SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 18-00291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GABRIEL CRUZ, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 4, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree and assault 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 a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and assault in the second degree (§ 120.05 [2]). The conviction arose from events in which defendant, while riding in the front passenger seat of an SUV driven by his accomplice as they pursued, through parking lots and on public roadways, a minivan that was occupied by two people known to defendant and the accomplice, leaned out of the window and fired numerous gunshots at the minivan over the course of the pursuit, thereby causing a fatal wound to the head of the passenger of the minivan (deceased victim) and a nonfatal wound to the arm of the driver of the minivan (surviving victim). We affirm.

Defendant contends that Supreme Court erred in refusing to suppress the historical cell site location information (CSLI) records related to his cell phone because, according to defendant, the search warrant that authorized law enforcement officials to obtain the CSLI records from defendant's cellular service provider was not supported by probable cause connecting defendant to the shooting. We reject that contention.

The United States Constitution provides that "[t]he right of the

people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" (US Const, 4th Amend; *see also* NY Const, art I, § 12; *People v Nieves*, 36 NY2d 396, 400 [1975]). "Given the more modern appreciation that property rights are not the sole measure of Fourth Amendment violations, a person's right to privacy has become the paramount concern in assessing the reasonableness of government intrusions, especially as innovations in surveillance tools . . . ha[ve] enhanced the [g]overnment's capacity to encroach upon areas normally guarded from inquisitive eyes, and courts must continue to secure the privacies of life against arbitrary power" (*People v Schneider*, 37 NY3d 187, 192 [2021], *cert denied* — US —, 142 S Ct 344 [2021] [internal quotation marks omitted]; *see Carpenter v United States*, — US —, —, 138 S Ct 2206, 2213-2214 [2018]). "[A]n individual maintains a legitimate expectation of privacy in the record of [their] physical movements as captured through CSLI" and, therefore, "the [g]overnment must generally obtain a warrant supported by probable cause before acquiring such records" (*Carpenter*, — US at —, —, 138 S Ct at 2217, 2221; *see People v Ozkaynak*, 203 AD3d 1616, 1617 [4th Dept 2022]).

"Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but[, rather, it] merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). " '[T]he legal conclusion [as to whether probable cause existed] is to be made after considering *all* of the facts and circumstances together' . . . A synoptic evaluation is essential because '[v]iewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found' " (*People v Shulman*, 6 NY3d 1, 26 [2005], *cert denied* 547 US 1043 [2006], quoting *Bigelow*, 66 NY2d at 423). With respect to judicial review of the validity of search warrants, it is well established that "search warrant applications should not be read in a hypertechnical manner as if they were entries in an essay contest"; rather, such applications "must be considered in the clear light of everyday experience and accorded all reasonable inferences" (*People v Hanlon*, 36 NY2d 549, 559 [1975]; *see People v Griminger*, 71 NY2d 635, 640 [1988]; *People v Hightower*, 207 AD3d 1199, 1201 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]). Indeed, "reviewing courts should accord the process proper deference and not defeat search warrants (or discourage law enforcement officials from seeking them) by imposing overly technical requirements or interpreting them incompatibly with common sense" (*People v Cahill*, 2 NY3d 14, 41 [2003]). In that regard, "[a]pproval by a reviewing magistrate cloaks a search warrant with 'a presumption of validity' " (*People v DeProspero*, 91 AD3d 39, 44 [4th Dept 2011], *affd* 20 NY3d 527 [2013], quoting *People v Castillo*, 80 NY2d 578, 585 [1992], *cert denied* 507 US 1033 [1993]; *see People v Socciarelli*, 203 AD3d 1556, 1557-1558 [4th Dept 2022], *lv denied* 38 NY3d 1035 [2022]). "In reviewing the validity of a search warrant to determine whether it

was supported by probable cause . . . , the critical facts and circumstances for the reviewing court are those which were made known to the issuing [m]agistrate at the time the warrant application was determined" (*Nieves*, 36 NY2d at 402).

Applying the requisite standard of review in this case, we conclude that the information contained in the search warrant application subscribed and sworn to by an investigating police officer, along with the supporting depositions of various witnesses submitted therewith (*see* CPL 690.35 [1], [3] [c]), was sufficient to support a reasonable belief that evidence of defendant's involvement in the shooting might be found in his CSLI records (*see People v Ozkaynak*, 217 AD3d 1376, 1377 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Harlow*, 195 AD3d 1505, 1506 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]). In his interview with the investigating police officer and in his supporting depositions, the surviving victim stated that, prior to the shooting, he had been having ongoing "issues" with a group consisting of defendant, the accomplice, and a third male. Indeed, approximately one week before the shooting, the surviving victim was struck in the head with a bottle at a party, and other partygoers informed him that defendant was the assailant. The surviving victim also reported that, on the afternoon of the shooting, after he picked up the deceased victim in a minivan, he noticed that an SUV with two occupants, whom he identified at that time as the accomplice in the driver's seat and the third male in the front passenger seat, were pursuing his minivan at a high rate of speed. As the surviving victim made unsuccessful attempts to drive away from the pursuing SUV, the occupants thereof began firing numerous gunshots at the minivan, and the gunfire continued at various points during the chase. In police interviews and supporting depositions, several bystander witnesses corroborated the details of the shooting, including by identifying the particular SUV by color, model, and license plate and by recounting that the front passenger of the SUV was firing gunshots at the minivan. The accomplice admitted in a police interview following his arrest that, on the day of the shooting, he was operating the SUV, which was registered to his cousin, and that he was accompanied by a passenger, but the accomplice declined to identify the passenger. The cousin recounted in a police interview and in a supporting deposition that, approximately 1 to 1½ hours after the time of the shooting, she received a phone call from the accomplice, who sounded scared, informing her that he had "hit somebody" and requesting that she retrieve the SUV as soon as possible. When the cousin arrived at the arranged location, she observed that defendant, whom the cousin described as a friend of the accomplice, was present with the accomplice. In response to the cousin's observation that there was no damage to the SUV despite the accomplice's claim of a vehicular accident, the accomplice responded that the SUV was not damaged because it was a large-style vehicle. The cousin further reported that the accomplice and defendant then got into a green car that was parked on the street, which may have belonged to a family member of defendant, and left the location; the cousin did not know who else was in the green car. The cousin thereafter arranged through her family members to have the SUV brought

to a salvage yard, from which the police later recovered it.

Here, although the surviving victim may have initially identified the third male as the front passenger of the SUV involved in the rapidly-developing, high-speed pursuit and shooting, we conclude, upon "considering all of the facts and circumstances together" (*Bigelow*, 66 NY2d at 423)—i.e., the ongoing and escalating feud between the surviving victim and the group including defendant, the information that defendant himself had directed violent conduct at the surviving victim approximately one week before the shooting, the accomplice's refusal to definitively identify the third male, rather than defendant, as the passenger, and defendant's presence and subsequent departure with the accomplice shortly after the shooting during an arranged dispossession, under suspicious circumstances, of the SUV that was just involved in the shooting—that "this is one of those situations where the pieces of the puzzle fit in such a manner as to support a finding of probable cause" (*People v Myhand*, 120 AD3d 970, 970 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]). While "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person" (*Ybarra v Illinois*, 444 US 85, 91 [1979], *reh denied* 444 US 1049 [1980]), here, defendant "was not merely near others suspected of criminal activity," but instead was a "person suspected of criminal activity" due to his own conduct (*People v Johnson*, 132 AD3d 1295, 1297 [4th Dept 2015], *lv denied* 27 NY3d 1134 [2016]). To the extent that defendant now challenges the sufficiency of the search warrant application on the ground that it did not adequately identify the source of the information that defendant had struck the surviving victim with a bottle at a party approximately one week before the shooting, we conclude that defendant's challenge is not preserved for our review because he " 'failed to raise that specific contention in his motion papers or at the [suppression] hearing' " (*People v Santos*, 122 AD3d 1394, 1395 [4th Dept 2014]; *see* CPL 470.05 [2]), and we decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Based on the foregoing, upon "[a]ffording great deference to the determination of the issuing [m]agistrate and reviewing the application in a common-sense and realistic fashion" (*People v Humphrey*, 202 AD3d 1451, 1451 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022] [internal quotation marks omitted]), we conclude that the court did not err in determining that the search warrant for defendant's CSLI records was supported by probable cause.

Defendant next contends for the first time on appeal that he was denied his right to counsel because the police questioned him outside the presence of counsel allegedly after the criminal action had been commenced (*see generally People v Samuels*, 49 NY2d 218, 221 [1980]). "[T]he rule 'authorizing review of unpreserved constitutional right-to-counsel claims' has been applied 'only when the constitutional violation was established on the face of the record' " (*People v McLean*, 15 NY3d 117, 121 [2010], quoting *People v Ramos*, 99 NY2d 27, 37 [2002]). Here, because "the record does not make clear, irrefutably, that a right to counsel violation has occurred, the

claimed violation can be reviewed only on a post-trial motion under CPL 440.10, not on direct appeal" (*id.*). Defendant's related contention that defense counsel was ineffective in failing to pursue that theory of suppression also involves matters outside the record on appeal and thus is properly raised by way of a CPL 440.10 motion (*see People v Bakerx*, 114 AD3d 1244, 1247 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]).

Defendant further contends that the court erred in failing to charge the jury on manslaughter in the first degree (Penal Law § 125.20 [1]) as a lesser included offense of murder in the second degree with respect to the deceased victim and on attempted assault in the second degree (§§ 110.00, 120.05 [1]) as a lesser included offense of attempted murder in the second degree with respect to the surviving victim. Even assuming, arguendo, that defendant's contention is preserved for our review in its entirety (*see generally People v Christopher D.G.*, 27 AD3d 1181, 1181 [4th Dept 2006], *lv denied* 7 NY3d 753 [2006]), we conclude that it lacks merit. The evidence at trial showed that defendant, while riding in the front passenger seat of the SUV and immediately after discussing with the accomplice the escalating feud between the groups, including the incident in which defendant struck the surviving victim with a bottle at a party and an incident a few days later in which the deceased victim allegedly fired gunshots at the third male's house, spotted the minivan he thought was occupied by the other individuals involved in the feud and thereafter leaned out of the window during the ensuing prolonged pursuit and fired several distinct rounds of numerous gunshots into the minivan, including within the confines of a parking lot, and defendant was prevented from firing additional gunshots only when the accomplice slowed the SUV and grabbed defendant by his pant leg, at which point defendant returned to the interior of the SUV from the window. Viewing the evidence " 'in the light most favorable to [the] defendant' " (*People v Rivera*, 23 NY3d 112, 121 [2014]), we conclude that "there is no reasonable view of the evidence whereby defendant intended to cause serious physical injury to th[e] victim[s] but did not intend to cause [their] death[s]" (*People v Ott*, 200 AD3d 1642, 1643 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert denied* — US —, 143 S Ct 403 [2022]; *see People v McMillian*, 158 AD3d 1059, 1061 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *People v Tyler*, 43 AD3d 633, 634 [4th Dept 2007], *lv denied* 9 NY3d 1010 [2007]; *cf. People v Cabassa*, 79 NY2d 722, 728-730 [1992], *cert denied sub nom. Lind v New York*, 506 US 1011 [1992]).

Relatedly, defendant contends that he was denied effective assistance of counsel on the ground that defense counsel failed to request that the court charge the jury on manslaughter in the second degree (Penal Law § 125.15 [1]) as a lesser included offense of murder in the second degree with respect to the deceased victim. We conclude that defendant's contention lacks merit inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Bailey*, 181 AD3d 1172, 1174 [4th Dept 2020], *lv denied* 35 NY3d 1025

[2020]).

Next, even assuming, arguendo, that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), upon acting, in effect, as a second jury by independently reviewing the evidence in light of the elements of murder in the second degree and attempted murder in the second degree as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349), we reject defendant's contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, in light of our conclusions, defendant's remaining contention is academic.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court