

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

People v. Magee

Magee, 2020 NY Slip Op 02396 (Supreme Court of the State of New York Appellate Division Fourth Judicial Department 2020) · No. 99 KA 18-00713 · Decided April 24, 2020

SUMMARY

The Appellate Division, Fourth Department affirmed Detavion Magee's conviction for criminal possession of a weapon in the second degree after a nonjury trial. The court rejected challenges concerning the sufficiency and weight of the evidence, defense counsel's alleged conflict of interest and ineffective assistance, and the severity of the sentence.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Smith, J.P.; Peradotto, J.; DeJoseph, J.; Nemoyer, J.; Curran, J.
JURISDICTION	New York
DECIDED	April 24, 2020
DOCKET	99 KA 18-00713
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from a judgment of Erie County Court entered after a nonjury trial convicting him of criminal possession of a weapon in the second degree.
STANDARD OF REVIEW	Legal sufficiency is reviewed under the applicable statutory elements and preservation requirements. In a nonjury trial, the weight-of-the-evidence review considers the evidence in light of the elements of the crime, with deference to the trial court's credibility determinations. Ineffective-assistance claims are assessed under New York's meaningful-representation standard, considering the evidence, law, and circumstances in totality as of the time of representation. Sentencing claims are reviewed for whether the sentence is unduly harsh or severe.
PRECEDENTIAL VALUE	Published intermediate appellate opinion; precedential within the applicable New York appellate hierarchy.

PARTIES

Detavion Magee v. The People of the State of New York

TOPICS

criminal procedure

evidence

ineffective assistance

preservation of error

appellate procedure

PRACTICE AREAS

criminal law

criminal procedure

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evidence

QUESTIONS PRESENTED

1. Whether defendant preserved his challenge to the sufficiency of the evidence that the handgun was operable and loaded with live ammunition.
2. Whether the evidence was legally sufficient to establish that defendant possessed a loaded firearm.
3. Whether the verdict finding defendant guilty of criminal possession of a weapon in the second degree was against the weight of the evidence.
4. Whether defendant was denied effective assistance of counsel because of an alleged conflict of interest, counsel's conversation with the court about defendant's letter, and counsel's failure to call a potentially exculpatory witness.
5. Whether defendant's sentence was unduly harsh or severe.

HOLDINGS

1. Defendant failed to preserve for appellate review his contention that the People did not present legally sufficient evidence that the handgun was operable and loaded with live ammunition.
2. The preserved challenge to the legal sufficiency of the evidence establishing that defendant possessed a loaded firearm was properly rejected.
3. The verdict was not against the weight of the evidence.
4. Defendant was not denied effective assistance of counsel and received meaningful representation.
5. The sentence was not unduly harsh or severe.

KEY QUOTATIONS

"the People supplied the necessary proof through circumstantial evidence, i.e., eyewitness testimony and surrounding circumstances," (*1)

"credible and compelling," (*1)

"defendant [repeatedly] indicated [at trial] that he was satisfied with the legal services provided to him" (*2)

FACTUAL BACKGROUND

The victim's teenage sister testified that she saw defendant fire a handgun during a gunfight near her home, and two other witnesses saw a man matching defendant's description fire a handgun. Police did not recover a handgun but recovered several shell casings, including casings from a small-caliber gun. The trial court found the victim's sister's testimony credible and compelling.

PROCEDURAL HISTORY

Erie County Court convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree and imposed sentence. Defendant appealed, challenging the sufficiency and weight of the evidence, the effectiveness of counsel, and the severity of the sentence. The Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- People v. Spears, 125 AD3d 1401, 1402 (4th Dept 2015), lv denied 25 NY3d 1172 (2015)
- People v. Bleakley, 69 NY2d 490, 495 (1987)
- People v. Danielson, 9 NY3d 342, 349 (2007)
- People v. Nicholas, 130 AD3d 1314, 1315 (3d Dept 2015)
- People v. Butler, 140 AD3d 1610, 1610-1611 (4th Dept 2016), lv denied 28 NY3d 969 (2016)
- People v. Singletary, 11 AD3d 567, 568 (2d Dept 2004), lv denied 4 NY3d 748 (2004)
- People v. Howard, 101 AD3d 1749, 1750 (4th Dept 2012), lv denied 21 NY3d 944 (2013)
- People v. Collins, 70 AD3d 1366, 1367 (4th Dept 2010), lv denied 14 NY3d 839 (2010)
- People v. Pohl, 160 AD3d 1453, 1454 (4th Dept 2018), lv denied 32 NY3d 940 (2018)
- People v. Pandajis, 147 AD3d 1469, 1470 (4th Dept 2017), lv denied 29 NY3d 1084 (2017)
- People v. Lombardo, 61 NY2d 97, 102 (1984)
- People v. Gomberg, 38 NY2d 307, 313 (1975)
- People v. Benevento, 91 NY2d 708, 712 (1998)
- People v. Terry, 55 AD3d 1149, 1150 (3d Dept 2008), lv denied 11 NY3d 931 (2009)
- People v. Grayson, 266 AD2d 740, 740-741 (3d Dept 1999), lv denied 94 NY2d 920 (2000)
- People v. Castricone, 239 AD2d 929, 929 (4th Dept 1997), lv denied 90 NY2d 1010 (1997)
- People v. Baldi, 54 NY2d 137, 147 (1981)

OPINION

People v. Magee 2020 NY Slip Op 2396

PER CURIAM.

People v Magee (2020 NY Slip Op 02396) People v Magee 2020 NY Slip Op 02396 Decided on April 24, 2020 Appellate Division, Fourth Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to

revision before publication in the Official Reports. Decided on April 24, 2020

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ. 99 KA 18-00713

[*1]THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

vDETAVION MAGEE, DEFENDANT-APPELLANT. THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT. JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL PUNCH OF COUNSEL), FOR RESPONDENT. Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered July 13, 2017. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon 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, after a nonjury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm. Insofar as defendant contends that the People failed to present legally sufficient evidence establishing that the handgun allegedly in his possession was operable and loaded with live ammunition, we conclude that he failed to preserve that contention for our review (see CPL 470.05 [2]; *People v Spears*, 125 AD3d 1401, 1402 [4th Dept 2015], lv denied 25 NY3d 1172 [2015]). Although defendant preserved for our review his contention that the evidence is legally insufficient to establish that he possessed a loaded firearm at all, we reject that contention (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crime in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495; *People v Nicholas*, 130 AD3d 1314, 1315 [3d Dept 2015]). The victim's teenage sister testified that she saw defendant fire a handgun during a gunfight that took place near her home, and two other witnesses testified that they saw a man matching defendant's description fire a handgun. Although the police did not recover a handgun, they did recover several shell casings, including some from a small caliber gun. Thus, "the People supplied the necessary proof through circumstantial evidence, i.e., eyewitness testimony and surrounding circumstances," "establishing that defendant possessed a loaded and operable firearm at the location and time of the incident (*Spears*, 125 AD3d at 1402; see *People v Butler*, 140 AD3d 1610, 1610-1611 [4th Dept 2016], lv denied 28 NY3d 969 [2016]; *People v Singletary*, 11 AD3d 567, 568 [2d Dept 2004], lv denied 4 NY3d 748 [2004]). Although defendant contends that the victim's sister was not credible, County Court explicitly found her testimony to be "credible and compelling," and such a determination is entitled to great deference (see *People v Howard*, 101 AD3d 1749, 1750 [4th Dept 2012], lv denied 21 NY3d 944 [2013]), given the court's "opportunity to view the witness, hear the testimony and observe demeanor" " (*People v Collins*, 70 AD3d 1366, 1367 [4th Dept 2010], lv denied 14 NY3d 839 [2010]). We similarly reject defendant's contention that he was denied effective assistance of counsel. With respect to defense counsel's alleged

conflict of interest, defendant did not meet his burden of "establishing that the conduct of his defense was in fact affected by the operation of the [alleged] conflict of interest" (People v Pohl, 160 AD3d 1453, 1454 [4th Dept 2018], lv [*2]denied 32 NY3d 940 [2018] [internal quotation marks omitted]; see People v Pandajis, 147 AD3d 1469, 1470 [4th Dept 2017], lv denied 29 NY3d 1084 [2017]). In any event, the record establishes that the court, upon learning of the potential conflict of interest, conducted an inquiry "to ascertain, on the record, [that defendant] had an awareness of the potential risks involved in his continued representation by the attorney and had knowingly chosen to continue such representation" (People v Lombardo, 61 NY2d 97, 102 [1984]; see generally People v Gomberg, 38 NY2d 307, 313 [1975]). With respect to defense counsel's conversation with the court regarding a letter that defendant had sent to the court, defendant failed to demonstrate the "absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (People v Benevento, 91 NY2d 708, 712 [1998]), especially in light of the fact that "defendant [repeatedly] indicated [at trial] that he was satisfied with the legal services provided to him" (People v Terry, 55 AD3d 1149, 1150 [3d Dept 2008], lv denied 11 NY3d 931 [2009]). In addition, with respect to defense counsel's alleged failure to call a potentially exculpatory witness, we conclude that defense counsel made a reasonable strategic decision not to call the witness in question based on an assessment that the witness was not present at the scene until after the gunfight ended and thus would not have provided testimony refuting the People's theory that defendant fired a handgun during the gunfight (see generally People v Grayson, 266 AD2d 740, 740-741 [3d Dept 1999], lv denied 94 NY2d 920 [2000]; People v Castricone, 239 AD2d 929, 929 [4th Dept 1997], lv denied 90 NY2d 1010 [1997]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided defendant with meaningful representation (see generally People v Baldi, 54 NY2d 137, 147 [1981]). Finally, we conclude that the sentence is not unduly harsh or severe. Entered: April 24, 2020 Mark W. Bennett Clerk of the Court