

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 24, 2020

109079

110646

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

FRANK DRAYTON,

Appellant.

Calendar Date: November 24, 2020

Before: Lynch, J.P., Clark, Aarons, Pritzker and Reynolds
Fitzgerald, JJ.

Sandra M. Colatosti, Albany, for appellant.

Meagan K. Galligan, Acting District Attorney, Monticello
(Kristin L. Hackett of counsel), for respondent.

Aarons, J.

Appeals (1) from a judgment of the Supreme Court (Schick, J.), rendered December 21, 2016 in Sullivan County, upon a verdict convicting defendant of the crimes of robbery in the second degree (two counts), conspiracy in the fourth degree (two counts), resisting arrest and criminal possession of stolen property in the fifth degree, and (2) by permission, from an order of the County Court of Sullivan County (LaBuda, J.), entered September 11, 2018, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, without a hearing.

In 2016, a confidential informant (hereinafter CI) was involved in a controlled buy for the purchase of drugs and a gun. At the controlled buy, defendant and others threatened the CI if he did not give them money. Defendant was later apprehended and charged with multiple crimes in connection with this incident. Prior to trial, defendant moved to suppress certain evidence. Following a hearing, County Court (LaBuda, J.) denied the motion. A Sandoval hearing was also held, after which the court found that the People could cross-examine defendant, should he testify, about his prior convictions. After a jury trial, defendant was convicted of robbery in the second degree (two counts), conspiracy in the fourth degree (two counts), resisting arrest and criminal possession of stolen property in the fifth degree. Defendant thereafter moved to set aside the verdict under CPL 330.30. Supreme Court (Schick, J.) denied the motion and sentenced defendant, as a second felony offender, to a term of imprisonment, to be followed by a period of postrelease supervision. Defendant then moved to vacate the judgment of conviction under CPL 440.10. County Court denied the motion without a hearing. Defendant appeals from the judgment of conviction and, by permission, from the order denying his CPL article 440 motion.

Defendant asserts that County Court erred in denying his motion to suppress – specifically, that probable cause was lacking to arrest him.¹ "A police officer may conduct a warrantless search of a defendant's person and possessions incident to a lawful arrest" (People v Ruppert, 42 AD3d 817, 818 [2007], lv denied 9 NY3d 964 [2007] [citations omitted]). "In the absence of a warrant, a lawful arrest is one that is supported by probable cause" (People v Cruz, 131 AD3d 724, 726 [2015] [citations omitted], lv denied 26 NY3d 1087 [2015]; see People v Turner, 178 AD3d 70, 75 [2019]). "Probable cause exists when an officer has knowledge of facts and circumstances sufficient to support a reasonable belief that an offense has

¹ Defendant asserted this ground as a basis when seeking suppression of the discovered tangible evidence. As such, contrary to the People's assertion, defendant's argument is preserved.

been or is being committed" (People v Maldonado, 86 NY2d 631, 635 [1995] [internal quotation marks and citations omitted]).

At the suppression hearing, a detective sergeant with the Sullivan County Sheriff's office testified that he observed the CI meet with two individuals and then engage in a hand-to-hand exchange with one of them. The sergeant further testified that, very shortly after the exchange took place, he observed a van approach and drop off two individuals – one of whom was wearing a black hoodie and was subsequently determined to be defendant. The group proceeded out of sight and then the sergeant heard a gunshot. Following the gunshot, defendant and another individual got in the van, which drove away. The CI eventually told the sergeant that he had been robbed by the individuals and that one of them was wearing a black jacket – information that was relayed to other law enforcement officials. Based upon testimony at the suppression hearing, the van cut off its lights, ran through stop signs, did not use turn signals and was driving at an unreasonable speed for the neighborhood. The van also did not stop, even though a marked law enforcement vehicle was following the van with its lights activated. When the van eventually stopped, defendant and another individual jumped out and ran away. A detective with the Monticello Police Department chased defendant, which ended after defendant tripped and fell while running. The detective searched defendant and found on him some of the money used in the controlled buy.

In view of the evidence that the CI was threatened by defendant, among others, the description of what defendant was wearing, the fact that defendant was seen absconding in a van, which was subsequently observed to be driving erratically, and defendant's flight from the van when it stopped, County Court did not err in finding that probable cause existed for the warrantless arrest of defendant. Accordingly, the suppression motion was correctly denied (see People v Ormsby, 30 AD3d 757, 758 [2006], lv denied 7 NY3d 816 [2006]; People v Virola, 300 AD2d 822, 823 [2002], lv denied 99 NY2d 633 [2003]; People v Oliver, 191 AD2d 815, 816-817 [1993]; People v Brown, 151 AD2d 199, 204 [1989], lv denied 75 NY2d 768 [1989]).

Defendant argues that County Court's Sandoval ruling was erroneous. Defendant, however, failed to object to the court's ruling at the close of the Sandoval hearing. In view of this, his argument is unpreserved (see People v Hawkins, 11 NY3d 484, 494 [2008]; People v Sansone, 163 AD3d 1271, 1272 [2018]; People v Stacconi, 151 AD3d 1395, 1397 [2017]).

As to defendant's adjudication as a second felony offender, the People filed a second felony offender statement relying on defendant's prior conviction, upon a guilty plea, of two counts of criminal sale of a controlled substance in the third degree. Defendant contends that his guilty plea in connection with these crimes was not made knowingly, intelligently and voluntarily. In view of our determination in People v Drayton (___ AD3d ___ [appeal No. 109111, decided herewith]) invalidating the guilty plea and reversing the judgment of conviction in that case, the matter must be remitted for resentencing.

Regarding the CPL 440.10 motion, County Court denied it on the sole basis that this appeal was pending at the time that defendant moved for postjudgment relief and that there were sufficient facts appearing on the record of the appeal to resolve the issues raised in his motion. Indeed, CPL 440.10 (2) (b) – the provision relied upon by the court – states that a court must deny a motion to vacate a judgment of conviction where "[t]he judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal." In his brief, defendant raises two issues with respect to the denial of his CPL 440.10 motion – the police officers conducted an impermissible showup and ineffective assistance of counsel. Because sufficient facts appear in the record of the direct appeal to resolve the issue of whether there was an impermissible showup, the court did not err in denying the motion under CPL 440.10 (2) (b) to that extent (see People v Grays, 162 AD3d 1224, 1228 [2018], lv denied 32 NY3d 1111

[2018]; People v Bruno, 97 AD3d 986, 987 [2012], lv denied 20 NY3d 931 [2012]).

We reach a different conclusion, however, with respect to defendant's ineffective assistance of counsel contention. This contention centers on the premise that his counsel was ineffective for failing to investigate a potential alibi defense. Defendant filed an alibi notice claiming that he had been at a restaurant prior to and at the time of the incident at issue. In his CPL 440.10 motion, defendant averred in a supporting affidavit that his counsel failed to interview witnesses at the restaurant and failed to secure surveillance video at the restaurant, as well as video depicting the crime scene. This issue involves, to an extent, the consideration of matters outside the record and, therefore, is proper for a CPL 440.10 motion to vacate a judgment of conviction (see People v Taylor, 156 AD3d 86, 91-92 [2017], lv denied 30 NY3d 1120 [2018]; People v Griffin, 134 AD3d 1228, 1230 [2015], lv denied 27 NY3d 1132 [2016]; People v McDonald, 255 AD2d 688, 688 [1998]). As such, the court mistakenly concluded that CPL 440.10 (2) (b) prohibited it from examining defendant's CPL 440.10 motion to the extent that defendant advanced an ineffective assistance of counsel claim.

Finally, although the parties have briefed the merits of the ineffective assistance of counsel issue, County Court did not address them. Rather, as noted, the court solely concluded that it was barred from doing so under CPL 440.10 (2) (b). In view of this, the matter must be remitted for a determination of the merits of the ineffective assistance of counsel claim (see People v Maxwell, 89 AD3d 1108, 1110 [2011]; see generally CPL 470.15 [1]; People v Nicholson, 26 NY3d 813, 826 [2016]; People v LaFontaine, 92 NY2d 470, 474 [1998]).² Defendant's remaining contentions have been considered and are unavailing.

² We express no opinion on the viability of the ineffective assistance of counsel claim, whether defendant's motion, to the extent premised on this claim, should be summarily granted or denied or whether defendant is entitled to a hearing on it.

Lynch, J.P., Clark, Pritzker and Reynolds Fitzgerald, JJ.,
concur.

ORDERED that the judgment is modified, on the law, by
vacating the sentence imposed; matter remitted to the Supreme
Court for resentencing; and, as so modified, affirmed.

ORDERED that the order is modified, on the law, by
reversing so much thereof as denied defendant's CPL 440.10
motion predicated upon a claim of ineffective assistance of
counsel; matter remitted to the County Court of Sullivan County
for further proceedings not inconsistent with this Court's
decision; and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court