

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

Decided and Entered: July 30, 2026

113165

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

MALIK BARBER,

Appellant.

Calendar Date: May 29, 2026

Before: Clark, J.P., Aarons, Ceresia, McShan and Powers, JJ.

David E. Woodin, Catskill, for appellant.

Andrew J. Wylie, District Attorney, Plattsburgh (*Vivian Joo* of counsel), for respondent.

Ceresia, J.

Appeal from a judgment of the County Court of Clinton County (William Favreau, J.), rendered July 1, 2021, upon a verdict convicting defendant of the crime of promoting prison contraband in the first degree.

Defendant, an incarcerated individual at Clinton Correctional Facility, was pat frisked and found to have a ceramic scalpel in his pocket. As a result, he was charged by indictment with one count of promoting prison contraband in the first degree. The case proceeded to a jury trial, whereupon defendant was convicted as charged. County Court sentenced him, as a second felony offender, to an indeterminate prison term of 3 to 6

years, to run consecutively to the sentence he was then serving, as well as a \$2,500 fine that was ordered to be deferred during the period of incarceration. Defendant appeals.

Initially, while not disputing that the ceramic scalpel was found in his possession, defendant claims that the trial evidence was legally insufficient and the verdict was contrary to the weight of the evidence because the object constituted, at most, contraband, rather than dangerous contraband as required for a conviction of this crime. We disagree. "A person is guilty of promoting prison contraband in the first degree when," as relevant here, he or she, "[b]eing a person confined in a detention facility . . . knowingly and unlawfully makes, obtains or possesses any dangerous contraband" (Penal Law § 205.25 [2]). "[T]he test for determining whether an item is *dangerous* contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" (*People v Finley*, 10 NY3d 647, 657 [2008]; *see* Penal Law § 205.00 [4]).

At trial, the correction officer who recovered the ceramic scalpel testified that it was embedded into a plastic pen cap to be used as a handle and was as sharp as a steel surgical scalpel. A photograph of the item was introduced into evidence. The officer indicated that the scalpel could cause severe injuries and created a safety risk within the facility, particularly as it could not be discovered using a metal detector. The foregoing proof is legally sufficient, as there is a valid line of reasoning and permissible inferences from which the jury could have concluded that the scalpel was dangerous contraband (*see People v McPherson*, 170 AD3d 1255, 1256 [3d Dept 2019], *lv denied* 33 NY3d 1071 [2019]; *People v Carralero*, 9 AD3d 790, 791 [3d Dept 2004], *lv denied* 4 NY3d 742 [2004]). To the extent that defendant argues that he intended to use the scalpel only for self-defense, this does not diminish its dangerousness in any way and, indeed, underscores it. Further, viewed in a neutral light, the weight of the evidence supports the conviction (*see People v Robinson*, 183 AD3d 1118, 1122 [3d Dept 2020], *lv denied* 35 NY3d 1069 [2020]; *People v Carralero*, 9 AD3d at 791).

Defendant also contends that the trial evidence is legally insufficient because he lacked knowledge that the contraband was dangerous, and the verdict is against the weight of the evidence for the same reason. "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he [or she] is aware that his [or her] conduct is of such nature or that such circumstance exists" (Penal Law § 15.05 [2]). As noted above, the scalpel found in defendant's pocket was "extremely sharp" and was fashioned into a functional weapon through the attachment of

a handle. Further, there was testimony that all incarcerated individuals are issued a handbook upon entry, and the handbook prohibits possession of dangerous contraband, defined to include weapons and with specific examples provided. We are satisfied that, from this evidence, the jury could reasonably have concluded that defendant was aware that the scalpel constituted dangerous contraband, such that there is legally sufficient evidence of defendant's knowing possession (*see People v Bailey*, 291 AD2d 667, 668 [3d Dept 2002]). As for the weight of the evidence, an acquittal on this basis would have been unreasonable, as any rational person "would understand that a [scalpel] could be used as a weapon, and would be unauthorized within the confines of a detention facility" (*People v Motley*, 119 AD2d 57, 59 [3d Dept 1986] [internal quotation marks and citation omitted], *aff'd* 69 NY2d 870 [1987]). Thus, the conviction is not against the weight of the evidence (*see People v Goberdhan*, 241 AD3d 992, 997 [3d Dept 2025], *lv denied* 44 NY3d 1011 [2025]; *People v Terry*, 240 AD3d 1128, 1131 [3d Dept 2025], *lv denied* 44 NY3d 995 [2025]).

Defendant next challenges County Court's denial of his motion to suppress statements he made to correction officers. Following discovery of the scalpel in defendant's pocket, he was questioned about it twice: once after being escorted to a frisk room within the facility hospital and strip frisked, and again upon being placed in a keep-lock cell to await disciplinary action. There was testimony at a *Huntley* hearing that defendant was not free to leave the frisk room, and he was locked inside the keep-lock cell. Given that defendant was taken to two places that provided added restraint over and above that of the ordinary confinement of incarcerated individuals (*see People v Alls*, 83 NY2d 94, 102-103 [1993], *cert denied* 511 US 1090 [1994]; *People v Andrade*, 172 AD3d 1547, 1552 [3d Dept 2019], *lv denied* 34 NY3d 928 [2019]; *People v Darrell*, 145 AD3d 1316, 1319 [3d Dept 2016], *lv denied* 29 NY3d 1125 [2017]), we conclude that these statements, which were made without the benefit of *Miranda* warnings, should have been suppressed (*see People v Gause*, 50 AD3d 1392, 1393-1394 [3d Dept 2008]; *People v VanPatten*, 48 AD3d 30, 33 [3d Dept 2007], *lv denied* 10 NY3d 845 [2008]). Nevertheless, the error was harmless, as there was overwhelming and undisputed proof of defendant's possession of the scalpel, such that there was no reasonable possibility that the statements contributed to his conviction (*see People v Lerario*, 246 AD3d 1281, 1285 [3d Dept 2026]; *People v Rivera*, 239 AD3d 1045, 1049 [3d Dept 2025], *lv denied* 43 NY3d 1058 [2025]; *People v Gause*, 50 AD3d at 1393).

Finally, defendant's challenge to the severity of the fine imposed by County Court is unpreserved for our review, as he raised no objection to it at sentencing (*see People v Sequin*, 201 AD3d 1252, 1253 [3d Dept 2022]; *People v Wingo*, 103 AD3d 1036, 1037

[3d Dept 2013], *lv denied* 21 NY3d 1021 [2013]). That said, in view of the seriousness of defendant's conduct, which endangered the safety of the correctional facility, together with the fact that defendant accepted no responsibility for his behavior nor expressed any remorse,¹ along with defendant's troubling and violent criminal history, we decline to exercise our interest of justice jurisdiction to modify the lawfully imposed fine (*see People v Jones*, 221 AD3d 1139, 1140 [3d Dept 2023]).²

Clark, J.P., McShan and Powers, JJ., concur.

Aarons, J. (concurring in part and dissenting in part).

I join the Court's decision except insofar as it declines to modify the judgment, as a matter of discretion in the interest of justice, by vacating the \$2,500 discretionary fine imposed by County Court (*see* CPL 470.15 [1], [6]; Penal Law § 80.00 [1] [a]). The fine, on top of a 3-to-6-year prison term that must run consecutively to the sentence he was already serving, renders defendant's sentence "unduly" harsh (CPL 470.15 [6] [b]; *see* Penal Law § 70.25 [2-a]).

The scalpel-like object was a one-inch-long melted pen cap with a ¼-inch piece of sharpened ceramic protruding from one end. Defendant took responsibility for possessing the object when he admitted to the correction officer that pat frisked him that the object was his, and he repeated that admission when he was searched again in the prison

¹ Our dissenting colleague equates defendant's admission to possessing the weapon immediately after it was found with a genuine acceptance of responsibility for the crime of which he was convicted. These are not one and the same. Possession is, of course, only one element of the crime of promoting prison contraband in the first degree. Moreover, when given the opportunity both during the presentence interview and again at sentencing, defendant gave no indication that he appreciated the wrongfulness of his behavior, nor did he acknowledge the threat that he caused. Instead, he defended his conduct.

² It is also worth noting that, at the time of sentencing, the People detailed to the court defendant's abysmal record while incarcerated, including instances where he assaulted a correction officer, spit in a correction officer's face, engaged in gang assault and possessed a handcuff key. Defendant did not object to or in any way dispute this conduct.

medical facility. He also admitted to his gang affiliation and that he carried the object as a means of protection. At sentencing, defendant never disavowed these admissions; in fact, he expanded on them by explaining how he been attacked and stabbed "in the head" while incarcerated, resulting in his placement in protective custody. Defendant admitted to having made mistakes in the past and asked the court to consider his circumstances and impose a "fair" sentence. Defendant has, however, consistently maintained his innocence of his previous crime – not this one – and so at sentencing he insisted upon being adjudicated a second felony offender in an immediate, minutes-long hearing rather than concede the predicate offense. None of that amounts to a failure to accept responsibility for this crime, nor is it evidence of remorselessness.

The 3-to-6-year prison term County Court imposed fully addresses the aggravating factors of this case. That sentence is near the top of the permissible range based upon his conviction record, and it accounts for the risk of danger defendant's possession of the object posed to prison personnel and other incarcerated individuals (*compare People v Encarnacion*, 243 AD3d 1115, 1115-1116 [3d Dept 2025], *lv denied* 45 NY3d 936 [2026]; *People v Jones*, 221 AD3d 1139, 1140 [3d Dept 2023]). At the same time, the mitigating facts – that defendant was not using the object when it was discovered, and that no other person or property was injured – are reflected in the court's decision to forgo the maximum prison term of 3½ to 7 years (*see* Penal Law § 70.06 [3] [d]; [4] [b]; *compare People v Infinger*, 194 AD3d 1183, 1184 [3d Dept 2020], *lv denied* 37 NY3d 965 [2021]). The same mitigating considerations weigh equally against imposing the fine. Indeed, this Court has in the past vacated lawful fines in the interest of justice by "tak[ing] into consideration [a] defendant's prison sentence" (*People v Roundtree*, 220 AD3d 1049, 1055 [3d Dept 2023], *lv denied* 41 NY3d 985 [2024]), and that reasoning justifies the same intervention here.

County Court's decision to defer payment of the fine until after defendant is released does not diminish its harshness (*see People v Brisman*, 43 NY3d 322, 331 [2025]; *compare* Penal Law § 80.00 [1]). For an indigent defendant trying to reenter the workforce with a felony record, the burden of repayment may not be sustainable given the scarcity of opportunities to earn a living wage upon release (*see generally* Chantal Polinsky et al., Vera Institute of Justice, [From Prisons to Jobs: Improving Vocational Training in Prison and Opening Employment Pathways for Formerly Incarcerated New Yorkers](#) at 6 [Jan. 2026]). Failure to pay the fine can lead to additional proceedings and, in some circumstances, reincarceration, undermining the rehabilitative and reintegration goals of sentencing (*see* CPL 420.10 [3], [4]; *see generally* Penal Law § 1.05 [6]). The

record does not support adding a financial obstacle to defendant's reentry to society after his custodial sentence.

The People argue in their March 2026 brief that defendant has not presented any "extraordinary circumstances" warranting our intervention. We ceased using the "extraordinary circumstances" standard for interest-of-justice reductions in 2022, and the Court of Appeals overruled it expressly in *People v Brisman* (43 NY3d at 329-331), handed down in January 2025. Even under ordinary circumstances a sentence can be deemed "*unduly* harsh or severe" (CPL 470.15 [6] [emphasis added]; see *People v Brisman*, 43 NY3d at 331; *People v Ofield*, 201 AD3d 743, 744 [2d Dept 2022], *lv denied* 38 NY3d 952 [2022]). Such is the case here. Because "defendant was indigent and represented by assigned counsel at trial as well as on appeal, the imposition of the fine was an improvident exercise of discretion" (*People v Monroe*, 212 AD2d 374, 374 [1st Dept 1995], *lv denied* 85 NY2d 941 [1995]). Accordingly, I respectfully dissent.

ORDERED that the judgment is affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large initial 'R' and a stylized 'M'.

Robert D. Mayberger
Clerk of the Court