulated what it meant by the term "others," and the court did not specifically inform defendant that his appeal waiver would encompass a challenge to the suppression determination.

We recognize that this Court has previously concluded that appeal waivers were sufficiently comprehensive to cover challenges to suppression rulings although the courts did not expressly mention suppression rulings during the waiver colloquies (*see e.g. People v Jackson*, 198 AD3d 1317, 1318 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]). The Court of Appeals reached that same conclusion in *Thomas* (34 NY3d at 564). In that case, the defendant entered a guilty plea

one day after the court issued an adverse suppression ruling (*see id.* at 553). During the colloquy, the court informed the defendant that if he waived the right to appeal, he would "give up the right . . . to challenge to a higher court what is taking place right now, the plea and what will take place in about two weeks when you are sentenced" (*id.* [internal quotation marks omitted]). The court also ensured that the defendant had been given a full opportunity to consult with defense counsel about a written appeal waiver, which enumerated specific appellate rights that survive a waiver of appeal, and that the defendant understood the consequences of signing the written waiver (*see id.*). Under those circumstances, the Court of Appeals concluded that the waiver was knowing and voluntary and that it was intended to cover the adverse suppression ruling (*see id.* at 564).

In contrast, defendant's suppression hearing in the instant case was held over a year before, and a decision denying suppression was issued some six months before his plea proceeding. Furthermore, the court's colloquy created ambiguity as to the scope of the appeal waiver because, in addition to three enumerated issues that would survive the appeal waiver, the court stated that there are "other[ ]" issues that are "so important" to defendant's case that they would also survive the appeal waiver, yet the court did not specify what those other issues are. We note that the record contains a written waiver of the right to appeal signed by both defendant and defense counsel, but the court did not inquire whether defendant had reviewed it, signed it, and understood it; in any event, the document does not explain that the appeal waiver encompasses an appellate challenge to the suppression ruling. The written appeal waiver therefore does not cure the ambiguity that was created by the oral colloquy (*see People v Outley*, 232 AD3d 1284, 1285 [4th Dept 2024], *lv denied* 43 NY3d 946 [2025]; *People v Durie*, 216 AD3d 1449, 1450 [4th Dept 2023]). We emphasize that the ambiguity could have been easily cured had the court mentioned, as suggested in the Model Colloquy, that the appeal waiver included appellate review of the suppression ruling.

Given the ambiguous colloquy, and the fact that the court's suppression determination was certainly the major aspect of defendant's case inasmuch as suppression of the firearm would have resulted in the only charge against defendant being dismissed, it was reasonable for defendant to erroneously conclude that the court's refusal to grant suppression of the firearm was "*so important*" to his case that it was one of those "*other[ ]*" issues that would be subject to appellate review despite his waiver of the right to appeal (emphasis added). Indeed, defendant's misunderstanding of the scope of the appeal waiver is apparent from the record. At sentencing, defense counsel – the same attorney who counseled defendant on his appeal waiver – requested that the court stay sentencing so that defendant could appeal the suppression ruling. Without explaining that defendant had waived the right to appellate review of the suppression ruling, the court simply denied the request for a stay. After imposing the sentence, the court immediately told defendant that he had "the ability to appeal" and further explained that his attorney would file a notice of appeal on his behalf, that it would not cost defendant anything, and that he may be entitled to assigned counsel.

Those exchanges at sentencing strengthened the inference that defendant retained the right to challenge the suppression ruling on appeal, and the record reflects that defendant and defense counsel in fact believed that appellate review of the suppression ruling was *not* foreclosed by the appeal waiver. Thus, on this record, we conclude that defendant's appeal waiver was not knowing and voluntary with respect to an appellate challenge to the suppression ruling (*cf. Thomas*, 34 NY3d at 565).

In regard to the merits of defendant's challenge to the court's refusal to suppress the firearm, we conclude that the record supports the court's determination that the property owner terminated the rental prior to the search and, thus, that defendant lost his reasonable expectation of privacy in the apartment *(see generally People v D'Antuono*, 306 AD2d 890, 890 [4th Dept 2003], *lv denied* 100 NY2d 593 [2003], *reconsideration denied* 100 NY2d 641 [2003], *cert denied* 541 US 994 [2004], *reh denied* 541 US 1083 [2004]).

Defendant's additional argument that the search was invalid under *Payton v New York*, i.e., a "warrantless and nonconsensual entry into a suspect's home in order to make a[n] . . . arrest" (445 US 573, 576 [1980]), is also without merit. Here, it is undisputed that defendant was taken into custody *outside* of the apartment, and thus *Payton* and its progeny do not apply to the facts in this case (*see People v Garvin*, 30 NY3d 174, 180-182 [2017], *cert denied* 586 US 814 [2018]). We therefore conclude that the court properly refused to suppress the firearm.

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court