

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

797

KA 14-01986

PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GARRY L. ROBINSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 4, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), based upon the recovery of a revolver from a bush near the location where defendant was detained by police officers. We reject defendant's contention that Supreme Court erred in refusing to suppress his statement as the alleged fruit of an illegal detention not supported by a reasonable suspicion of criminality. An officer testified that he observed defendant repeatedly grabbing at his waistband (see *People v Benjamin*, 51 NY2d 267, 271; *People v Rivera*, 286 AD2d 235, 235-236, lv denied 97 NY2d 760). The officer also observed defendant remove an object from his waistband and place the object in a bush when he saw a marked patrol car approach, and then return the item to his waistband after the patrol car passed (see generally *People v Meredith*, 201 AD2d 674, 674-675, lv denied 83 NY2d 1005). The officer thereafter observed defendant remove the object from his waistband and hide it in the bush a second time when a second marked patrol car turned onto the street where defendant was standing. We conclude that the evidence thus supports the court's determination that defendant's conduct gave rise to a reasonable suspicion that he was in possession of illegal contraband, most likely a weapon (see *People v Roots*, 13 AD3d 886, 887, lv denied 4 NY3d 890).

The evidence also supports the court's determination that defendant's act of discarding the weapon in the bush before the officers detained him constituted an abandonment, i.e., a strategic, calculated decision not made in response to any police illegality (see *People v Johnson*, 111 AD3d 469, 470, *lv denied* 22 NY3d 1157; *People v Morris*, 105 AD3d 1075, 1077-1078, *lv denied* 22 NY3d 1042). Thus, the court also properly refused to suppress the weapon.

Finally, in light of defendant's resentencing, we do not consider his challenge to the severity of his original sentence, and we dismiss the appeal from the judgment to that extent (see *People v Williams*, 136 AD3d 1280, 1284, *lv denied* 27 NY3d 1141, 29 NY3d 954).