

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

107

KA 22-01049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES A. MOORE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (BRIDGET FIELD OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 8, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the motion dated February 7, 2022, seeking to suppress physical evidence is granted, and count 4 of the indictment is dismissed.

Memorandum: Defendant appeals in appeal No. 1 from a judgment convicting him, upon a guilty plea, of criminal possession of a weapon in the second degree (§ 265.03 [3]). In appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of three counts of sexual abuse in the first degree (Penal Law § 130.65 [4]) and one count of escape in the second degree (§ 205.10 [2]).

Initially, in appeal No. 1, we agree with defendant that Supreme Court (Renzi, J.) erred in refusing to suppress the handgun underlying his conviction and that the judgment must be reversed. Testimony at a suppression hearing reflected that, after receiving the allegations of sexual abuse underlying defendant's conviction in appeal No. 2, an investigator with the Rochester Police Department attended defendant's scheduled probation meeting in order to question defendant regarding the allegations. The investigator testified that defendant was not under arrest at the outset of the interview. At the conclusion of the interview, the investigator called a second officer into the room to assist him in transporting defendant to the Public Safety Building (PSB) for further questioning, to which defendant had agreed. When the second officer entered the room, he asked defendant to stand and immediately searched defendant's person, revealing, among other

things, a key fob. Probation officers, who were present in the room and were aware that defendant did not have a valid driver's license, then took the key fob, exited the building, and began activating the fob while they walked around the surrounding area. Probation officers ultimately found a vehicle that was activated by the fob parked in a nearby parking garage. Upon searching the vehicle, a probation officer discovered a firearm.

At the suppression hearing, although the police investigator testified that he believed defendant was under arrest at the time of the search of his person, the investigator testified that he did not inform defendant that he was under arrest, nor was he the officer who actually arrested defendant. Instead, the investigator testified that the officer who had performed the search had arrested defendant. Although that officer was unavailable to testify at the hearing, his body camera footage was introduced. That footage reflected that, at the time of the search of his person, defendant asked the searching officer whether he was under arrest, and the searching officer responded that he was not under arrest and was merely being detained and brought to the PSB for a continued investigation.

Even assuming, arguendo, that either the investigator or the searching officer *could* have arrested defendant prior to or contemporaneously with the search of his person, we note that "[a] search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not" (*People v Reid*, 24 NY3d 615, 619 [2014]). A lawful search incident to arrest "requires proof that, at the time of the search, an arrest has already occurred or is about to occur" (*id.* at 620). The search must be "substantially contemporaneous" to an actual arrest "so as to constitute one event" (*People v White*, 228 AD3d 1317, 1318 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024] [internal quotation marks omitted]; see *People v Lamberty*, 233 AD3d 627, 627 [1st Dept 2024]). Under the circumstances of this case, we conclude that there was no actual arrest of defendant justifying the search, inasmuch as the only officer who was purported to have actually placed defendant under arrest prior to or contemporaneously with the search explicitly informed defendant that he was not under arrest at that time (see *People v Huggins*, 187 AD3d 484, 484 [1st Dept 2020], *lv denied* 36 NY3d 973 [2020]). The court upheld the search as a lawful search incident to an arrest, and thus we are precluded from affirming on any alternative basis (see *White*, 228 AD3d at 1318, citing, inter alia, *People v Concepcion*, 17 NY3d 192, 197-198 [2011]).

We further conclude that the "discovery of the [weapon] in the vehicle was the direct result of, and not entirely free and distinct from, the . . . unlawful search of defendant and seizure of the key[fob]," and thus that the court erred in refusing to suppress the handgun (*People v Smith*, 202 AD3d 1492, 1495 [4th Dept 2022]). Inasmuch as our determination results in the suppression of all evidence supporting the crime charged in count 4 of the indictment, that count must be dismissed (see *id.* at 1497; *People v Lopez*, 149 AD3d 1545, 1548 [4th Dept 2017]).

In light of our determination, we do not address defendant's remaining contentions with respect to appeal No. 1.

In appeal No. 2, defendant contends that the court (Renzi, J.) denied him his right to hire counsel of his choosing and denied him a reasonable opportunity to find new counsel prior to trial. Contrary to defendant's contention, however, the record reflects that the court did not deny defendant the opportunity to find new counsel; rather, the court invited defendant to retain a new attorney but, the following week, defendant indicated that he had opted not to seek new counsel because, in his view, any newly retained attorney would not have had sufficient time to prepare for the upcoming trial. To the extent defendant contends that the court should have granted an adjournment of trial to have permitted sufficient time for a new attorney to become familiar with his case, we conclude, even assuming, *arguendo*, that defendant preserved that contention, that he failed to demonstrate that any requested adjournment was necessitated by factors outside of his control, and that the court did not abuse its discretion in refusing to adjourn the trial (*see People v DeValle*, 194 AD3d 1411, 1412 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]; *see generally People v Burney*, 204 AD3d 1473, 1476 [4th Dept 2022]).

Contrary to defendant's further contention in appeal No. 2, he was not deprived of a fair trial due to certain allegedly improper remarks made by the prosecutor during opening statements and on summation. Initially, we note that defendant preserved his contention for our review only with respect to one of the allegedly improper remarks (*see CPL 470.05 [2]*). In any event, we conclude with respect to both the preserved and unpreserved challenges that the remarks were either fair comment on the evidence and the reasonable inferences to be drawn therefrom or responsive to defense counsel's summation, or otherwise did not deprive defendant of a fair trial (*see People v Hawley*, 112 AD3d 968, 969 [2d Dept 2013], *lv denied* 23 NY3d 963 [2014]; *see generally People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]).

Defendant further contends in appeal No. 2 that he received ineffective assistance of counsel because defense counsel filed a motion in which he made an untimely request to dismiss the indictment pursuant to CPL 30.30. We reject that contention. Although defendant contends that defense counsel's error rendered the motion insofar as it concerned that request subject to dismissal, the court (Walsh, Jr., J.) heard argument on the merits of the motion from both defense counsel and the People and denied the motion with respect to the CPL 30.30 request on the merits without regard to its timeliness. Thus, insofar as defendant asserts that defense counsel's error in filing an untimely motion precluded the trial court's review of the motion, under the circumstances here, "defendant has not shown prejudice under the state or federal standards" (*People v McCray*, 165 AD3d 595, 596 [1st Dept 2018], *lv denied* 32 NY3d 1175 [2019]; *see generally People v Jackson*, 140 AD3d 1771, 1771-1772 [4th Dept 2016], *lv denied* 28 NY3d 931 [2016]). We note that, under the New York standard, prejudice is "a significant but not indispensable element in assessing meaningful representation" (*People v Caban*, 5 NY3d 143, 155-156 [2005] [internal

quotation marks omitted]) and our focus is instead upon "the fairness of the proceedings as a whole" (*People v Stultz*, 2 NY3d 277, 284 [2004], *rearg denied* 3 NY3d 702 [2004]; see *People v Watkins*, 42 NY3d 635, 639-640 [2024]). Here, however, defendant obtained the very review on the merits that he claimed was foreclosed by defense counsel's allegedly ineffective performance, and thus defendant has failed to show either prejudice or that he "was deprived of fair process" under the New York standard (*Watkins*, 42 NY3d at 640). In any event, had defendant shown some other basis for prejudice, defendant's claim of ineffective assistance would nevertheless rely, in part, on matters outside of the record insofar as the record does not establish the motion's likelihood of success (see generally *People v Heverly*, 230 AD3d 1534, 1534-1535 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]), and such claim would thus have to be raised by motion pursuant to CPL 440.10 (see generally *People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]). Although defendant in his post-argument submission notes that this Court previously denied his motion seeking leave to appeal from the denial of his prior CPL 440.10 motion, that motion suffered from the same defect as the ineffective assistance of counsel contention articulated on the present appeal, i.e., the lack of a showing of prejudice or that he was "deprived of fair process" under the New York standard (*Watkins*, 42 NY3d at 640). Nothing in this memorandum would preclude defendant, however, from filing a successive CPL article 440 motion (see generally CPL 440.10 [3] [c]).

Contrary to defendant's related contention in appeal No. 2, we conclude that defendant did not receive ineffective assistance of counsel at trial based on other alleged deficiencies. As discussed above, defendant was not deprived of a fair trial by the prosecutor's allegedly improper remarks during opening statements and summation, and we therefore conclude that "defense counsel's failure to object to the alleged instances of prosecutorial misconduct did not constitute ineffective assistance of counsel" (*People v Fick*, 167 AD3d 1484, 1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019] [internal quotation marks omitted]). Additionally, defense counsel was not ineffective for failing to prevent the jury from hearing that defendant invoked his right to counsel inasmuch as the record reflects that defendant, in fact, did not do so. Although defendant contends that defense counsel was ineffective for failing to request a limiting instruction with respect to certain testimony at trial, for delivering his closing argument prior to a conference regarding the jury charge, and for failing to challenge a prospective juror during jury selection, defendant failed to "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's decisions (*People v Maffei*, 35 NY3d 264, 269 [2020]; see generally *People v Piasta*, 207 AD3d 1054, 1055 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]). Lastly, although defendant contends that defense counsel was ineffective for failing to call an expert to address the victim's medical records at trial, defendant failed to establish that "opposing expert testimony was available, that it would have assisted [the factfinder] in its determination or that he was prejudiced by its

absence" (*People v McKnight*, 236 AD3d 1483, 1483 [4th Dept 2025], lv denied 43 NY3d 1010 [2025]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court