

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

687

KA 18-00796

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TYSHAWN K. KING, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered April 27, 2018. The judgment convicted defendant upon a 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 his waiver of indictment and consent to be charged under a single-count superior court information (SCI) was defective because the felony complaint charged a lesser included offense of a charge, arising from the same underlying incident, on which he had already been indicted. We reject that contention (*see generally People v D'Amico*, 76 NY2d 877, 879 [1990]; *People v Colon*, 42 AD3d 411, 412 [1st Dept 2007]; *People v Waid*, 26 AD3d 734, 735 [4th Dept 2006], *lv denied* 6 NY3d 839 [2006]). The fact that a defendant has already been indicted for a related offense does not prohibit a waiver of indictment on a "new charge contained in [a subsequent] felony complaint" (*D'Amico*, 76 NY2d at 879). Although we agree with defendant that a lesser included offense of a related charge on which a defendant has already been indicted would not constitute a "new charge" that would permit defendant to waive indictment and consent to be prosecuted by an SCI (*see Colon*, 42 AD3d at 412; *see generally People v Pierce*, 14 NY3d 564, 568 [2010]), we nevertheless reject defendant's contention inasmuch as the offense charged in the subsequent felony complaint—criminal possession of a weapon in the second degree (§ 265.03 [3])—is not a lesser included offense of the related charge on which he was indicted, criminal use of a firearm in the first degree (§ 265.09 [1]; *see People v Argueta*, 194 AD3d 857, 859-860 [2d Dept 2021], *lv denied* 37 NY3d 970 [2021]).

To establish that a count is a lesser included offense, a defendant must show " 'that it is theoretically impossible to commit the greater crime without at the same time committing the lesser' " (*People v Repanti*, 24 NY3d 706, 710 [2015], quoting *People v Glover*, 57 NY2d 61, 64 [1982]). "Such determination requires the court to compare the statutes in the abstract, without reference to any factual particularities of the underlying prosecution," and defendant must demonstrate that one offense is a lesser included offense of the other "in all circumstances, not only in those presented in the particular case" (*id.*). Defendant failed to do so. Comparing the applicable statutes, we conclude that criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) can "only be committed if the possession occurs outside of the defendant's home or place of business," an element that is not required by the count of criminal use of a firearm in the first degree (*Argueta*, 194 AD3d at 859; see § 265.09 [1]). To the extent that defendant relies on *People v Lott* (55 AD3d 1274, 1276 [4th Dept 2008]) and *People v Fowler* (45 AD3d 1372, 1374 [4th Dept 2007], *lv denied* 9 NY3d 1033 [2008]) for the contrary conclusion, those cases addressed former Penal Law § 265.03 (2), which did not contain this location-based element.

As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (see *People v Bisoño*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Grabowski*, 200 AD3d 1718, 1718 [4th Dept 2021]). Contrary to defendant's contention, however, the sentence is not unduly harsh or severe.