

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

1263

KA 17-00095

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDERSON ARROYO, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),
FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered September 13, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of two counts of robbery in the first degree (Penal Law § 160.15 [2], [4]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject defendant's contention that Supreme Court erred in refusing to suppress physical evidence seized following a traffic stop of his vehicle. The evidence at the suppression hearing established that the police officer who initiated the stop had probable cause to stop defendant's vehicle for a violation of Vehicle and Traffic Law § 1111 (d) (1). We further conclude that the officer had a founded suspicion that criminal activity was afoot and he was therefore justified in asking for defendant's consent to search the vehicle (*see People v McGinnis*, 83 AD3d 1594, 1595 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012]; *People v Tejada*, 217 AD2d 932, 933 [4th Dept 1995], *lv denied* 87 NY2d 908 [1995]). At the time the officer asked defendant for his consent, the officer was aware that an armed robbery had occurred in physical and temporal proximity to the stop and that the robbery had involved two suspects whose clothing partially matched items either worn by defendant and the other occupant of the car or found in the backseat. Further, the officer testified that the occupants were not wearing coats despite the freezing weather and gave illogical and contradictory responses to his questions (*see McGinnis*, 83 AD3d at 1595; *cf. People v Hightower*, 136 AD3d 1396, 1396-1397 [4th Dept 2016]). Defendant abandoned his contention that the People failed to

establish through clear and convincing evidence that he consented to the search of his vehicle (see *People v Carrasquillo*, 142 AD3d 1359, 1360 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]) and, in any event, that contention lacks merit. Finally, in light of our determination, defendant's remaining contentions are moot.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court