

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

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KA 22-00116

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HAROLD E. BROWN, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL),
FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA, JR.,
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 16, 2020. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and, upon his plea of guilty, of unlawful fleeing of a police officer in a motor vehicle in the third degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Oneida County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and, upon his plea of guilty, of unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25) and resisting arrest (§ 205.30).

Defendant contends that County Court erred in refusing to suppress evidence seized during the execution of search warrants for two cell phones that were recovered from him at the time of his arrest. He specifically focuses on three screenshots of text messages recovered from one of the two cell phones, which a police officer briefly testified at trial contained language reflecting defendant's involvement in narcotic sales. Defendant asserts that the search warrants were overbroad and lacked sufficient particularity. To the extent he contends that the search warrants lacked sufficient particularity due to their failure to reference a specific crime, that contention is unpreserved because defendant "did not challenge the warrant in County Court on that ground," and the court did not expressly decide that issue when denying suppression (*People v Samuel*, 137 AD3d 1691, 1693 [4th Dept 2016]; see CPL 470.05 [2]; *People v*

Navarro, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]). With respect to defendant's preserved contention, he asserts that the search warrants were overbroad and lacked sufficient particularity because they did not contain any date restrictions on the material to be recovered from the cell phones. He further contends that the court erred in applying the doctrine of severability to temporally narrow the warrant's scope to an eight-hour period on the day of defendant's arrest that encompassed the arrest itself as well as several hours preceding it. Even assuming, *arguendo*, that the omission of date restrictions rendered the warrants overbroad and lacking sufficient particularity, and further assuming, *arguendo*, that the court erred in applying the doctrine of severability (*cf. People v Brown*, 96 NY2d 80, 86 [2001]; *People v Ozkaynak*, 217 AD3d 1376, 1377-1378 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Herron*, 199 AD3d 1476, 1479 [4th Dept 2021]), we conclude that the error is harmless inasmuch as "[t]he proof of [defendant's] guilt is overwhelming, and there is no reasonable possibility that admission of the fruits of the [overbroad search warrants] contributed to the conviction" (*People v Bloom*, 241 AD2d 975, 976 [4th Dept 1997], *lv denied* 90 NY2d 938 [1997]; see *People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Farmer*, 198 AD2d 805, 806 [4th Dept 1993], *lv denied* 83 NY2d 804 [1994]). The evidence at trial—exclusive of the material recovered from the cell phones—overwhelmingly established that defendant possessed narcotics with the intent to sell them (see Penal Law § 220.16 [1]; *Farmer*, 198 AD2d at 806). Specifically, the evidence established that defendant was seen engaging in a hand-to-hand sale of narcotics; that he promptly left the scene, whereupon he led multiple police vehicles on an extended high-speed chase through city streets; and that, upon crashing his vehicle into three civilian vehicles, he fled on foot before the police wrestled him to the ground and arrested him. In his possession were two cell phones, narcotics, and a large amount of cash. Testimony of defendant's own witness established that defendant was unemployed at the time of the underlying incident, and he was not found in possession of any paraphernalia suggesting that the narcotics were for his personal use.

Defendant's contention that the court erred in admitting in evidence at trial the amount of money recovered from him upon his arrest is unpreserved for our review (see CPL 470.05 [2]; see generally *People v DuBois*, 203 AD3d 1621, 1622 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]). Defendant's further contention that he was deprived of a fair trial due to instances of prosecutorial misconduct during the prosecutor's summation is unpreserved because defense counsel did not object to any of the purportedly improper comments (see *People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *People v Miller*, 115 AD3d 1302, 1303 [4th Dept 2014], *lv denied* 23 NY3d 1040 [2014]). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of the crime of criminal possession of a controlled substance in the third degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence

with respect to the element of defendant's intent to sell (see *People v Perkins*, 229 AD3d 1223, 1225 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495; see *People v McPherson*, 213 AD3d 1261, 1263 [4th Dept 2023], *lv denied* 39 NY3d 1112 [2023]). The jury was entitled to credit the testimony of the People's witnesses over the testimony of defendant's witness, and we perceive no reason to disturb those credibility determinations (see *People v Tetro*, 181 AD3d 1286, 1288 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]).

Defendant contends that the court erred in sentencing him at an electronic appearance inasmuch as he did not knowingly, voluntarily, and intelligently waive his right to be personally present at the sentencing proceeding. "[D]efendants have a 'fundamental right to be present at sentencing' in the absence of a waiver" of that right (*People v Estremera*, 30 NY3d 268, 272 [2017], quoting *People v Rossborough*, 27 NY3d 485, 488 [2016]). At the time of defendant's sentencing, in response to the COVID-19 pandemic, certain prohibitions on electronic court appearances had been suspended for sentencing proceedings and a defendant could thus consent to an electronic appearance (see Executive Order [A. Cuomo] No. 202.1 [9 NYCRR 8.202.1]; Executive Order [A. Cuomo] No. 202.76 [9 NYCRR 8.202.76]). Here, the record establishes that defendant refused to consent to an electronic appearance and requested that he be personally present for sentencing. Thus, as the People correctly concede, the court erred in imposing sentence at a virtual sentencing proceeding without defendant's consent to an electronic appearance (see *People v Perkins*, 162 AD3d 1641, 1642 [4th Dept 2018]; cf. *People v Lawhorn*, 206 AD3d 1630, 1630-1631 [4th Dept 2022], *lv denied* 38 NY3d 1151 [2022]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing, at which time defendant must be permitted to appear.

In light of our conclusion, defendant's remaining contention is academic.

All concur except BANNISTER and DELCONTE, JJ., who dissent and vote to modify in accordance with the following memorandum:

We respectfully dissent. In our view, the search warrants for defendant's cell phones were unconstitutionally overbroad, and County Court's application of the doctrine of severability was not harmless error.

As our Court recently explained, "[a] person's cell phone now contains at least as much personal and private information as their home and, thus, indiscriminate searches of cell phones cannot be permitted" (*People v Conley*, 234 AD3d 1363, 1365 [4th Dept 2025]; see *People v Ozkaynak*, 217 AD3d 1376, 1377-1378 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Thompson*, 178 AD3d 457, 458-459 [1st Dept

2019]; see generally *Riley v California*, 573 US 373, 386 [2014]). Further, "[a] search warrant must be 'specific enough to leave no discretion to the executing officer' " (*People v Wiggins*, 229 AD3d 1095, 1096 [4th Dept 2024]). To meet the particularity requirement, a warrant authorizing the search of a cell phone "must (1) 'identify the specific offense for which the police have established probable cause,' (2) 'describe the place to be searched,' and (3) 'specify the items to be seized by their relation to designated crimes' " (*People v Saeli* [appeal No. 1], 219 AD3d 1122, 1124 [4th Dept 2023]; see *Wiggins*, 229 AD3d at 1096).

In our view, contrary to the majority's conclusion, defendant's assertion in his omnibus motion that the "search warrant[s] fail[] to contain any objective standards to guide the executing officers" preserved his contentions that the search warrants for his two cell phones lacked sufficient particularity due to both their failure to reference a particular crime and their failure to impose any temporal restriction.

On the merits, we agree with defendant that, inasmuch as the search warrants authorized the examination of "[a]ny and all stored memory" without restriction by reference to any particular crime or date, they were overbroad and, thus, unconstitutional (see *Ozkaynak*, 217 AD3d at 1377; *Thompson*, 178 AD3d at 458; *People v Melamed*, 178 AD3d 1079, 1081 [2d Dept 2019]). Although the applications for the search warrants contained information about alleged specific criminal activity and sought information relating to text messages sent on or about the date of defendant's arrest, the applications were not incorporated into the search warrants, and therefore did not "save the warrant[s] from [their] facial invalidity" (*Wiggins*, 229 AD3d at 1097 [internal quotation marks omitted]; see *Saeli*, 219 AD3d at 1124; *Melamed*, 178 AD3d at 1083).

We further agree with defendant that the court erred in applying the doctrine of severability to the constitutional error by inserting new language into the search warrants that set temporal restrictions. As the Court of Appeals explained in *People v Brown* (96 NY2d 80 [2001]), the doctrine of severability provides that "when a search warrant is partially but not wholly invalid, only the fruits of the invalid portion need be suppressed" (*id.* at 85). The search warrants here were wholly invalid inasmuch as they lacked sufficient particularity (see *Wiggins*, 229 AD3d at 1096-1097; cf. *Ozkaynak*, 217 AD3d at 1377-1378), and the court thus erred by rewriting them.

Finally, we disagree with the majority's conclusion that, in any event, the application of the doctrine of severability was harmless with respect to defendant's conviction of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), which requires proof that defendant knowingly and unlawfully possessed "a narcotic drug with intent to sell it" (*id.*). Defendant was in possession of a small amount of narcotics when he was arrested. Excluding the data recovered from defendant's cell phones, the only evidence that the People offered at trial of defendant's intent to

sell those drugs consisted of the facts that he possessed two cell phones and \$2,301 in cash when he was arrested and that he possessed no paraphernalia suggesting that the drugs were for his personal use. The data recovered from the cell phones, however, consisted of a series of text messages that, according to a police officer's trial testimony, established that defendant was selling drugs on the date of his arrest. Inasmuch as there was no other evidence that defendant was selling—as opposed to buying—the drugs in his possession, "the evidence [of defendant's guilt is] not overwhelming," and the harmless error doctrine is inapplicable (*People v Coffie*, 192 AD3d 1641, 1642 [4th Dept 2021], *lv denied* 37 NY3d 963 [2021]; see *People v DeJesus*, 206 AD3d 1554, 1556 [4th Dept 2022]; see generally *People v J.L.*, 36 NY3d 112, 124 [2020]). Even assuming, arguendo, that the evidence was overwhelming, given the police officer's trial testimony as to the content of the text messages recovered from the cell phones, we conclude that "it cannot be said that 'there is no reasonable possibility that the error affected the jury's verdict' " (*People v Huntsman*, 96 AD3d 1390, 1392 [4th Dept 2012], quoting *People v Douglas*, 4 NY3d 777, 779 [2005]). Therefore, the court's refusal to suppress the evidence seized from defendant's cell phones constitutes reversible error. We would thus modify the judgment by reversing that part convicting defendant of criminal possession of a controlled substance in the third degree and granting defendant's omnibus motion insofar as it seeks to suppress evidence seized following the execution of the search warrants for defendant's two cell phones, and we would grant a new trial on the first count of the indictment.

We agree with the majority that the remainder of defendant's contentions do not warrant further modification or reversal of the judgment.