

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

747

KA 10-01486

PRESENT: SMITH, J.P., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LABRADFORD SMITH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 14, 2009. The judgment convicted defendant, upon a jury 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 upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that he received ineffective assistance of counsel. Defense counsel's failure to request a *Wade* hearing did not constitute ineffective assistance inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success'" (*People v Caban*, 5 NY3d 143, 152; see *People v Sebring*, 111 AD3d 1346, 1346-1347, lv denied 22 NY3d 1159; *People v Hughes*, 148 AD2d 1002, 1002, lv denied 74 NY2d 741, reconsideration denied 74 NY2d 848). Defense counsel's failure to object to alleged *Molineux* evidence and to request a limiting instruction "was a tactical decision" and did not constitute ineffective assistance (*People v Taylor*, 2 AD3d 1306, 1308, lv denied 2 NY3d 746). Inasmuch as one of the eyewitnesses knew defendant, defense counsel was not ineffective in failing to call an expert witness to testify about the reliability of eyewitness identifications (see *People v Faison*, 113 AD3d 1135, 1136; see also *People v Stanley*, 108 AD3d 1129, 1130-1131, lv denied 22 NY3d 959; *People v McDonald*, 79 AD3d 771, 772, lv denied 16 NY3d 861). Defense counsel's failure to request a missing witness charge did not constitute ineffective assistance of counsel. There was no indication that the witness would have provided noncumulative testimony favorable to the People (see *People v Hicks*, 110 AD3d 1488, 1489, lv denied 22

NY3d 1156; *People v Myers*, 87 AD3d 826, 828, lv denied 17 NY3d 954; see generally *People v Savinon*, 100 NY2d 192, 197).

Contrary to defendant's contention, the verdict is not against the weight of the evidence. Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that "the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*id.* at 348). We further conclude that Supreme Court did not abuse its discretion in determining that defendant was ineligible for youthful offender status inasmuch as there were no "mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10 [3] [i]; see *People v Parker*, 67 AD3d 1405, 1406, lv denied 15 NY3d 755; see also *People v Pulvino*, 115 AD3d 1220, 1223). Finally, the sentence is not unduly harsh or severe.

Entered: June 20, 2014

Frances E. Cafarell
Clerk of the Court