

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

838

KA 22-01853

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MASURE EVANS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Thomas E. Moran, J.), rendered October 17, 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
unanimously modified on the law by remitting the matter to Supreme
Court, Monroe County, for further proceedings on the suppression
application and as modified the judgment is affirmed in accordance
with the following memorandum: On appeal 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]),
defendant contends that he did not receive effective assistance of
counsel from the attorney representing him at his suppression hearing.
We agree with defendant. A weapon was recovered after police officers
stopped defendant's vehicle after they allegedly observed him driving
without wearing a seatbelt. When defendant reached into his pocket to
retrieve his identification, he lifted his right leg up to access his
pocket, and, at that point, one of the officers allegedly observed the
barrel of a handgun underneath defendant's leg. Defendant contends
that defense counsel was ineffective for failing to request an adverse
inference charge concerning surveillance videos of the area from
cameras operated by the City of Rochester Police Department that were
undisputedly not preserved and reasonably likely to be material.
Supreme Court, as relevant here, denied that part of defendant's
omnibus motion seeking suppression of the weapon on the basis of lack
of probable cause to stop defendant's vehicle, without mentioning the
unpreserved surveillance videos.

Although defense counsel otherwise competently represented
defendant, we conclude that the single omission of failing to request
that the court consider an adverse inference charge at the suppression

hearing deprived defendant of meaningful representation (see *People v Carter*, 142 AD3d 1342, 1343 [4th Dept 2016]; see generally *People v Turner*, 5 NY3d 476, 480 [2005]). Defense counsel's error in failing to make that argument was sufficiently egregious and prejudicial as to deprive defendant of his constitutional right to effective legal representation because the only evidence presented by the People at the hearing was testimony from one of the arresting officers, whose testimony was inconsistent at times, and an adverse inference charge could have successfully undermined the officer's testimony on the issue of probable cause to stop defendant, i.e., whether defendant was, in fact, not wearing a seatbelt. Indeed, suppression of the gun that was seized as a result of defendant's encounter with the police would have been dispositive of the sole count of the indictment, charging defendant with criminal possession of a weapon in the second degree (see *Carter*, 142 AD3d at 1343; see generally *People v Bilal*, 27 NY3d 961, 962 [2016]; *People v Clermont*, 22 NY3d 931, 934 [2013]). Under the circumstances of this case, defense counsel's failure to request an adverse inference charge could not have been grounded in legitimate strategy (see generally *People v McGee*, 20 NY3d 513, 518 [2013]). We note that defendant's contention survives his guilty plea inasmuch as he demonstrated that defense counsel's error infected the plea bargaining process (see *Carter*, 142 AD3d at 1343).

We therefore conditionally modify the judgment by remitting the matter to Supreme Court "for further proceedings on the suppression application, to include legal argument by counsel for both parties and, if defendant so elects, reopening of the hearing" (*Clermont*, 22 NY3d at 934; see *People v Layou*, 114 AD3d 1195, 1198 [4th Dept 2014]). In the event that defendant prevails on the suppression application, the judgment is reversed, the plea is vacated and the indictment is dismissed and, if the People prevail, then the judgment "should be amended to reflect that result" (*Clermont*, 22 NY3d at 932; see *Layou*, 114 AD3d at 1198-1199).

We have reviewed defendant's remaining contentions and conclude that none warrants reversal or further modification of the judgment.