APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT, DATED JANUARY 31, 2020

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

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KA 18-00147

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT,

V.

MELQUAN TUCKER,

DEFENDANT-APPELLANT.

OPINION AND ORDER

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DENNIS A. RAMBAUD OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 8, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a firearm.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Opinion by Peradotto, J.:

We conclude that New York's criminal prohibition on the possession of a handgun in the home without a license, as applied to defendant, does not violate the Second Amendment of the Constitution of the United States.

I

Upon executing a no-knock search warrant, police officers entered a residence in which defendant and other people were present. While searching a bedroom, the police discovered a gun box in the closet containing a revolver, two cylinders, and ammunition. The police also discovered in that bedroom, among other things, defendant's driver's license and a bottle of medication prescribed to defendant. Later DNA testing also connected defendant to the revolver. It is undisputed that defendant did not have a license to possess a handgun, and defendant does not claim that he had applied for one. Additionally, when the police first entered the residence, another officer positioned outside had observed the codefendant jump from a first floor window of another bedroom and saw numerous baggies, later determined to contain

heroin, fall from the codefendant's person. The police also seized a small digital scale from the kitchen of the residence.

Defendant and the codefendant were charged by joint indictment with criminal possession of a controlled substance in the third degree (Penal Law § 220.16[1]), and defendant was separately charged in the indictment with criminal possession of a firearm (§ 265.01–b [1]). Defendant moved to dismiss the criminal possession of a firearm charge on the ground that the charge is unconstitutional as applied to him because it violates his right under the Second Amendment to possess the revolver in his home for self-defense. Defendant notified the Attorney General of the State of New York pursuant to Executive Law § 71 that he was challenging the constitutionality of Penal Law § 265.01–b (1). The People opposed the motion, and defendant replied in further support of his constitutional challenge. Supreme Court denied the motion.

Following trial, the jury rendered a verdict finding defendant guilty of criminal possession of a firearm (Penal Law § 265.01–b [1]) but acquitting him of the drug-related charge. Defendant now appeals, raising as his primary contention that the court erred in denying his motion to dismiss the charge of criminal possession of a firearm because, as applied to him, criminal prosecution under the statute for possession of an unlicensed firearm violates his right under the Second Amendment to possess the revolver in his home for self-defense. We note at the outset that the issue before us does not involve a challenge to any particular provision of the licensing requirement; instead, the central question is whether New York may constitutionally

impose any criminal sanction whatsoever on the unlicensed possession of a handgun in the home.

II

New York has a long history of regulating the possession of firearms by persons within the state, particularly by way of a licensing requirement. In the latter part of the nineteenth century, the legislature enacted a law prohibiting any person under 18 years old from "hav[ing], carry[ing] or hav[ing] in his possession in any public street, highway or place in any city" a pistol or firearm of any kind without a license from a police magistrate of such city and making the violation thereof a misdemeanor (L. 1884, ch. 46, § 8; *see also* L. 1883, ch. 375). In 1905, the legislature amended the law to prohibit any person over 16 years old from carrying a concealed firearm in any city or village without a license and to further prohibit any person from selling or otherwise providing any pistol, revolver or other firearm to a person under 16 years old (*see* L. 1905, ch. 92, §§ 1, 2).

As has been recounted in prior cases (*see e.g. Kachalsky v. County of Westchester*, 701 F.3d 81, 84–85 [2d Cir.2012], *cert. denied* 569 U.S. 918 [2013]), following an increase in shooting homicides and suicides committed with revolvers and other concealable firearms during the early twentieth century, as reported in a coroner's office study, the legislature enacted the Sullivan Law to address the rise of violent crimes associated with such weapons (*see id.*; *People ex rel. Darling v. Warden of City Prison*, 154 App. Div. 413, 422–423 [1st Dept. 1913]; *Revolver Killings Fast Increasing*, N.Y. Times, Jan. 30, 1911, at 4, col 4). The law made it a misdemeanor to

possess without a license "any pistol, revolver or other firearm of a size which may be concealed upon the person" "in any city, village or town of th[e] state" (L. 1911, ch. 195, § 1). Although the First Department, in rejecting a challenge to the law shortly after its passage, relied in part on the now-repudiated basis that the Second Amendment does not apply to the states (*see Darling*, 154 App. Div. at 419), the court also reasoned that the right conferred by statute (*see* Civil Rights Law § 4; *People v. Perkins*, 62 A.D.3d 1160, 1161 [3d Dept. 2009], *lv. denied* 13 N.Y.3d 748 [2009]) was not violated by the law inasmuch as the legislature had "passed a regulative, not a prohibitory, act" in the proper exercise of its police powers to promote the safety of the public (*Darling*, 154 App. Div. at 423). The First Department noted that prior state laws regulating the carrying of concealed weapons had not "seem[ed] effective in preventing crimes of violence" and that the legislature had therefore determined to proceed "a step further with the regulatory legislation" concerning licensing in order to prevent criminals from possessing handguns (*id.*).

The law was subsequently amended and recodified, and today New York maintains its criminal prohibition on the possession of certain firearms, including pistols and revolvers, without a valid license, even if such firearms remain in one's home (see Penal Law §§ 265.00[3]; 265.01[1]; 265.01–b [1]; 265.20[a][3]).

III

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Supreme Court of the United States has held that the

amendment confers an individual right to keep and bear arms for lawful purposes, such as self-defense in the home (*see District of Columbia v. Heller*, 554 U.S. 570 [2008]), and that the right is fully applicable to the states (*see McDonald v. City of Chicago*, 561 U.S. 742 [2010]). The Court held that self-defense is the central component of the Second Amendment right and stated that "the need for defense of self, family, and property is most acute" in the home and that handguns are "the most preferred firearm in the nation to keep and use for protection of one's home and family" (*Heller*, 554 U.S. at 628–629 [internal quotation marks omitted]; *see id.* at 599; *see also McDonald*, 561 U.S. at 767). The Court thus struck down laws that effectuated complete bans on in-home possession of handguns (*see McDonald*, 561 U.S. at 791; *Heller*, 554 U.S. at 635).

The Court also recognized, however, that "the right secured by the Second Amendment is not unlimited" and has never been understood as allowing one "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" (*Heller*, 554 U.S. at 626; *see generally Robertson v. Baldwin*, 165 U.S. 275, 281–282 [1897]). The Court made clear that its holdings "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms' " (*McDonald*, 561 U.S. at 786, quoting *Heller*, 554 U.S. at 627–628). Such "presumptively lawful regulatory measures" were

offered "only as examples" rather than as an exhaustive list (*Heller*, 554 U.S. at 627 n. 26).

In light of the lack of detailed guidance offered in *Heller* and *McDonald* regarding the manner in which Second Amendment challenges to firearms legislation should be evaluated, the courts began to develop an analytical framework for reviewing such challenges (*see generally New York State Rifle & Pistol Assn., Inc. v. Cuomo*, 804 F.3d 242, 252–254 [2d Cir.2015], *cert. denied* —— U.S. ——, 136 S.Ct. 2486 (2016)). Appellate courts, including the Court of Appeals, have generally applied or taken an approach consistent with a two-step analysis in which they first " 'determine whether the challenged legislation impinges upon conduct protected by the Second Amendment' " and, if so, they then "determine the appropriate level of scrutiny to apply and evaluate the constitutionality of the law using that level of scrutiny" (*United States v. Jimenez*, 895 F.3d 228, 232 [2d Cir.2018]; *see e.g. People v. Hughes*, 22 N.Y.3d 44, 51, 978 N.Y.S.2d 97, 1 N.E.3d 298 [2013]; *New York State Rifle & Pistol Assn., Inc.*, 804 F.3d at 254 and n. 49 [citing cases using a two-step approach]).

IV

On this appeal, defendant contends that the court erred in denying his motion to dismiss the criminal possession of a firearm count (Penal Law § 265.01–b [1]) because New York's criminal prohibition on the possession of a handgun in the home without a license, as applied to him, violates his right under the Second Amendment. Although defendant mentions that Penal Law article 265 allows for prosecutorial

discretion in these circumstances to determine whether to pursue a class E felony (*see* § 265.01–b) or a class A misdemeanor (*see* § 265.01; *see generally* William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 265.01 at 106 [2017 ed.]), that is not the premise of his challenge (*cf. People v. Eboli*, 34 N.Y.2d 281, 284 [1974]); nor does this case involve a constitutional challenge to the licensing requirements or process upon a denial or revocation of such a license (*cf. Matter of Delgado v. Kelly*, 127 A.D.3d 644, 644 [1st Dept. 2015], *lv. denied* 26 N.Y.3d 905, 2015 WL 5445688 [2015]). Rather, defendant contends that New York may not constitutionally impose any criminal sanction whatsoever on the unlicensed possession of a handgun in the home. According to defendant, that criminal prohibition should be subjected to strict scrutiny because it implicates conduct at the core of the Second Amendment and cannot withstand such scrutiny. The People respond that defendant's contention is without merit. The Attorney General, as intervenor, responds that defendant's challenge fails at step one of the analysis and that, even at step two, an intermediate level of scrutiny would apply and the criminal prohibition on unlicensed possession of a handgun in the home would survive such scrutiny.

The Attorney General presents arguments for rejecting defendant's challenge at the first step of the analysis based on the longstanding nature of New York's criminal prohibition relative to the presumptively lawful regulatory measures listed as examples in *Heller* and the historical and traditional justifications for regulating firearm possession (*see e.g. National Rifle Assn. of Am., Inc. v. Bureau of Alcohol,*

Tobacco, Firearms, and Explosives, 700 F.3d 185, 196–197 [5th Cir.2012], *cert. denied* 571 U.S. 1196, 134 S.Ct. 1364, 188 L.Ed.2d 296 [2014]; *Heller v. District of Columbia*, 670 F.3d 1244, 1253–1255 [D.C. Cir.2011] [*Heller II*]; *United States v. Skoien*, 614 F.3d 638, 640–641 [7th Cir.2010], *cert. denied* 562 U.S. 1303 [2011]; *see generally* 1 William Blackstone, Commentaries on the Laws of England at 139–140 [1765]). However, we need not address that issue here because, even assuming, arguendo, that defendant's challenge advances beyond the first step of the analysis, we conclude that New York's criminal prohibition passes constitutional muster under Second Amendment scrutiny at the second step (*see generally Jimenez*, 895 F.3d at 234). Specifically, we conclude for the reasons that follow that, contrary to defendant's contention, the appropriate level of scrutiny is intermediate and the criminal prohibition on the possession of a handgun in the home without a license withstands such scrutiny.

With regard to the appropriate level of scrutiny, the Court of Appeals in Hughes considered the defendant's challenge to his conviction of criminal possession of a weapon in the second degree stemming from his unlicensed possession of a handgun in the home. The defendant's challenge was on the ground that the inapplicability of the home exception due to his prior misdemeanor conviction (*see* Penal Law §§ 265.02[1]; 265.03[3]), which effectively elevated his criminally culpable conduct from a class A misdemeanor to a class C felony, infringed upon his Second Amendment right (22 N.Y.3d at 48–50). The Court—assuming, without deciding, that Second Amendment scrutiny was appropriate—applied intermediate scrutiny after

concluding that several federal appellate courts had applied that level of scrutiny in Second Amendment cases and that the *Heller* opinion itself pointed in that direction (*id.* at 51, 978 N.Y.S.2d 97, 1 N.E.3d 298).

Second Circuit precedent also holds that "[l]aws that place substantial burdens on core rights are examined using strict scrutiny" whereas "laws that place either insubstantial burdens on conduct at the core of the Second Amendment or substantial burdens on conduct outside the core of the Second Amendment (but nevertheless implicated by it) can be examined using intermediate scrutiny" (*Jimenez*, 895 F.3d at 234). Here, the record does not establish that New York's licensing requirement as backed by a criminal penalty for noncompliance imposes anything more than an insubstantial burden on conduct at the core of the Second Amendment, i.e., the right of a law-abiding, responsible citizen to possess a handgun in the home for self-defense (*see generally id.* at 234–235). Contrary to defendant's contention that New York "prevent[s] citizens from protecting themselves in their home[s] and penaliz[es] them for doing so," state law does not effectuate a complete ban on the possession of handguns in the home (*cf. McDonald*, 561 U.S. at 750; *Heller*, 554 U.S. at 629; *see generally Perkins*, 62 A.D.3d at 1161). Instead, "New York's criminal weapon possession laws prohibit only unlicensed possession of handguns. A person who has a valid, applicable license for his or her handgun commits no crime" (*Hughes*, 22 N.Y.3d at 50; *see* Penal Law § 265.20 [a][3]). Moreover, the Court of Appeals has noted that a license to possess a handgun in the home is not "difficult to come by" (*Hughes*, 22 N.Y.3d at 50). There is no evidence on this record to support defendant's conclusory

assertions that the expense and logistics of obtaining a license constitute substantial burdens on the right to possess a handgun in the home for self-defense (*see Kwong v. Bloomberg*, 723 F.3d 160, 164–165 [2d Cir.2013], *cert. denied* 572 U.S. 1149 [2014]; *see also United States v. Marzzarella*, 614 F.3d 85, 97 [3d Cir.2010], *cert. denied* 562 U.S. 1158 [2011]; *see generally Heller II*, 670 F.3d at 1254–1255).

In light of the holding in *Hughes*, and as reinforced by persuasive federal case law, we conclude that intermediate scrutiny is the appropriate level by which to evaluate the constitutionality of the criminal prohibition on the possession of a handgun in the home without a license.

With regard to that evaluation, "[i]ntermediate scrutiny requires us to ask whether a challenged statute bears a substantial relationship to the achievement of an important governmental objective" (*Hughes*, 22 N.Y.3d at 51). First, it is beyond dispute that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention" (*Kachalsky*, 701 F.3d at 97; *see Hughes*, 22 N.Y.3d at 52; *New York State Rifle & Pistol Assn., Inc.*, 804 F.3d at 261–262; *Schulz v. State of N.Y. Exec.*, 134 A.D.3d 52, 56–57 [3d Dept. 2015], *appeal dismissed* 26 N.Y.3d 1139 [2016], *reconsideration denied* 27 N.Y.3d 1047 [2016], *lv. denied* 27 N.Y.3d 907 [2016]). Those concerns include the state's "substantial and legitimate interest and[,] indeed, . . . grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown" that they should not be entrusted with a dangerous instrument (*Matter of Galletta v. Crandall*, 107 A.D.3d 1632, 1632 [4th Dept. 2013] [internal quotation marks omitted]). Further, we reject

defendant's contention that the state's interest in this regard does not extend into the home and is limited to "prevent[ing] public, violent conduct from illegal gun use" (emphasis added). It is well established that the state's interest includes protecting persons within the home from violence and danger attributable to individuals who pose a safety risk if allowed to possess a handgun (*see Delgado*, 127 A.D.3d at 644; *Matter of Lipton v. Ward*, 116 A.D.2d 474, 475–477 [1st Dept. 1986]).

Second, the criminal prohibition on the unlicensed possession of a handgun, including in the home, bears a substantial relationship to the state's interests. "In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying [and possessing] firearms and the manner to combat those risks" (*Kachalsky*, 701 F.3d at 97). We are satisfied that New York " 'has drawn reasonable inferences based on substantial evidence' " in formulating its judgment on the subject at issue (*id.*; *see e.g. id.* at 97–98; Rep. of the N.Y. State Joint Legis. Comm. on Firearms and Ammunition, 1965 N.Y. Legis. Doc. No. 6 at 7–18). Contrary to defendant's assertions, we conclude that the possibility of a criminal penalty is well-suited to promote compliance with the licensing requirement for handgun possession in furtherance of the state's interests (*see Hughes*, 22 N.Y.3d at 52).

V

Defendant further contends that reversal is required because the court erred in denying his *Batson* application concerning the prosecutor's use of a peremptory

challenge to exclude a black prospective juror. We reject that contention. Inasmuch as the prosecutor offered a race-neutral reason for the challenge and the court thereafter "ruled on the ultimate issue" by determining, albeit implicitly, that those reasons were not pretextual, the issue of the sufficiency of defendant's prima facie showing of discrimination at step one of the *Batson* test is moot (*People v. Smocum*, 99 N.Y.2d 418, 423 [2003]; *see People v. Jiles*, 158 A.D.3d 75, 78 [4th Dept. 2017], *lv. denied* 31 N.Y.3d 1149 [2018]; *cf. People v. Bridgeforth*, 28 N.Y.3d 567, 575–576 [2016]). Contrary to defendant's contention, we conclude that the court properly determined at step two that the People met their burden of offering a facially race-neutral explanation for the challenge (*see People v. Lee*, 80 A.D.3d 877, 879 [3d Dept. 2011], *lv. denied* 16 N.Y.3d 833 [2011]). Defendant failed to preserve for our review his contention that the prosecutor's explanation was pretextual because the prosecutor engaged in disparate treatment of similarly situated prospective jurors (*see People v. Lucca*, 165 A.D.3d 414, 414 [1st Dept. 2018], *lv. denied* 32 N.Y.3d 1126 [2018]; *Lee*, 80 A.D.3d at 879; *see generally Smocum*, 99 N.Y.2d at 423), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15[6][a]).

* * *

Accordingly, we conclude that the judgment convicting defendant of criminal possession of a firearm (Penal Law § 265.01–b [1]) should be affirmed.

Entered: January 31, 2020 Mark W. Bennett, Clerk of the Court

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT, DENYING MOTION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS DATED JUNE 29, 2020

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

KA 18-00147

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT,

V.

MELQUAN TUCKER,

DEFENDANT-APPELLANT.

Indictment No. 2016-1409

I, Erin M. Peradotto, Associate Justice of the Appellate Division, Fourth Judicial Department, do hereby certify that, upon the motion of appellate pursuant to CPL 46-.20 for permission to appeal to the Court of Appeals from the order of this Court entered January 31, 2020, which affirmed a judgment of the Supreme Court, Erie County, rendered January 8, 2018, there is no question of law presented that ought to be reviewed by the Court of Appeals, and permission to appeal is hereby denied.

Dated: June 29, 2020

/s/
Hon. Erin M. Peradotto
Associate Justice

Entered: July 2, 2020

APPENDIX C —ORDER OF THE SUPREME COURT OF NEW YORK, IN THE COUNTY OF ERIE, DENYING MOTION TO DISMISS COUNT BASED ON CONSTITUTIONAL CLAIMS DATED AUGUST 28, 2017

At a term of this Court, held in
And for the County of Erie and State of
New York on July 19, 2017

Present: Hon. Russell P. Buscaglia

STATE OF NEW YORK
SUPREME COURT ; COUNTY OF ERIE

The People of the State of New York,

v.

Melquan Tucker, Defendant

ORDER

Ind. 01409-2016

Upon the transcript attached to this Order, the following decisions have been decided by this Court as follows:

1. Written application for the search warrant herein will not be disclosed to the defense.

2. Defendant Melquan Tucker's motion to dismiss the firearm count of the Indictment is denied.

3. The District Attorney is to advise the defense by July 27, 2017, as to the tapes of the phone conversations the People have in their possession.

4. The issue of the operability of the firearm remains an issue for the jury.

5. The defense motion to preclude the use of the recorded conversations is denied.

6. A *Sandoval* and *Molineux* hearing, if required, will be held prior to trial.

7. On August 1, 2017 *Molineux* and issues would be noticed to the defense.

8. The search warrant is based on the requisite probable cause.

So Ordered this 28th Day of August, 2017 at Buffalo, New York.

/s/
Hon. Russell P. Buscaglia

GRANTED: August 29, 2017