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

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KA 19-00489

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE PORTERFIELD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP 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 (Russell P. Buscaglia, A.J.), rendered January 3, 2019. 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: Defendant appeals 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]). Preliminarily, the People correctly concede that defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

On the merits, defendant challenges Supreme Court's refusal to suppress his statement at the crime scene. Although defendant acknowledges that the police did not question or interrogate him at the scene, he asserts that his statement was nevertheless inadmissible because officers purposefully delayed removing him from the "chaotic" crime scene in the hope that he would spontaneously confess. We reject that contention. Both the United States Supreme Court and the Court of Appeals have held that " '[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself' " (*People v Doll*, 21 NY3d 665, 672 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014], quoting *Arizona v Mauro*, 481 US 520, 529 [1987]). Moreover, it is well established that police officers need not "take affirmative steps, by gag or otherwise, to prevent a talkative person in custody from making an incriminating statement" (*People v Rivers*, 56 NY2d 476, 479 [1982], *rearg denied* 57 NY2d 775 [1982]; *see People v Krom*, 61 NY2d 187, 199 [1984]). Thus, the officers' alleged failure to immediately transport defendant to the

precinct did not, standing alone, amount to the functional equivalent of interrogation and thereby require the suppression of his spontaneous, pre-*Miranda* statement at the scene (*see Doll*, 21 NY3d at 671-672).

Contrary to defendant's further contention, the court properly determined that his post-*Miranda* statements at the precinct were not involuntary (*see People v Mateo*, 2 NY3d 383, 413-414 [2004], *cert denied* 542 US 946 [2004]; *People v Childres*, 60 AD3d 1278, 1278-1279 [4th Dept 2009], *lv denied* 12 NY3d 913 [2009]). Finally, the period of postrelease supervision is not unduly harsh and severe.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court