

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

People v. Persen

2020 NY Slip Op 04204 (N.Y. Ct. App. 2020) · No. 109845 · Decided July 23, 2020

SUMMARY

The Appellate Division, Third Department, reviewed Cecilio Persen's convictions for criminal possession of a weapon in the third degree and menacing in the second degree. The court held that his arrest for disorderly conduct was invalid and that the knife should have been suppressed, but found the error harmless beyond a reasonable doubt in light of the extensive evidence of possession. The court also found ineffective assistance of counsel at the suppression hearing and reduced the weapon-possession sentence to time served, affirming the judgment as modified.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Appellate Division of the Supreme Court of the State of New York, Third Department                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| WRITING FOR THE COURT | Clark, J.; Garry, P.J.; Lynch, J.; Devine, J.; Reynolds Fitzgerald, J.                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| JURISDICTION          | New York                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| DECIDED               | July 23, 2020                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| DOCKET                | 109845                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| PROCEDURAL POSTURE    | Defendant appealed from a judgment of the Fulton County Court entered after a jury convicted him of criminal possession of a weapon in the third degree and menacing in the second degree.                                                                                                                                                                                                                                                                                                                                              |
| STANDARD OF REVIEW    | Weight-of-the-evidence review requires the appellate court to determine whether the People proved each element beyond a reasonable doubt, while deferring to the jury's credibility determinations. Suppression issues were reviewed under the applicable reasonable-cause and search-incident-to-arrest standards. Constitutional trial error was reviewed for harmlessness beyond a reasonable doubt. The sentence was reviewed for whether it was harsh and excessive and was reduced in the court's interest-of-justice discretion. |
| PRECEDENTIAL VALUE    | Published New York intermediate appellate decision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

## TOPICS

suppression of evidence

criminal procedure

ineffective assistance

harmless error

sentencing

## PRACTICE AREAS

criminal law

criminal procedure

evidence

appellate sentencing

## QUESTIONS PRESENTED

1. Whether defendant's convictions were supported by legally sufficient evidence and the weight of the evidence.
2. Whether defendant's arrest for disorderly conduct was supported by reasonable cause and whether the knife found during the search incident to that arrest should have been suppressed.
3. Whether defendant received ineffective assistance of counsel at the suppression hearing.
4. Whether the erroneous admission of the knife required a new trial or was harmless beyond a reasonable doubt.
5. Whether defendant's challenge to the Sandoval ruling was preserved for appellate review.
6. Whether defendant's sentence was harsh and excessive.

## HOLDINGS

1. The convictions for criminal possession of a weapon in the third degree and menacing in the second degree were supported by the weight of the evidence.
2. The arrest for disorderly conduct was invalid because the evidence did not establish reasonable cause to believe that defendant intended to cause public inconvenience, annoyance, or alarm, or recklessly created a risk thereof; the knife discovered during the search incident to that arrest therefore should have been suppressed.
3. Defense counsel provided ineffective assistance at the suppression hearing, and that deficient representation contributed to County Court's failure to suppress the knife.
4. The erroneous admission of the physical knife was harmless beyond a reasonable doubt and did not require a new trial.
5. The sentence for criminal possession of a weapon in the third degree was harsh and excessive and was reduced to time served in the interest of justice.

## KEY QUOTATIONS

*"In our view, the evidence presented by the People at the suppression hearing fell far short of establishing that the arresting officer had reasonable cause to believe that defendant intended to cause public inconvenience, annoyance or alarm, or recklessly created a risk thereof"*

*“As proof of the public harm element was lacking, we find that defendant's arrest for disorderly conduct was invalid”*

*“As such, we find that County Court's error in denying defendant's motion to suppress the knife is harmless beyond a reasonable doubt”*

## FACTUAL BACKGROUND

During an altercation outside a police station, the victim stabbed defendant's 17-year-old son. Witnesses testified that defendant then pulled a knife, chased the victim, threatened to kill him, and threw the knife at him; defendant's wife and son testified that he used the knife to protect them. Police later arrested defendant for disorderly conduct after an exchange outside the station and found a folding knife in his sweatshirt pocket during a search incident to arrest. Defendant made statements admitting that he possessed and used the knife.

## PROCEDURAL HISTORY

Defendant moved to suppress a folding knife and inculpatory statements obtained after his arrest for disorderly conduct. County Court denied suppression, dismissed the harassment charge after jury selection, and proceeded to trial on the remaining charges. The jury convicted defendant, County Court denied his motion to set aside the verdict, and imposed an aggregate prison sentence of 1 1/2 to 4 1/2 years. The Appellate Division held that the arrest and search were unlawful, that counsel was ineffective at the suppression hearing, but that admission of the knife was harmless beyond a reasonable doubt; it also reduced the weapon sentence to time served.

## DISPOSITION

affirmed

## CASES CITED

- People v Stone, 179 AD3d 1287, 1288 [2020]
- People v Hilton, 166 AD3d 1316, 1317 [2018], lv denied 32 NY3d 1205 [2019]
- People v McCoy, 169 AD3d 1260, 1261 [2019], lv denied 33 NY3d 1033 [2019]
- People v Hernandez, 165 AD3d 1473, 1473 [2018]
- People v Bleakley, 69 NY2d 490, 495 [1987]
- People v Hernandez, 180 AD3d 1234, 1235 [2020], lv denied 35 NY3d 993 [2020]
- People v Ford, 66 NY2d 428, 440 [1985]
- People v Jackson, 38 AD3d 1052, 1054 [2007], lv denied 8 NY3d 986 [2007]
- People v Pine, 126 AD3d 1112, 1116 [2015], lv denied 27 NY3d 1004 [2016]
- Matter of Jamie D., 59 NY2d 589, 591 [1983]
- People v Taylor, 118 AD3d 1044, 1047 [2014], lv denied 23 NY3d 1043 [2014]
- People v Padgett, 60 NY2d 142, 144-145 [1983]
- People v Ellis, 233 AD2d 692, 693 [1996]
- People v Soriano, 121 AD3d 1419, 1421 [2014]

- People v Bailey, 111 AD3d 1310, 1311-1312 [2013], lv denied 23 NY3d 1018 [2014]
- People v Conway, 179 AD3d 1218, 1218 [2020], lv denied 35 NY3d 941 [2020]
- People v Baker, 20 NY3d 354, 359-360, 363-364 [2013]
- People v Weaver, 16 NY3d 123, 128 [2011]
- People v Lepard, 83 AD3d 1214, 1215-1216 [2011], lv denied 18 NY3d 925 [2012]
- People v Gonzalez, 25 NY3d 1100, 1101-1102 [2015]
- People v Johnson, 22 NY3d 1162, 1164 [2014]
- People v Martinez, 37 NY2d 662, 673-674 [1975]
- People v Palmer, 161 AD3d 1291, 1293 [2018], lvs denied 31 NY3d 1148, 1151, 1153 [2018]
- People v Mairena, 34 NY3d 473, 484-486 [2019]
- People v Crimmins, 36 NY2d 230, 237 [1975]
- People v Etoll, 51 NY2d 840, 841 [1980]
- People v Baptiste, 306 AD2d 562, 567-568 [2003], lv denied 1 NY3d 594 [2004]
- People v Jackson, 29 NY3d 18, 22 [2017]
- People v Delbrey, 179 AD3d 1292, 1295 [2020], lv denied 35 NY3d 969 [2020]
- People v Masucci, 266 AD2d 579, 580-581 [1999], lv denied 95 NY2d 836 [2000]
- People v Wright, 81 AD3d 1161, 1163 [2011], lv denied 17 NY3d 803 [2011]