State of New York
Court of Appeals

OPINION

No. 107
The People &c.,
Respondent,
v.
Tyrell Cook,
Appellant.

Alexandra L. Mitter, for appellant.
Shera Knight, for respondent.

GARCIA, J.:

Defendant moved to suppress evidence and a hearing was held. After argument but before the court rendered a decision, the People were granted permission to reopen the hearing and present additional testimony. The court then denied defendant's motion. We

must decide whether the hearing court had discretion to reopen a suppression hearing at this stage of the proceedings – after the People had rested but before rendering a decision – and, if it did, whether it was an abuse of that discretion to do so here. Because we hold that Supreme Court had, and did not abuse, the discretion to reopen the suppression hearing, we affirm.

I

Late one night in September 2013, the victim, a taxi driver, picked up a passenger in the Bronx. A few minutes into the ride, the passenger, who was in the backseat, pulled out a knife and demanded money. The assailant cut the victim's neck with the knife, a struggle ensued, and the victim crashed his taxi. The assailant fled. Police officers arrived on the scene almost immediately, obtaining and broadcasting a description of the suspect. A few minutes later, two other officers observed defendant, who matched the description provided by the victim, on a subway platform two blocks from the crash. Defendant appeared to be trying to conceal himself from view. Soon after spotting him, police detained defendant. A police sergeant brought the victim from the crash site to the arrest scene where he identified defendant as his assailant. Defendant was arrested and charged with, among other things, attempted robbery and assault.

Defendant moved to suppress the identification made by the victim on the night of the assault, arguing that the identification procedures had been unduly suggestive and that his initial detention at the subway station had been without reasonable suspicion. A hearing was held. The People called one witness, the police sergeant, who testified as to the

victim's account of the incident and description of the assailant, the sergeant's observations of defendant upon the sergeant's arrival at the subway station four to five minutes after responding to the crash scene – including that defendant appeared out of breath and was sweating – and the steps taken to obtain the initial police-arranged show-up identification. Defendant presented no evidence.

Oral argument on the motion followed, during which defense counsel asserted that the People had not demonstrated reasonable suspicion to support detaining defendant, namely that the sergeant's testimony that he had witnessed defendant sweating and out of breath *after* he was detained did not support a finding that the police had reasonable suspicion to detain him. The court appeared to agree that the testimony concerning defendant's physical state after his detention was of limited relevance. The People responded that they had other witnesses available to testify, but the court stated that this was impermissible because the People had rested.

The next morning, after reviewing Appellate Division precedent provided by the People, the court changed course and determined that it did in fact have discretion to reopen the suppression hearing but did not immediately do so. Rather, the court explained that it would not continue with argument on the merits of the suppression motion if the People were going to make a motion to reopen, as "tipping [its] hand" or "telling [the People] what [its] feeling [wa]s . . . would be inappropriate." The People then formally requested to reopen the hearing and described the additional proof they planned to offer. Defense counsel responded and, after argument, the court granted the People's request. The court

assured defense counsel that she would be afforded as much time as she needed to cross–examine on whether the additional testimony was tailored to the issues raised at the previous argument on the merits of the motion to suppress.

Upon reopening, the People called one of the officers who had first spotted defendant on the subway platform. That officer – who did not describe whether defendant was out of breath or sweating prior to being stopped – testified that approximately five people were on the platform at the time he observed defendant, that defendant was the only one matching the description provided by the victim, and that defendant appeared to be hiding. Based on the testimony of both officers, Supreme Court denied defendant's suppression motion. A jury found defendant guilty of attempted first-degree robbery with a dangerous instrument and second-degree assault. The Appellate Division affirmed the judgment of conviction and sentence, holding that Supreme Court "providently exercised its discretion in reopening a suppression hearing, before rendering a decision, in order to permit the People to call an officer with additional information tending to establish reasonable suspicion for defendant's detention" (People v Cook, 161 AD3d 708, 708 [1st Dept 2018]). A Judge of this court granted defendant leave to appeal.

II

Defendant, relying on this Court's decisions in People v Havelka (45 NY2d 636 [1978]) and People v Kevin W. (22 NY3d 287 [2013]), argues that the hearing court did not have discretion, absent exceptional circumstances not present here, to reopen the suppression hearing once the People had rested. The People, in turn, argue that the court

had broad authority to reopen at this stage, grounded in the court's common law power to alter the order of proof in its discretion, citing as authority our decision in People v Whipple (97 NY2d 1, 6 [2001]; see People v Brujan, 104 AD3d 481 [1st Dept 2013]). We will not extend the Havelka/Kevin W. rule to situations where the court has not yet ruled on the suppression motion; rather, decisions to grant a request to present additional evidence at this stage of the proceedings should be reviewed under our traditional abuse of discretion standard.

A.

This Court has, in certain circumstances, placed strict limits on a court's discretion to reopen a suppression hearing. In Havelka, we considered whether an appellate court could hold an appeal in abeyance and remit a case for a second hearing after finding "the evidence offered at the initial hearing insufficient to justify the challenged police action" (45 NY2d at 639). We disagreed with the Appellate Division's decision to do so, explaining that "there is no justification to afford the People a second chance to succeed where once they had tried and failed," potentially subjecting defendants to multiple hearings on the same issue on which they had prevailed (id. at 643). In addition, a remand under these circumstances could lead to impermissible "tailoring" of testimony to overcome defects in the People's proof identified in the Appellate Division decision (id. at 643-644). We held that "where no contention is made that the People have not had a full opportunity to present evidence[,] there is no justification" to remit for a second suppression hearing (id. at 643).

In Kevin W. we extended the "one full opportunity" rule from Havelka to a suppression court's decision to reopen a hearing after a formal decision on the merits. Almost two months after granting suppression, the People in Kevin W. moved to reargue and four months after that, the court reopened the suppression proceedings to allow the People to call another witness (22 NY3d at 292-293). Based on the additional testimony, the court reversed course and denied the suppression motion (id. at 293-294). We affirmed the Appellate Division order reversing the denial of the suppression motion and dismissing the indictment. Relying on the reasoning in Havelka, we held that a judge in these circumstances was precluded "from reopening a suppression hearing to give the People an opportunity to shore up their evidentiary or legal position absent a showing that they were deprived of a full and fair opportunity to be heard" (id. at 289).[1] In doing so, we noted that:

> "The truth-seeking function of a suppression hearing is critical, and there is a strong public policy interest in holding culpable individuals responsible and protecting legitimate police conduct. Finality is important, too, and parties are expected to be prepared for relevant proceedings with their best evidence. Our rule in Havelka balances these sometimes competing considerations, which are as evident in the pretrial context as they are on the appeal of a suppression court's decision."

(id. at 296).

We must again decide where to strike that balance between "sometimes competing considerations." In Havelka, we applied the "one full opportunity" rule to a holding by an

[1] The People do not argue that they were denied a full opportunity to present their case prior to reopening here.

appellate court overturning the decision of the suppression court. In Kevin W. we applied the same rule to the suppression court's decision to reopen the hearing after its ruling on the merits of the motion. Defendant now asks us to apply the rule at a point still earlier in the process, similarly restricting the suppression court's discretion before any decision is made. This we decline to do.

A basic concern underlying both Havelka and Kevin W. is finality, described as the "haunt[ing] . . . specter of renewed proceedings" after the defendant initially has prevailed (Havelka, 45 NY2d at 643). We explained in Havelka that allowing the People to present additional evidence at a new hearing would render success at the original suppression hearing "nearly meaningless" (id.). The People, we said, should not get "a second chance to succeed where once they tried and failed" (id.). However, that concern is absent where no decision on the motion has been rendered by the hearing court: no victory will be rendered "nearly meaningless."

The second issue of concern weighing in favor of the "one full opportunity" rule – the risk of improperly tailored testimony at the reopened proceedings – is significantly lower where the People do not have a formal decision from either an appellate court or the hearing court. We explained the risk in terms of distorted testimony designed to meet "the court's *established* requirements" (Havelka, 45 NY2d at 643 [emphasis added]). Without a decision by the court, there is no established blueprint for the People's presentation.

Nevertheless, if the suppression court "tips its hand" about perceived weaknesses in the People's proof after the People have rested, that insight might create a risk of tailored

testimony at the reopened hearing. However, hearing courts usually will be able to take precautions to minimize that risk (see Geders v United States, 425 US 80, 89-90 [1976] [explaining that thorough cross-examination is an effective "weapon() to cope" with the possibility of fabricated testimony]). And, hearing courts are "more than up to the task" of detecting manufactured testimony in such circumstances (Brujan, 104 AD3d at 481). This evaluation might include, as we noted in Kevin W., the degree to which evidence at the reopened hearings addresses specific weaknesses the court identified in the People's case, a potential factor in the court's credibility determinations in either granting or denying the suppression motion (see 22 NY3d at 297). And acute ex ante concerns, such as the degree to which the court signaled specific concerns, should inform an appellate court's review of the decision under the abuse of discretion standard.[2]

As we noted in Kevin W., concerns about finality and improper tailoring of testimony must be balanced against the "strong public policy interest in holding culpable individuals responsible and protecting legitimate police conduct" (22 NY3d at 296; see also Herring v United States, 555 US 135, 141 [2009] [suppression of otherwise highly probative evidence may lead to "substantial social costs," of which the "principal cost" is "letting guilty and possibly dangerous defendants go free – something that offends basic concepts of the criminal justice system" (internal quotation marks omitted)]). It is not guilt

[2] In terms of strategically withholding proof, the People rely on the hearing court's discretion at their peril: appellate courts may well determine that it was not an abuse of discretion for the hearing court to *deny* the People's motion to reopen prior to a decision (see e.g. People v Ynoa, 223 AD2d 975, 978 [3d Dept 1996]; People v Lopez, 206 AD2d 894, 894 [4th Dept 1994]).

or innocence that is at stake in a suppression hearing, but rather whether the police had lawful cause to take the challenged action (see People v Merola, 30 AD2d 963, 964 [2d Dept 1968]). "If the [People] possess[] evidence showing that, in fact, no official misconduct occurred, the interests of justice militate strongly in favor of considering this evidence even if it is belatedly brought to the [suppression] court's attention" (In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F3d 177, 197 [2d Cir 2008]).

Balancing the competing considerations and keeping in mind the overarching goal of serving the "truth-seeking function" (Kevin W., 22 NY3d at 296), we decline to extend the "one full opportunity" rule to decisions to reopen suppression hearings prior to any ruling on the merits. Absent finality concerns and with the risk of improper tailoring less acute, a rule severely constricting the suppression court's discretion cannot be justified.

B.

Based on language we used in Whipple, the People ask us to rely on the suppression court's "common-law power . . . to alter the order of proof in [its] discretion and in furtherance of justice" at any point prior to rendering a formal decision (see 97 NY2d at 6, quoting People v Olsen, 34 NY2d 349, 353 [1974]). Reliance on that power is consistent with the rationale of several Appellate Division decisions declining to apply the Havelka/Kevin W. rule in similar circumstances (see Brujan, 104 AD3d at 481; People v McCorkle, 111 AD3d 557, 557 [1st Dept 2013]).

We reject the dissent's suggestion that, with respect to reopening suppression hearings, courts have discretion to exercise their "common-law power" only in

circumstances identical to those in Whipple, where the issue to be presented after reopening is simple to prove and not seriously contested (see dissenting op at 7, quoting Whipple, 97 NY2d at 3). The very point of a motion to suppress is to "seriously contest" the legality of police conduct, and motions to suppress rarely reflect "elements" that are "simple to prove" (compare e.g. Camara v Mun. Ct. of City and County of San Francisco, 387 US 523, 536-537 [1967] ["(T)here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails"]; Brujan, 104 AD3d 481-482 [evaluating extensive facts to determine whether police had reasonable suspicion] with e.g. Whipple, 97 NY2d at 4 [whether parking lot could hold four or more vehicles]; People v Maloy, 36 AD3d 1017, 1019 [3d Dept 2007] [whether bullet in gun was operative]; People v Smith, 118 AD3d 920, 921 [2d Dept 2014] [holding that trial court had discretion to reopen trial proof to allow People to submit defendant's mugshot into evidence]). Moreover, motions to suppress do not raise double jeopardy concerns, do not implicate the People's separate constitutional burden of proof as to the statutory elements of the charged crime, and do not involve a jury's potential response to a sudden deviation in the order of proof (see Olsen, 34 NY2d at 354-356).[3]

[3] We respectfully disagree with the dissent's position that the brief analogy to a "parallel" situation made by this Court in People v Crandall (69 NY2d 459, 467 [1987] [affirming reopening of a suppression hearing when the People did not have a full opportunity to present evidence during the initial hearing]) somehow effected a wholesale importation of the entire body of law related to reopening of trial proof into the suppression hearing context (see dissenting op at 5-6). Notably, we did not cite Olsen, Whipple, or any other case related to trial proceedings in Kevin W., decided 26 years after we purportedly opened this portal in Crandall and 12 years after we decided Whipple.

Further, as we noted in Whipple, the common law power to alter the order of trial proof remains despite the Criminal Procedure Law's myriad statutory provisions governing the order of proceedings during a trial (97 NY2d at 6; see e.g. CPL 260.30 (1) to (11) [stating the order of a jury trial]; CPL 290.10 [explaining when a defendant may move for a trial order of dismissal]). That common law power must, however, be exercised in a manner consistent with the applicable statutes. By contrast, the statutory framework governing suppression hearing procedures is significantly less comprehensive (see CPL 710.60 [4]; see generally People v Mendoza, 82 NY2d 415, 429 [1993] [holding that suppression courts may exercise their discretion to hold a hearing even if a motion to suppress is technically deficient]). Other rules governing suppression hearings are similarly relaxed compared to restrictions that apply in the trial context (see CPL 710.60 ["(H)earsay evidence is admissible (in a suppression hearing) to establish any material fact"]; People v Edwards, 95 NY2d 486, 492 [2000], citing People v Darden, 34 NY2d 177, 181 [1974] [holding that when evaluating a motion to suppress, the court may conduct an *ex parte*, *in camera* examination of a confidential informant without disclosing the informant's identity to the defendant]). The general flexibility of these procedural rules counsels for substantial discretion in altering the order of proof at pretrial suppression hearings.

Accordingly, it is not surprising that both defendant and the dissent have failed to point us to a single decision in which an appellate court has used Whipple to so tightly cabin the hearing court's discretion prior to rendering a decision. Decisions at this stage

of the proceedings – denying or granting a motion to reopen – will be reviewed under our traditional abuse of discretion standard.[4]

C.

Applying the relevant standard in this case, the hearing court's reopening was a permissible exercise of its discretion. Under the abuse of discretion standard, "[w]e are not free to substitute our judgment for that of the . . . court [of first instance] when conflicting facts and inferences reasonably support a decision for or against a certain result" (People v Branch, 83 NY2d 663, 667 [1994]). Instead, the question is whether "the case presented shows no room for the exercise of reasonable discretion" (id.).

It is true, as defendant asserts, that the hearing court had expressed some skepticism regarding part of the People's proof, a fact which might have led to an increased possibility of tailoring. However, contrary to defendant's contention, there is a difference between

[4] This approach is consistent with numerous decisions in all four Appellate Division departments holding that it was not an abuse of discretion to reopen a pretrial hearing after the People rested but before the suppression court had rendered a decision (see e.g. Brujan, 104 AD3d at 481; People v Suphal, 7 AD3d 547, 547 [2d Dept 2004]; People v Whitmore, 12 AD3d 845, 846 [3d Dept 2004]; People v Brown, 148 AD3d 1534, 1534-1535 [4th Dept], lv denied, 29 NY3d 1076 [2017]). These include several decisions of the First and Fourth Departments issued after we decided Kevin W. (see e.g. People v Gnesin, 127 AD3d 652, 653 [1st Dept 2015]; Brown, 148 AD3d 1534; People v Williams, 151 AD3d 1834, 1835 [4th Dept], lv denied, 29 NY3d 1135 [2017]). The Court of Appeals for the Second Circuit has rejected the "one full opportunity" rule altogether, instead allowing hearing courts the discretion to reopen a suppression hearing even after rendering a formal decision (see In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F3d at 197; see also United States v Ozuna, 561 F3d 728, 734 [7th Cir 2009]; United States v Rabb, 752 F2d 1320, 1323 [9th Cir 1984], abrogated on other grounds by Bourjaily v United States, 483 U.S. 171 [1987]).

skepticism and the functional equivalent of a decision. Indeed, skepticism may not always portend an adverse ruling. Moreover, once it became clear that the People likely would make a motion to reopen the hearing, Supreme Court refused to entertain or comment on any additional argument on the merits. Thereafter, to address any risk of tailoring, the court allowed defense counsel wide latitude in cross-examining any of the People's witnesses. "In light of these safeguards undertaken to preserve both the truth-seeking function of [the hearing] and defendant's rights, we conclude that the [hearing] court did not abuse its discretion" (Branch, 83 NY2d at 668; cf. Geders, 425 US at 89-90).

Nor can defendant claim any unfair prejudice. The hearing and rehearing occurred over the course of two days, as opposed to the months-long period in Kevin W. (see 22 NY3d at 292-294). The court denied defendant's suppression motion less than a week after the hearing and rehearing. And, the additional witness should not have come as a surprise as it was one of the officers who initially spotted defendant at the subway station.

It is also worth noting that, although Supreme Court had focused on what reasonable inferences could be drawn from the original witness's observation that defendant was sweating and out of breath shortly after being detained, at the reopened hearing the People elected to rely on other, unrelated proof in establishing reasonable suspicion. Both the inconclusive nature of Supreme Court's comments prior to the motion to reopen and the nature of the subsequent proof reinforce our view that any risk of tailoring here was minimal (see Kevin W., 22 NY3d at 297 ["the nature of (the) later testimony underscore(d)

the risk of presentations shaped, whether deliberately or subconsciously, by hindsight" because that testimony directly addressed the expressed concerns of the hearing court]).

D.

In Havelka, we prefaced our holding by observing that "[r]ules emerge and are tested against varying factual backgrounds. Those rules which accomplish just and workable results survive and expand. But a principle should never be applied hastily without measuring its probable effect. It is the purpose of the rule, rather than the rule itself, to which we are ultimately bound" (45 NY2d at 642). The Havelka rule, given its purpose and justification, has reached "the limit of its logic" (Messersmith v Am. Fid. Co., 232 NY 161, 165 [1921]) and should not be further extended. Instead, decisions by the suppression court to reopen a hearing made prior to any decision on the merits should be reviewed under our traditional abuse of discretion standard. The hearing court did not abuse its discretion here.

* * *

We have examined defendant's remaining contentions and find them without merit.

Accordingly, the order of the Appellate Division should be affirmed.

People v Tyrell Cook

No. 107

STEIN, J. (dissenting):

Although I agree with the majority that a hearing court may have the discretion to reopen a suppression hearing after the People have rested but before rendering a decision, I disagree with the majority's analysis of the boundaries of that discretion, and I conclude that Supreme Court abused its discretion in granting the People's request to reopen the suppression hearing under the particular circumstances of this case. Therefore, I respectfully dissent.

I.

As the majority notes, our jurisprudence addressing courts' discretion to allow reopening of a suppression hearing "balances . . . sometimes competing considerations" (People v Kevin W., 22 NY3d 287, 296 [2013]). The issue presented on this appeal requires us to balance those considerations yet again.

After a formal decision on the merits of a suppression motion has been issued, our precedent "preclude[s] a trial judge from reopening a suppression hearing to give the People an opportunity to shore up their evidentiary or legal position absent a showing that they were deprived of a full and fair opportunity to be heard" (id. at 289; see People v Crandall, 69 NY2d 459, 463-467 [1987]; People v Havelka, 45 NY2d 636, 643-644 [1978]). One consideration underlying this rule is finality; a "defendant, having prevailed at the hearing, [should not] be haunted by the specter of renewed proceedings" (Havelka, 45 NY2d at 643; see Kevin W., 22 NY3d at 296). Absent a formal decision on the merits, such as here, finality is not a concern. However, while, as a general matter, "[f]inality is important," we have recognized that "[t]he truth-seeking function of a suppression hearing is critical" (Kevin W., 22 NY3d at 296 [emphasis added]).

Our cases establish that "the risk of the introduction of distorted testimony at a rehearing" (Havelka, 45 NY2d at 644) or tailored testimony "shaped, whether deliberately or subconsciously, by hindsight" (Kevin W., 22 NY2d at 297; see Crandall, 69 NY2d at 467) undermines the truth-seeking function of a hearing. The rules set forth in our prior cases limiting courts' ability to reopen suppression hearings are designed to protect the

truth-seeking function of suppression hearings by minimizing the risk of tailored testimony. While "there is a strong public policy interest in holding culpable individuals responsible and protecting legitimate police conduct" (Kevin W., 22 NY3d at 296 [emphasis added]), testimony that is tailored by police to fit "implicit and explicit direction from the court about the weaknesses of [the People's] case" (id. at 295) works to defeat a court's ability to determine the truth of whether police misconduct has, in fact, occurred. Admitting such testimony undermines the truth-seeking function of a suppression hearing. The majority overlooks the simple proposition recognized by our cases that distorted or tailored police testimony does not assist a suppression court in determining whether official misconduct has occurred. Indeed, the majority's decision herein, which provides the People with virtually unlimited opportunity, after the People have rested but before a decision is made, to tailor their presentation at a reopened hearing to satisfy the implicit or explicit direction provided by the court "magnif[ies] the potential for abuse and injustice" (Havelka, 45 NY2d at 643 [emphasis added]).[1]

The majority not only holds that hearing courts may routinely grant a request by the People to reopen a suppression hearing after both parties have rested but prior to a formal decision, but also that such a determination should be upheld, almost without limitation.

[1] The majority appears to imply that the truth-seeking function is more important in suppression hearings than at trials because, in suppression hearings "[i]t is not guilt or innocence that is at stake in a suppression hearing, but rather whether the police had lawful cause to take the challenged action" (majority op. at 8-9). I profoundly disagree. The truth matters in all judicial fact-finding proceedings.

Despite our repeated caution that the "courts should be alert to the potential for abuses through the tailoring or alteration of testimony to satisfy the deficiencies found by a[] . . . court" (Crandall, 69 NY2d at 467), the majority allows only that "acute ex ante concerns, such as the degree to which the court signaled specific concerns, should inform an appellate court's review of the decision under the abuse of discretion standard" (majority op. at 8). In addition, although the majority erroneously insists that Kevin W. addressed only the risk of tailored testimony arising from the expressly identified concerns of the court about the weaknesses of the People's case (majority op at 8, 13-14), we plainly emphasized in that case that such risk is present when the People "benefit from implicit and explicit direction from the court" about the insufficiency of their proof (22 NY3d at 295 [emphasis added]). Thus, contrary to the majority's constricted reading of our prior case law, we have recognized that it is not only the explicit or "established requirements" of the courts that may enable the People to provide tailored testimony at a reopened suppression hearing (Havelka, 45 NY2d at 643), but also the court's "implicit . . . direction" (Kevin W., 22 NY3d at 295).

The majority's vague rule, pursuant to which an appellate court should assess only whether the hearing created a risk of tailored police testimony when the court has expressly identified the weaknesses in the People's case, increases the "potential for abuse and injustice" that our prior jurisprudence has consistently warned "should not be tolerated"

(Havelka, 45 NY2d at 643-644).[2] Therefore, I would apply the standard urged by the parties in accordance with our decision in People v Whipple (97 NY2d 1 [2001]) in assessing whether a suppression court abused its discretion in granting a request to reopen, rather than the nebulous standard articulated by the majority. Under that standard, the court's reopening of the suppression hearing here constituted an abuse of discretion. However, even under the majority's standard—pursuant to which appellate courts "should" consider "the degree to which the court signaled specific concerns" (majority op. at 8)—the hearing court abused its discretion in granting the People's request to reopen because the "nature of Supreme Court's comments prior to the motion to reopen" gave significant substantive guidance to the People regarding the deficiencies in their case, and the testimony proffered on reopening directly addressed the explicit concerns of the suppression court (majority op. at 13).

II.

In contesting whether Supreme Court abused its discretion in reopening the suppression hearing below, both parties before this Court rely heavily on People v Whipple,

[2] The majority concludes that this risk is attenuated because hearing courts are easily able to detect manufactured testimony in the face of strong cross-examination by defense counsel (see majority op. at 7-8). However, the availability of cross-examination upon rehearing was not deemed to be sufficient in any of our prior cases to ameliorate the risk. The majority does not adequately explain why cross-examination is insufficient to minimize the risk when a formal decision detailing the deficiencies in the People's case has been rendered, as in Kevin W. and Havelka, but the risk is somehow significantly less acute when the court merely informs the People of those deficiencies without issuing a formal decision.

which the majority cites but then rejects. Indeed, the People argue that "this Court should . . . be guided by the outcome in Whipple." I agree.

By way of background, this Court recognized in Crandall that, in determining whether remittal for a second suppression hearing was appropriate, we should look to the rules that are applied in the trial context (69 NY2d at 467). We explained that our cases in the suppression context

> "can be analogized in terms of the appropriate corrective action to cases where, as a consequence of trial error by the prosecution or the court, a new trial is ordered. Correspondingly, as under the Havelka principle, when the evidence at trial is insufficient after the People have had a full opportunity to present their evidence, the appropriate corrective action is to dismiss the criminal charge. In short, the parallel between the corrective action of cases of true insufficiency of the evidence and those involving trial errors helps to demonstrate the correctness of the rationale and result we reach in this case"

(id.). Given the procedural posture of the instant case—in which the People sought to reopen the suppression hearing in order to present evidence to support a finding of reasonable suspicion after both parties had rested and defendant had thoroughly argued the insufficiency of the People's proof—the relevant precedent arising out of the trial context, as correctly identified by the parties, is Whipple.[3] In Whipple, "the People rest[ed] without

[3] The majority contends that Whipple cannot be relevant because it was not cited in Kevin W. (see majority op. at 10, n 3). Given that Kevin W. was not decided in a similar procedural context—Kevin W. involved the propriety of a suppression court's decision to reopen a suppression hearing six months after a formal decision had been rendered (see 22 NY3d at 292-293)—there was no reason for that Court to cite Whipple.

evidence establishing an element of an offense, . . . the defendant move[d] for a trial order of dismissal on that basis, [and] the trial court . . . permit[ted] the People to reopen their case [to] cure the omission" before the case was submitted to the jury (97 NY2d at 3). Under Whipple, even when the People have a full and fair opportunity to litigate an issue before the close of proof, the trial court retains discretion to allow them to reopen prior to a decision being rendered on the ultimate issue. Specifically, Whipple rejected the notion that, simply because a "motion for a trial order of dismissal gave the People notice of [a] technical omission[,] . . . a trial court may never permit the People to act on such notice—a sort of 'gotcha' principle of law" (97 NY2d at 7).

So too here, I agree with the majority that a suppression court retains some discretion, pursuant to its "common-law power . . . to alter the order of proof" (Whipple, 97 NY2d at 6), in order to allow the People to reopen a suppression hearing prior to rendering a decision on the merits. However, the common-law power recognized in Whipple is not unlimited. Rather, the Court held in Whipple that reopening is not an abuse of discretion only "where the missing element is simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense" (97 NY2d at 3). That standard is entirely consistent with our concern in Havelka and its progeny about the risk of the People undermining the truth-seeking function of a suppression hearing by offering testimony that is tailored in response to guidance previously provided by the court.

The majority contends that Whipple cannot be applied in the suppression context because the purpose of a motion to suppress is to "seriously contest" the legality of police

conduct (majority op. at 10), and suppression motions do not reflect issues that are "simple to prove" (Whipple, 97 NY2d at 3). However, the question is not whether the ultimate issue—i.e., illegality of police conduct or guilt versus innocence—is uncontested and easy to prove, but whether the missing testimony is a mere technical omission. In any event, while Havelka and its progeny effectively apply an absolute bar to permitting a rehearing on a suppression motion after a decision has been rendered, the Court noted in Havelka that, "[u]nder certain circumstances, . . . the risk of the introduction of distorted testimony at a rehearing is minimal" (45 NY2d at 644). The Havelka Court gave as an example a situation in which "information supporting a search was furnished by an interstate bulletin . . . or by a communication from one division of a police department to another," explaining that "[i]n such cases the lack of familiarity and personal contact between the sending and receiving officers diminished the potential for distortion" (id.). The example given in Havelka reflects an identified deficiency in the People's case that "is simple to prove and not seriously contested" (Whipple, 97 NY2d at 3) and demonstrates that Whipple easily translates to the suppression context. Moreover, unlike the standard adopted by the majority decision, application of Whipple would present an effective guard against the risk of tailored testimony.

The majority further concludes that, contrary to Crandall, we should not look to the trial context because the statutory framework governing suppression hearings is less comprehensive and more "relaxed" than the framework that applies to suppression hearings. This explanation for departing from Crandall is contradicted by the majority's

own recognition that Whipple involves the courts' common-law power to alter the order of trial proof, which is separate and apart from the statutory provisions governing the order of proceedings during a trial. In other words, the majority relies on Whipple in recognizing a suppression court's "common-law power . . . to alter the order of proof 'in its discretion and in furtherance of justice'" (Whipple, 97 NY2d at 6, quoting People v Olsen, 34 NY2d 349, 353 [1974]), but then states that the scope of that common-law power should be governed by the comprehensiveness—or lack thereof—in a statutory framework that it essentially recognizes as inapplicable. This unique legal analysis is puzzling. I agree with the People that Whipple should govern the analysis instead.

III.

Here, after the sole witness testified at the hearing on defendant's motion to suppress the identification made by the victim and the parties rested, defendant argued that the victim's description of the perpetrator was too vague to provide the police with reasonable suspicion to detain defendant. The court inquired about the impact of the testimony of the witness—a police sergeant who brought the victim to identify defendant after defendant had been detained—that he observed defendant to be sweating and out-of-breath. Defense counsel responded that the sergeant's observation of defendant panting and sweating after he was handcuffed and surrounded by police officers could not contribute to reasonable suspicion for the police to initially approach and stop defendant. The court not only "appeared to agree that the testimony concerning defendant's physical state after his detention was of limited relevance" (majority op. at 3), but expressly identified that

deficiency as "the issue." The court then explained that if, after reviewing the sergeant's testimony, it concluded that the sergeant had stated that the fellow officer who first detained defendant observed both that defendant met the victim's vague description and "that he was huffing and puffing and was sweating, then there's not an issue." The People conceded that the sergeant did not so testify, and the court denied the People's request to call additional witnesses who could testify about defendant's appearance before he was detained. The court opined that it lacked discretion to reopen the hearing because the People had rested, but it adjourned until the next day to permit the People to provide cases instructive on the court's ability to do so.

The following day, the court changed course, concluding that it had discretion to reopen the hearing to allow the People to put in further proof. The court explained that defendant had pointed to a deficiency in the People's proof, and that it was the People's "call" whether to move to reopen the hearing. The court further stated that, after the parties rested, it was left with "the question" for the People of "whether there was anything . . . [it] could or anything that [it] would draw in terms of an inference as to why this detention occurred beyond the [victim's] description." Only after making that statement did the court indicate that it was "not tipping [its] hand" or "rendering a decision." Contrary to the majority's assertion that the court refused to entertain or comment on additional argument on the merits, the court did in fact tip its hand and provide explicit direction to the People on the merits after the People stated that, "at this time we are moving to reopen the hearing." Indeed, the court arguably suggested which officer the court believed the People

should call to testify, stating that "the DA perhaps has concluded that maybe the fellow officer rule is not going to meet his burden of going forward and maybe he needs to bring in the officer who actually detained the person." After the People indicated that they intended to call a police witness to testify that he observed defendant hiding on the subway platform in a manner that would prevent him from being seen, the court stated "I'm sorry, I'm not understanding. You're not putting on the person who detained defendant?" The People then answered the court's repeated questions about exactly what the proposed witness communicated to the officer who actually detained defendant; those questions went to the merits of the defendant's suppression motion.

Defendant objected that, given the parties' extensive oral argument exploring the issue of reasonable suspicion, reopening the hearing would create a danger of tailored testimony because "the police know what they need to say now to Your Honor in order to meet their burden." Defendant argued that this case should be distinguished from one in which the People simply "forgot to ask a particular question;" rather, after the issues were explored at length, the People realized that their witness did not "say what we need him to say," so they wanted to call an additional officer to cure the deficiencies in their case. In other words, defendant pointed out that the extensive exploration of the issue had given rise to the potential for tailored testimony. Nevertheless, the court granted the motion to reopen the hearing and informed defense counsel that she would have an opportunity to cross examine the witness on the issue of tailoring.

At the reopened suppression hearing, the officer who first observed defendant on the subway platform testified that he saw defendant on the uptown side of the platform. From the downtown side, the officer could see defendant seated on the ground behind a barrier or obstruction, hiding in a way that made him not visible to anyone walking up the stairs to the uptown side of the platform. Other officers arrived on the uptown side of the platform, and the testifying officer pointed out defendant's location to them—i.e., he signaled to the officer who detained defendant where he was and that he was hiding—whereupon defendant was taken into custody. This testimony did not expressly address "the issue" with the People's proof that the suppression court initially identified. However, it did address the court's extensive questions regarding what was communicated to the officer who detained defendant, and it provided additional proof in response to the court's clear indication that the evidence previously provided was insufficient to establish reasonable suspicion.

The additional evidence that the courts below held was required to prove reasonable suspicion was not a mere "technical omission," where "the People simply forgot a technically necessary element . . . [that] was simple to prove, and uncontested," as in Whipple (97 NY2d at 7), or that involved "diminished . . . potential for distortion," as set forth in Havelka (45 NY2d at 644). Rather, the question of whether there was reasonable suspicion—turning on what police observed about defendant before he was stopped and what was communicated to the officer who detained him—was seriously contested.

Moreover, as the parties' extensive oral arguments at the trial level indicate, the issue was far from simple to prove. Thus, under Whipple, reopening was not permissible.

Moreover, under these circumstances, "the nature of [the] later testimony underscores the risk of presentations shaped, whether deliberately or subconsciously, by hindsight" (Kevin W., 22 NY3d at 297), and reopening the hearing allowed the People to elicit testimony tailored to the court's "implicit and explicit direction" (id. at 295).[4] The safeguards to which the majority points that were purportedly employed by the suppression court to preserve the truth-seeking function of the hearing and defendant's rights simply did not exist (cf. People v Branch, 83 NY2d 663, 668 [1994]). Rather, defendant was placed in the untenable position of having to choose between vigorous argument regarding the deficiencies in the People's proof and avoiding a clear articulation of those deficiencies so that the People would not be given the opportunity to present tailored testimony upon a reopening of the hearing. Given the manifest risk of tailoring here, I would hold that Supreme Court abused its discretion in reopening the hearing even under the vague standard established by the majority.

Accordingly, I would reverse and grant defendant's motion to suppress.

[4] Of course, even if police do not tailor their testimony to the court's concerns in a reopened hearing—and thereby confirm the risk—an appellate court may nevertheless conclude that the suppression court so signaled its position on the deficiencies in the People's case that an intolerable risk of distorted testimony was present.

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Order affirmed. Opinion by Judge Garcia. Chief Judge DiFiore and Judges Fahey, Wilson and Feinman concur. Judge Stein dissents in an opinion in which Judge Rivera concurs.

Decided December 19, 2019