# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**637**

**KA 19-01762**

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND NOWAK, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEYONTAY BARNETT, DEFENDANT-APPELLANT.

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DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

DEYONTAY BARNETT, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (James A.W. McLeod, A.J.), rendered May 14, 2019. The judgment convicted defendant upon a nonjury verdict of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Defendant's parole officer found the weapon when he and his partner arrived at the apartment where defendant was residing, for a routine home visit and curfew check, and observed signs that defendant had been consuming alcohol, which would violate the conditions of defendant's parole. The parole officers then conducted a search of the apartment, and discovered evidence of several additional parole violations, including a loaded handgun in a back bedroom of the apartment.

We reject defendant's contention in his main brief that County Court erred in refusing to suppress the handgun recovered by the parole officers. A parole officer may conduct a warrantless search where "the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty" (*People v June*, 128 AD3d 1353, 1354 [4th Dept 2015], *lv denied* 26 NY3d 931 [2015] [internal quotation marks omitted]; *see People v Huntley*, 43 NY2d 175, 181 [1977]). Here, the parole officers reasonably suspected that defendant had been consuming alcohol in violation of his parole conditions, and we conclude that their search of the apartment for evidence of other parole violations was rationally and reasonably related to the performance of their duties (*see June*, 128 AD3d at

1354; *People v Nappi*, 83 AD3d 1592, 1593-1594 [4th Dept 2011], *lv denied* 17 NY3d 820 [2011]).

Defendant contends in his main brief that his waiver of the right to a jury trial was not knowing, intelligent, and voluntary. By failing to challenge the adequacy of the allocution related to his jury trial waiver, however, defendant "failed to preserve for our review [his] challenge to the sufficiency of the court's inquiry" (*People v McCoy*, 174 AD3d 1379, 1381 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019], *reconsideration denied* 35 NY3d 994 [2020] [internal quotation marks omitted]; *see People v Hailey*, 128 AD3d 1415, 1415-1416 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]). In any event, we conclude that defendant's contention lacks merit inasmuch as defendant "waived [his] right to a jury trial in open court and in writing in accordance with the requirements of NY Constitution, art I, § 2 and CPL 320.10 (2) . . . , and the record establishes that defendant's waiver was knowing, voluntary and intelligent" (*McCoy*, 174 AD3d at 1381; *see People v Wegman*, 2 AD3d 1333, 1334 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]; *see generally People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]).

Defendant further contends in his main brief that the court erred in denying his motion to set aside the verdict based on newly discovered evidence (*see* CPL 330.30 [3]). We reject that contention inasmuch as defendant "did not establish that the evidence could not have been discovered before trial by the exercise of due diligence and would probably change the result if a new trial were granted" (*People v Carrier*, 270 AD2d 800, 802 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000]; *see People v Thomas*, 136 AD3d 1390, 1391 [4th Dept 2016], *lv denied* 27 NY3d 1140 [2016], *reconsideration denied* 28 NY3d 974 [2016]; *People v Robertson*, 302 AD2d 956, 958 [4th Dept 2003], *lv denied* 100 NY2d 542 [2003]).

Defendant additionally contends in his main brief that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In particular, the evidence presented at trial, including the presence of defendant's jacket in the bedroom where the gun was recovered, "went beyond defendant's mere presence in the residence . . . and established a particular set of circumstances from which a [finder of fact] could infer possession" (*People v Boyd*, 145 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017] [internal quotation marks omitted]; *see People v McGough*, 122 AD3d 1164, 1166-1167 [3d Dept 2014], *lv denied* 24 NY3d 1220 [2015]). Moreover, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, we have reviewed the remaining contention in the main

brief and the contentions in defendant's pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court