# APPENDIX

**APPENDIX A — MEMORANDUM AND ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT, DATED NOVEMBER 20, 2020**

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

573
KA 18-01620
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V. MEMORANDUM AND ORDER

KEITH GRIFFIN, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO, (DANIELLE PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 15, 2018. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that County Court erred in refusing to suppress a handgun and his statements to the police. Contrary to defendant's contention, the court properly determined that the police conduct was "justified in its inception and . . . reasonably related in scope to the circumstances [that] rendered its initiation permissible" (*People v DeBour*, 40 NY2d 210, 222 [1976]). The 911 caller who reported the incident identified herself as the mother of the victim and indicated that the

victim was being subjected to domestic violence by her boyfriend at a specified address, thereby providing sufficient "self-identifying information" to support the court's determination that "the call was not a truly anonymous one, and [that] the police were justified in acting on such information" (*People v Dixon*, 289 AD2d 937, 937, 938 [4th Dept 2001], *lv denied* 98 NY2d 637 [2002]; *see also People v Van Every*, 1 AD3d 977, 978 [4th Dept 2003], *lv denied* 1 NY3d 602 [2004]). The officers' prior knowledge of the residents of the address given by the 911 caller, specifically that defendant was the boyfriend of the reported victim and that the pair resided together at the address given, allowed the officers to identify defendant as the individual suspected of hitting or "jumping on" the reported victim. Thus, at the time the officers arrived at the location in response to the dispatch for a "violent domestic," they possessed a "reasonable suspicion that [defendant] was involved in a felony or misdemeanor" (*People v Moore*, 6 NY3d 496, 499 [2006]).

When the officers arrived at the scene shortly after 11:30 p.m., they observed defendant standing behind a minivan that was parked in the driveway. Initially, defendant was visible to the responding officers from about the waist up. Upon seeing the officers, however, defendant crouched behind the minivan out of the officers' sight for a few seconds before standing up again. Based on the totality of the circumstances—including the short period of time between the 911 call, the dispatch for a "violent domestic," and the arrival of the police officers at the reported location; the presence of defendant and his girlfriend in the driveway at that location; the responding officers' knowledge of and familiarity with defendant and his girlfriend and the fact that the officers had responded to the same location earlier that night; and defendant's act of crouching behind the minivan when he saw the officers arriving—the officer's verbal command for defendant to emerge from behind the vehicle and place his hands on the side of a house was a reasonably tailored intrusion on defendant's freedom of movement consistent with a level three encounter (*see People v Camber*, 167 AD3d 1558, 1558-1559 [4th Dept 2018], *lv denied* 33 NY3d 946 [2019]; *see generally De Bour*, 40 NY2d at 223).

Contrary to defendant's further contention, he was not subjected to an unlawful arrest when he was handcuffed, pat frisked, and placed in the back of a patrol vehicle. "It is well established that not every forcible detention constitutes an arrest" (*People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]; *see People v Hicks*, 68 NY2d 234, 239 [1986]) and that "officers may handcuff a detainee out of concern for officer safety" (*People v Wiggins*, 126 AD3d 1369, 1370 [4th Dept 2015]; *see People v Allen*, 73 NY2d 378, 379-380 [1989]). A "corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he [or she] is in danger of physical injury by virtue of the detainee being armed" (*De Bour*, 40 NY2d at 223; *see Wiggins*, 126 AD3d at 1370). In the context of this level three encounter—in which the officers were responding to a "violent domestic," defendant and his girlfriend were observed by the responding officers in proximity to one another in the driveway, it was dark outside, and

defendant crouched behind a van upon seeing the police arrive—the officers had "reasonable suspicion to believe that defendant posed a threat to their safety" (*People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]). Defendant was carrying something over his shoulder, and a pat frisk of his person was a reasonable measure taken by the officers to ensure that defendant was not armed with a weapon (*see Camber*, 167 AD3d at 1559; Mack, 49 AD3d at 1292).

Although the pat frisk of defendant's person did not reveal any weapons, his brief detention in the patrol vehicle was justified while the officers spoke to defendant and his girlfriend separately and investigated the report of domestic violence. Defendant had a history of fleeing from responding officers, and his brief continued detention was reasonable inasmuch as the officers "diligently pursued a minimally intrusive means of investigation likely to confirm or dispel suspicion quickly" (*Hicks*, 68 NY2d at 242; *see Allen*, 73 NY2d at 380) and " 'a less intrusive means of fulfilling the police investigation was not readily apparent' " (*People v Howard*, 129 AD3d 1654, 1656 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]). Under these circumstances, we conclude that defendant was not under arrest when he was handcuffed, pat frisked, and placed in the patrol vehicle for an investigatory detention (*see People v Pruitt*, 158 AD3d 1138, 1139-1140 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *see also People v McCoy*, 46 AD3d 1348, 1349 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]). The subsequent discovery by an officer of a handgun on the driveway in the same location where defendant had been observed crouching moments earlier gave the officers probable cause to believe defendant dropped the gun there when he saw the officers arrive at the location (*see People v Smith*, 167 AD3d 1505, 1507-1508 [4th Dept 2018], *lv denied* 33 NY3d 954 [2019]).

Contrary to defendant's further contention, the court properly refused to suppress the initial statements he made while detained in the patrol vehicle. Although defendant was at that time in custody for *Miranda* purposes, " 'both the elements of police "custody" and police "interrogation" must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*' " (*People v Hailey*, 153 AD3d 1639, 1640 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017], quoting *People v Huffman*, 41 NY2d 29, 33 [1976]). Here, the only question asked of defendant prior to the administration of *Miranda* warnings was "What is going on?" We conclude that defendant's statements in reply "were responses to [a] threshold inquir[y] by the [officer] that [was] intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and those statements thus were not subject to suppression" (*People v Mitchell*, 132 AD3d 1413, 1414 [4th Dept 2015], lv denied 27 NY3d 1072 [2016] [internal quotation marks omitted]; *see People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016]; *People v Carbonaro*, 134 AD3d 1543, 1547 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *reconsideration denied* 27 NY3d 1149 [2016]). Defendant was advised of

and waived his *Miranda* rights before he was asked any further questions by either the officers at the scene or the detective at the police station.

Defendant further contends that the action of the officer in signaling to the other officers at the scene that he found a handgun in the driveway was the functional equivalent of interrogation. That contention is not preserved for our review inasmuch as defendant failed to raise it in his omnibus motion or before the suppression court (*see generally People v White*, 128 AD3d 1457, 1459 [4th Dept 2015], lv denied 26 NY3d 1012 [2015]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant also contends that the court erred in refusing to suppress the handgun on the ground that the officer's discovery of it was the result of an unlawful warrantless search of the curtilage of his home. We reject that contention. "Although a private driveway leading to a home is not outside the area entitled to protection against unreasonable search and seizure . . . , the key inquiry . . . is whether defendant had a reasonable expectation of privacy in this area" (*People v Smith*, 109 AD2d 1096, 1098 [4th Dept 1985]). Here, the record establishes that an officer standing "a couple feet" away from the minivan parked in defendant's driveway observed the handgun on the surface of the driveway below the front bumper of the minivan, which was "the same location" where defendant had crouched when he first saw the officers arriving. The driveway was adjacent to defendant's property on the right and the neighboring house on the left, and it was connected to the public sidewalk in the front. The rear of the parked minivan was approximately at the sidewalk, and the front bumper was approximately "halfway up the driveway" between the two houses. The handgun, therefore, was approximately a minivan's length away from the sidewalk, between defendant's house and the house next door. The area was used for vehicle parking, it was not fenced or gated, and there were no signs or notices evidencing any intent to exclude the public from the area. The area was illuminated by the light from the streetlights. Thus, we conclude that the record supports the court's determination that defendant lacked a reasonable expectation of privacy in the area where the handgun was observed by the officer (*see People v Reed*, 115 AD3d 1334, 1337 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]; *People v Versaggi*, 296 AD2d 429, 429 [2d Dept 2002], *lv denied* 98 NY2d 714 [2002]; *People v Warmuth*, 187 AD2d 473, 474 [2d Dept 1992], *lv denied* 81 NY2d 894 [1993]; *cf. Collins v Virginia*, — US — , 138 S Ct 1663, 1670-1671 [2018]; *United States v Alexander*, 888 F3d 628, 633-634 [2d Cir 2018]).

Even assuming, arguendo, that defendant had established standing to challenge the search of his driveway, the record supports the suppression court's determination that the handgun was not unlawfully seized because "[t]he officer who found the firearm did nothing other than to look at the ground to discover it." The officer was lawfully in a position to view the handgun, had lawful access to it, and its incriminating nature was immediately apparent (*see generally People v Brown*, 96

NY2d 80, 88-89 [2001]; *People v Bishop*, 161 AD3d 1547, 1547 [4th Dept 2018], *lv denied* 32 NY3d 1002 [2018]).

Inasmuch as there was no unlawful police conduct with respect to defendant's investigative detention, his initial statements to the officer, or the seizure of the handgun, his further contention that his subsequent statements to police should have been suppressed as tainted by unlawful police conduct is necessarily without merit (*see People v Bethany*, 144 AD3d 1666, 1668 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]).

Entered: November 20, 2020 Mark W. Bennett, Clerk of the Court

**APPENDIX B — ORDER OF THE NEW YORK COURT OF APPEALS DENYING APPLICATION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS DATED JANUARY 26, 2021**

State of New York
Court of Appeals

BEFORE: HON. JANET DiFIORE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

KEITH GRIFFIN,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberations, it is

ORDERED that the application is denied.

Dated: 1/26/21

/s/ Janet DiFiore
Chief Judge

* Description of Order: Order of the Appellate Division, Fourth Department, entered November 20, 2020, affirming a judgment of the County Court, Erie County, rendered August 15, 2018.

**APPENDIX C — DECISION AND ORDER OF THE COUNTY COURT, IN THE COUNTY OF ERIE, NEW YORK, DENYING MOTION TO SUPPRESS DATED MARCH 13, 2018**

STATE OF NEW YORK
COUNTY COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

v. DECISION AND ORDER
Indictment No. 00192-2017

KEITH GRIFFIN,
Defendant

APPEARANCES: John J. Flynn, Erie County District Attorney
Danielle E. Phillips, Esq., Assistant District Attorney
Appearing for the People

Leigh E. Anderson, Esq.
Appearing for the Defendant

Case, J.

Defendant moves this Court for an Order suppressing statements and physical evidence obtained from him. Defendant alleges the tangible evidence the People seek to introduce at trial was taken from him after he was illegally seized and searched by law enforcement officers. Defendant further alleges that any statement obtained by officers subsequent to his seizure should be suppressed arguing that the statements were a fruit of the Fourth Amendment violation and taken in violation of his Fifth Amendment rights. This Court held pre-trial hearings on defendant's motions on December 19, 2017 and on January 8, 2018.

The People called Buffalo Police Officers Kevin Murphy, Patrick McDonald and Detective Jerry Giulian at the hearing. The People introduced into evidence a Buffalo Police Department *Miranda* warning card, defendant's type-written statement and photographs of the weapon and the location where it was recovered.

The defendant called no witnesses.

After considering the testimony elicited at the hearing and the submissions made by defendant and the People, defendant's motions are denied in all respects.

FINDINGS OF FACT

On January 12, 2017 at approximately 11:30pm Buffalo Police Officers Kevin Murphy and Courtney Halligan arrived at 64 Weber in a marked patrol vehicle in response to a 911 call reporting domestic violence. The officers were acquainted with defendant who resided at 64 Weber, and Michelle Brown, defendant's girlfriend. Defendant had previously fled from the officers. The officers had responded numerous times to 64 Weber; and this was the second report of domestic violence at that address the officers had responded to that day.

When Officer Murphy arrived, he observed defendant standing in front of a van that was parked in the driveway. The driveway was directly accessible from the street and was not enclosed by a fence. When defendant noticed the officers, he crouched down. When Officer Murphy instructed defendant to approach, defendant stood and complied. As defendant approached, Officer Murphy instructed him to place his hands on the house next to 64 Weber. Defendant was wearing a backpack and when officers tried to remove it from him, defendant removed his hands from the house and began objecting to the officers' conduct. Defendant was handcuffed by Officer McDonald, who had just arrived on scene, and placed in the rear of a patrol vehicle.

After speaking with the other individuals who were at the scene, Officer Murphy walked to the front of the van where defendant had been standing. Officer Murphy observed a handgun beneath the van's front bumper.

Prior to discovery of the handgun, Officer Patrick McDonald asked defendant "What's going on?" Defendant responded that he went to the casino and that there had been an argument with his girlfriend. Defendant, who could see Officer Murphy approach the area where the firearm was found, then stated "Whatever they found is mine, they had nothing to do with it." Officer McDonald stepped away from defendant, and learned Officer Murphy found a firearm. Officer McDonald photographed the firearm. Officer McDonald then returned to defendant and advised him of his *Miranda* warnings from a card that was provided by the Buffalo Police Department.

After being advised of his *Miranda* warnings, defendant admitted he knew that officers recovered a firearm and that the other civilians present at the scene knew nothing about it. Defendant was transported to a police station house and on the way admitted to the officers how much he paid for the firearm.

Defendant was interviewed by Detective Jerry Giulian, who re-read defendant his *Miranda* warnings. Defendant then provided a three page written statement that he signed at the bottom of each page.

CONCLUSIONS OF LAW

A. PHYSICAL EVIDENCE

The Fourth Amendment to the United States Constitution and Article I, Section 12 of the New York State Constitution precludes public officials from conducting unreasonable searches or seizures upon the general citizenry. In determining whether or not a search or seizure is unreasonable, the hearing court must weight the "government's interest in the detection and apprehension of criminals against the encroachment involved with respect to an individual's right to privacy" (*People v Cantor*, 36 NY2d 106 [1975]). Any evidence obtained in direct violation of these protections is inadmissible at trial (*Mapp v Ohio*, 367 US 643 [1961]). This "exclusionary rule" likewise applies to evidence indirectly obtained through a violation of these protections under the "fruit of the poisonous tree" doctrine (*Wong Sun v United States*, 371 US 471 [1963]).

There is no legal basis for suppression of tangible evidence unless the accused alleges facts that, if true, demonstrate standing to challenge the search or seizure (*see People v Rodriguez*, 69 NY2d 159 [1987]). Standing exists where a defendant was aggrieved by the search of a place or object in which he or she had a legitimate expectation of privacy (*see People v Ramirez Portoreal*, 88 NY2d 99 [1996]). This burden is satisfied if the accused subjectively manifested an expectation of privacy with respect to the location or item searched that society recognizes to be objectively reasonable under the circumstances (*People v Burton*, 6 NY3d 584 [2006]).

Here, defendant had not established an expectation of privacy in the area where the firearm was recovered. Without evidence of an intent to exclude the public (e.g. a fence, a gate or a posted notice) a driveway leading to a home offers an implied permission to approach (*People v Warmuth*, 589 NYS2d 522, 523 [2d Dept 1992]). The firearm was discovered on the surface of the driveway, beneath the bumper of a vehicle parked there. The officer who found the firearm did nothing other than to look at the ground to discover it. The defendant could not have had a legitimate expectation of privacy with respect to the driveway and therefore lacks standing to contest the recovery of the firearm.

In the alternative, if defendant placed the firearm under the bumper prior to approaching the officers, the firearm was abandoned. The question in abandonment cases is whether the contraband "was revealed as a direct consequence of the illegal nature of the stop" (*People v Cantor*, 36 NY2d 106 [1975]) or, on the other hand, whether the defendant's decision to relinquish possession was a calculated decision which attenuated the discovery of the evidence from the illegal police conduct (*People v Boodle*, 47 NY2d 398 [1979]; see also People v Ramirez Portoreal, 88 NY2d 99 [1996]).

Here, officers were called to the address by a 911 call reporting domestic violence, the second such call that evening. When the officers arrived, they asked defendant to approach. Defendant made a calculated decision to abandon the firearm in an area in which he had no reasonable expectation of privacy, as opposed to abandoning it due to the improper conduct of the police (*People v Walters*, 34 NYS3d 821 [4th Dept 2016]). Therefore, defendant lacks standing to contest the recovery of the firearm.

B. STATEMENTS

In determining the admissibility of the statements attributed to defendant there are two questions presented: (1) whether the statements were made in violation of defendant's Fifth Amendment rights and (2) whether the statements are the fruit of an illegal seizure.

The Fifth Amendment to the United States Constitution and Article I, Section 6 of the New York State Constitution precludes the use of confessions or admissions that were made involuntarily. The Sixth Amendment to the United States Constitution prevents the People from introducing an accused's statement if it was elicited in violation of his right to consult with counsel. Collectively, these protections are codified under CPL § 60.45.

Pursuant to the Fifth Amendment, a statement will be deemed "voluntary" when the People demonstrate beyond a reasonable doubt that defendant's decision to speak with law enforcement was the "product of his free and rational choice" (*Greenwald v Wisconsin*, 390 US 519 [1968]; *People v Huntley*, 15 NY2d 72 [1965]). More particularly, if the statement was the product of custodial interrogation, the People must establish that defendant was "adequately apprised" of his Fifth and Sixth Amendment rights, and that he knowingly and voluntarily waived them prior to the initiation of any questioning (*Miranda v Arizona*, 384 US 436 [1966]; *Moran v Burbine*, 475 US 412 [1986]). However, once a person in custody unequivocally invokes his Fifth Amendment right to be silent or Sixth Amendment right to counsel, any statements elicited by the police thereafter may be considered "involuntarily made" (*People v Harris*, 57 NY2d 335 [1982]; *People v Ferro*, 63 NY2d 316 [1984]).

In the instant case, defendant was handcuffed and placed in the rear of a patrol vehicle prior to any questioning by officers. The only question asked of defendant prior to the administration of *Miranda* warnings was "What is going on?" Both the "elements of police custody and interrogation must be present" before officers are required to advise suspects of their *Miranda* warnings (*People v Huffman*, 390 NYS2d 843, 846 [1976]). Where, as here, the question posed to defendant is designed to clarify the situation rather than the interrogate, it need no be preceded by *Miranda* warnings (*People v Carbonaro*, 23 NYS3d 525 [4th Dept 2015]; *People v Taylor*, 869 NYS2d 442 [1st Dept 2008]).

Before defendant was questioned further by officers, he was read *Miranda* warnings from a card issued by the Buffalo Police Department. Thereafter, defendant answered questions and engaged in conversation with officers. Defendant was adequately apprised of his *Miranda* warnings while defendant was seated in the police vehicle and again when he was seated n a detective's office. In both instances defendant answered questioned posed to him and knowingly waived his rights (*People v Gonclaves*, 732 NYS2d 765 [4th Dept 2001]; *People v Spoor*, 50 NYS3d 232 [4th Dept 2017]). Defendant's statements were not obtained in violation of his Fifth Amendment rights.

Turning the second possible ground for suppression of defendant's statements requires a Fourth Amendment analysis of the encounter between defendant and the officers.

In evaluating police conduct, a court "must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833 [4th Dept 1998]). In *People v DeBour* (40 NY2d 210 [1976]), the Court of Appeals delineated a "four-tiered method for evaluating the propriety of encounters initiated by police officers in their criminal law enforcement capacity" (*People v Hollman*, 79 NY2d 181 [1992]): a level one request for information, the least intrusive level of police inquiry, is justified by "an objective, credible reason not necessarily indicative of criminality" (*People v Ocasio*, 85 NY2d 982 [1995]); level two, the common law right to inquire, which calls short of forcible seizure, must be based upon a founded suspicion that criminal activity is afoot (*Matter of Steven McC*, 304 AD2d 68 [1st Dept 2003], *lv denied* 100 NY2d 511 [2003]); level three authorizes an officer to forcibly stop and detain an individual, and requires that the officer possess a reasonable suspicion that the person has committed, or is about to commit, a crime (*People v Moore*, 6 NY3d 496 [2006]); and level four, arrest, which requires probable cause (id. at 499).

Here, the officers responded to their second report of domestic violence at defendant's address that day. The radio dispatch to officers informed them that the victim's mother was reporting for her daughter and claiming her boyfriend was hitting her. It is clear from the officers' response to dispatch, and the other testimony presented at the hearing, that the officers knew the parties they were going to encounter prior to their arrival.

When the officers arrived on scene, they were aware of the previous history between defendant and his girlfriend, as well as defendant's history of fleeing responding officers. The same officers had also responded to defendant's address earlier that day and had the information relayed to them from dispatch. Upon their arrival at 64 Weber, the "quantum of knowledge" held by the officers was that a crime had been or was being committed (*People v Howard*, 12 NYS3d 708, 710 [4th Dept 2015] internal

quotations omitted). The verbal command for defendant to approach and the instruction to place his hands on a neighboring house were reasonably tailored intrusions on defendant's freedom of movement, consistent with a level three encounter (*People v Zeigler*, 877 NYS2d 557 [4th Dept 2009]; *Howard*, *supra*). Further, handcuffing defendant and placing him in the rear of a patrol vehicle did not ripen his seizure into an arrest (*People v Drake*, 940 NYS2d 403, 405 [4th Dept 2012]). Thereafter defendant remained handcuffed in the police vehicle for several minutes, transforming his detention into an arrest. However, the discovery of the firearm at the scene provided the requisite probable cause for defendant's arrest. As such, defendant's statements were not obtained in violation of his Fourth Amendment rights.

WHEREFORE, defendant's motions to suppress his statements and the physical evidence recovered at the scene are hereby DENIED.

Dated: March 13, 2018
Buffalo, New York

/s/
Hon. Kenneth F. Case, J.C.C.