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

703

KA 17-00969

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICARDO NELLONS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 8, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in failing to conduct a *Darden* hearing with respect to a confidential informant who allegedly purchased heroin from defendant while working with the police (*see generally People v Darden*, 34 NY2d 177, 181 [1974], *rearg denied* 34 NY2d 995 [1974]). Because defendant did not request a *Darden* hearing or object to the court's failure to conduct one, however, he failed to preserve his contention for our review (*see People v Brown*, 181 AD3d 1301, 1303 [4th Dept 2020]; *People v Cruz*, 89 AD3d 1464, 1465 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012]). We reject defendant's assertion that his contention is preserved for appellate review under CPL 470.05 (2) because the court "expressly decided" that a *Darden* hearing was not warranted. Even assuming, arguendo, that the court's statement that there is "no *Darden* here" constitutes an express ruling that defendant was not entitled to a *Darden* hearing, we conclude that such ruling was not "in re[s]ponse to a protest by a party" (*id*.).

We also reject defendant's related contention that his attorney was ineffective in failing to request a *Darden* hearing. A single error rises to the level of ineffective assistance of counsel only in the rare instance when the error " 'involve[s] an issue that is so clear-cut and dispositive that no reasonable defense counsel would

have failed to assert it, and it [is] evident that the decision to forego the contention could not have been grounded in a legitimate trial strategy' " (*People v Keschner*, 25 NY3d 704, 723 [2015], quoting *People v McGee*, 20 NY3d 513, 518 [2013]; *see People v Flowers*, 28 NY3d 536, 541 [2016]). Additionally, counsel is not ineffective for failing to "make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Here, the issue whether defendant was entitled to a *Darden* hearing is not "clear-cut." Moreover, because there is no indication in the record that the confidential informant was "wholly imaginary" or that his communications to the police were "entirely fabricated" (*Darden*, 34 NY2d at 182; *see People v Crooks*, 27 NY3d 609, 613 [2016]), defendant has failed to establish that he would have been entitled to any relief had a *Darden* hearing been conducted.

Finally, we have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: October 2, 2020

Mark W. Bennett
Clerk of the Court