

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

442

KA 07-00403

PRESENT: SMITH, J.P., CENTRA, LINDLEY, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT A. FORBES, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered November 14, 2006. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the motion seeking to suppress tangible property is granted and a new trial is granted.

Memorandum: On appeal from a judgment convicting him after a jury trial of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking to suppress tangible property seized by the police following their warrantless entry into his home. We agree. It is well settled that "police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home" (*Kirk v Louisiana*, 536 US 635, 638; see *Payton v New York*, 445 US 573, 589-590). Where, as here, the People contend that a suspect gave his or her consent to the police to enter the suspect's home, "the burden of proof rests heavily upon the People to establish the voluntariness of that waiver of a constitutional right" (*People v Whitehurst*, 25 NY2d 389, 391). We agree with defendant that the People failed to meet that burden in this case. The record of the suppression hearing establishes that two Rochester police officers went to defendant's last known address for the purpose of taking defendant into custody for questioning. Upon arriving there, the officers asked defendant for identification and then immediately entered his home when he turned to procure his identification papers. Consequently, we conclude that defendant did not voluntarily consent to the officers' entry into his home (see *People v Richardson*, 229 AD2d 316, appeal dismissed 89 NY2d 933; see generally *People v Gonzalez*, 39 NY2d 122, 128). We note in addition that the People did

not contend at the suppression hearing that exigent circumstances existed to justify the entry or that the tangible property was not the fruit of the unlawful entry, nor indeed do they raise those contentions on appeal. We thus agree with defendant that the court erred in denying that part of his omnibus motion seeking to suppress tangible property.

In view of our determination, we do not address defendant's remaining contentions.

Entered: March 19, 2010

Patricia L. Morgan
Clerk of the Court