SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

662

KA 19-02108

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY WATKINS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Charles A. Schiano, Jr., J.), rendered September 9, 2019. 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 affirmed.

Memorandum: On appeal from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends and the People correctly concede that his waiver of the right to appeal is unenforceable because Supreme Court mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Beltran*, 213 AD3d 1293, 1293 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023], *reconsideration denied* 40 NY3d 950 [2023]). With respect to the merits, defendant initially contends that the court should have suppressed the loaded firearm that he was charged with possessing because police officers unlawfully pursued and arrested him. For the same reasons, defendant contends that his subsequent statements to the police should be suppressed as fruit of the poisonous tree. We reject those contentions.

The evidence at the suppression hearing established that two uniformed police officers were responding to a domestic dispute on Depew Street in Rochester when they heard five gunshots in quick succession. The shots sounded like they were fired from an area northwest of the officers' location. The officers then received a dispatch over police radio stating that someone had called 911 and reported shots having been fired on Garfield Street, which runs parallel to Depew Street and is one street to the west. According to

the report, there were three Black "kids" walking southbound on Garfield Street, one of whom had a gun. The caller stated that the person with the gun was wearing a blue or navy blue jacket. The officers immediately responded to the dispatch in separate police vehicles.

As they approached the intersection of Depew Street and Forbes Street, which is less than a block from where shell casings were later found on Garfield Street, the officers observed four Black males walking closely together. There were no other people in the area. When the officers stopped their vehicles and approached the males to ask where they had been coming from, one of the suspects, later identified as defendant, distanced himself from the other three, kept his hands in the pocket of his hooded sweatshirt or waistband and then fled on foot. The other three men remained at the scene with the officers.

At the suppression hearing, the People called one of the two officers involved in the encounter, and he testified that defendant, while running away, held his right hand in front of his body as if he were holding something in his pocket or waistband. Defendant's left arm swung up and down by his side as he ran. Both officers then pursued defendant, who was initially caught by the officer who did not testify at the hearing. The officer who did testify was several feet behind the other officer as they chased defendant, who, upon capture, was found to have a loaded semiautomatic handgun in his hooded sweatshirt. Following a waiver of his *Miranda* rights, defendant told the police that he found the gun on Garfield Street and fired it into the air a number of times to see if it worked.

"[T]he police may forcibly stop or pursue an individual if they have information which, although not yielding the probable cause necessary to justify an arrest, provides them with a reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Martinez*, 80 NY2d 444, 447 [1992]; *see People v De Bour*, 40 NY2d 210, 223 [1976]). Reasonable suspicion is defined as the "quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*Martinez*, 80 NY2d at 448 [internal quotation marks omitted]; *see People v Cantor*, 36 NY2d 106, 112-113 [1975]). "Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information . . . , is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]). On the other hand, a suspect's flight in response to a lawful approach and common-law inquiry by the police may justify pursuit (*see People v Sierra*, 83 NY2d 928, 929 [1994]; *Martinez*, 80 NY2d at 448).

Here, as defendant correctly concedes, the officers, when they encountered defendant on the street, had a "founded suspicion that criminal activity [was] afoot" (*De Bour*, 40 NY2d at 223), thereby justifying a common-law approach and inquiry of all four men (*see People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d

1102 [2012]). Contrary to defendant's contention, we conclude that his flight when lawfully approached by the police justified the ensuing pursuit, especially considering the unorthodox manner in which he was running, which, again, was observed before the officers gave chase (*see People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *People v Thacker*, 156 AD3d 1482, 1483 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). At that point, it was reasonable for the officers to suspect that defendant possessed a firearm or was otherwise involved in the shooting that occurred minutes earlier less than a block away.

Defendant further contends that the People did not establish that the subsequent search of his person and arrest were lawful because the officer who initially took him into custody and found the gun did not testify at the suppression hearing. That contention is not preserved for our review (*see People v Owusu*, 234 AD2d 893, 893 [4th Dept 1996], *lv denied* 89 NY2d 1039 [1997]; *see also People v Reyes*, 112 AD3d 465, 465 [1st Dept 2013], *lv denied* 22 NY3d 1158 [2014]). At the hearing, defendant's focus was on the legality of the police pursuit, not the search or arrest. In any event, the testimony of the officer who testified at the hearing, along with the video from that officer's body camera, which was also admitted into evidence, was sufficient to establish the legality of the search and arrest (*see People v Williams*, 4 AD3d 852, 852 [4th Dept 2004], *lv denied* 2 NY3d 809 [2004]; *People v Turner*, 275 AD2d 924, 924 [4th Dept 2000], *lv denied* 95 NY2d 939 [2000]).

Defendant next contends that Penal Law § 265.03 (3) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). As defendant correctly concedes, that contention is not preserved for our review (*see People v Wright*, 213 AD3d 1196, 1196 [4th Dept 2023]; *People v Reese*, 206 AD3d 1461, 1462-1463 [3d Dept 2022]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, as defendant contends and the People correctly concede, the presentence investigation report (PSR) has not been corrected as the court ordered during sentencing. Therefore, all copies of the PSR must be redacted in accordance with those directives (*see People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]).

All concur except OGDEN and NOWAK, JJ., who dissent and vote to reverse in accordance with the following memorandum: We agree with the majority that defendant did not validly waive his right to appeal and that defendant's contention that Penal Law § 265.03 (3) is unconstitutional is not preserved for our review. We further agree that all copies of the presentence investigation report must be amended in accordance with Supreme Court's directives (*see People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149

[2022]).

We, however, disagree with the majority that the court properly refused to suppress the evidence in question.

"[T]he police may forcibly stop or pursue an individual if they have information which, although not yielding the probable cause necessary to justify an arrest, provides them with a reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Martinez*, 80 NY2d 444, 447 [1992]; *see People v Leung*, 68 NY2d 734, 736 [1986]; *People v De Bour*, 40 NY2d 210, 223 [1976]). Reasonable suspicion is defined as the "quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*Martinez*, 80 NY2d at 448 [internal quotation marks omitted]; *see People v Cantor*, 36 NY2d 106, 112-113 [1975]). "Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information . . . , is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]).

Although the police officers here were aware that shots had been fired, when the officers observed four men in the general vicinity of those shots, no criminal activity was in progress. Given the recent shots that had been fired, we agree with the majority that the officers had a founded suspicion that criminality was afoot, thus warranting a level two inquiry under *De Bour*. We cannot, however, for the reasons that follow, conclude that the officers had reasonable suspicion to pursue defendant.

First, only one of the two officers who observed and approached the four men testified at the suppression hearing, and we cannot credit that officer's testimony that defendant had his hands in his waistband or that he was running in an "unorthodox" manner with his hands in his waistband. That officer's testimony seemingly conflated the areas of defendant's waistband with the pockets of his sweatshirt and pants, and the body camera footage admitted during the suppression hearing did not show defendant with his hands in his waistband area. Moreover, the placement of one's hands in the pockets of one's sweatshirt or pants on a cold evening in the middle of a Western New York winter is subject to an innocuous, innocent interpretation and cannot ripen an encounter such as that here into one of reasonable suspicion justifying pursuit (*see People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]).

Additionally, while the majority concludes that a suspect's flight in response to a lawful approach and level two common-law inquiry by the police may justify a level three pursuit, in each of the cases the majority cites in support of its conclusion, other circumstances of criminality existed to support such a pursuit that are not present here. For example, in *People v Sierra* (83 NY2d 928, 930 [1994]), the police were patrolling an area known to them as a

"narcotics supermarket" for out-of-state residents and, in *People v Martinez* (80 NY2d 444, 446 [1992]), the police were patrolling a "high-crime area" known for drug activity. The majority also cites two cases from this Court (*People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *People v Thacker*, 156 AD3d 1482, 1482-1483 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). In those two cases, the defendant and codefendant " 'matched the general description of the suspects' " (*Thacker*, 156 AD3d at 1483, quoting *Gayden*, 126 AD3d at 1518).

Here, defendant did not match the description provided by the 911 caller of the person the caller said had a gun (*cf. Gayden*, 126 AD3d at 1518; *People v Beltran*, 213 AD3d 1293, 1293-1294 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023], *reconsideration denied* 40 NY3d 950 [2023]; *Thacker*, 156 AD3d at 1483). Although defendant was observed walking in the general vicinity of the reported gun shots, that observation does not provide the "requisite reasonable suspicion," i.e., "in the absence of other objective indicia of criminality that would justify pursuit" (*People v Jones*, 174 AD3d 1532, 1533-1534 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019] [internal quotation marks omitted]).

Furthermore, we disagree with the majority's conclusion that defendant failed to preserve his contentions regarding the officers' search of his person and his arrest. Defendant specifically contested the legality of the search and the seizure of the gun and noted, during the suppression hearing, the "missing evidence" and "critical proof" that was lacking. Notably, the officer who conducted the search did not testify at the suppression hearing, nor did he preserve his body camera footage. Rather, the other officer involved in the encounter—whose body camera footage established that he did not observe the search or seizure of the gun—testified that he was in fact present during the search and that the gun was found in defendant's hooded sweatshirt. We have previously held that the testimony of an officer who was present during a search but who did not conduct the search "was insufficient to establish that the search of defendant's pocket was legal" (*People v Lazcano*, 66 AD3d 1474, 1475 [4th Dept 2009], *lv denied* 13 NY3d 940 [2010]). Thus, even assuming, arguendo, that the police were justified in stopping defendant and conducting a pat-down search, we agree with defendant that the People failed to meet their burden of "going forward to show the legality of the police conduct in the first instance" inasmuch as the People "failed to establish that the officer who conducted the pat-down search was justified in reaching into defendant's pocket" and seizing the weapon (*id.* at 1475 [internal quotation marks and emphasis omitted]; *see People v Noah*, 107 AD3d 1411, 1413 [4th Dept 2013]).

In light of the foregoing, we would reverse the judgment, vacate defendant's guilty plea, grant those parts of defendant's omnibus motion seeking to suppress tangible property and statements, and

dismiss the indictment (*see People v Cady*, 103 AD3d 1155, 1157 [4th Dept 2013]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court