Using Electronic Evidence at Trial in the Age of Smart Cities

Daniel J. Pautz, Esq.

This page intentionally left blank

Table of Contents

Notice and Agenda 3
How AI Could Shake Up Federal Evidence Rules 4
People v. Destefano_74 Misc. 3d 858 10
People v Oquendo_152 A.D.3d 1220 16
People v Sanders_185 A.D.3d 1280 18

USING ELECTRONIC EVIDENCE AT TRIAL IN THE AGE OF SMART CITIES

Dan Pautz, Esq.

Tuesday, May 19, 2026
10:00 A.M. – 10:50 A.M.
CLE Timed Agenda[1]

10:00 A.M. – 10:05 A.M. **Overview of Topics**

10:05 P.M. – 10:50 A.M. **Topics Covered**

- What is a smart city?
- Review of examples of why and how smart cities collect data.
- Overview of the connection between collecting and maintaining data and establishing a foundation for introducing evidence at trial.
- Introduce some of the legal issues smart devices create in a litigation setting.
- Overview of the relevant Federal Rules of Civil Procedure.
- Overview of the relevant New York State Civil Practice Law and Rules.
- Review of state and federal cases examining the ways in which courts have decided admissibility issues.
- Key take aways to avoid admissibility hurdles.

Questions encouraged throughout the program.

[1]**This CLE will provide 1 hour NY CLE credit in Skills.**

Content. The course content is appropriate for both newly admitted attorneys and experienced attorneys.

In accordance with NYS CLE Board Regulations & Guidelines, attendees will only receive credit for a segment of the timed agenda if they have attended the entire segment. Anyone who arrives late, leaves early or misses part of a segment will not receive credit for that segment of the timed agenda.

[How AI Could Shake Up Federal Evidence Rules]

Go to: Proposed Rule Changes | AI Evidence Creeps Into Courts | Rule Change Happens Slowly | Related Content

Current as of: ***08/27/2024***

All Content © 2003–2024 Portfolio Media, Inc.

By Phillip Bantz

Law360 (August 21, 2024, 4:55 PM EDT) -- Judges, lawyers and academics say it's only a matter of time before the breakneck development of artificial intelligence collides with a cautious, slow-moving judicial system and gives rise to a thorny array of evidentiary issues. They're just not sure what to do about it.

"This is in the very early stage right now, and there are lots of disagreements," U.S. District Judge Patrick Schiltz of Minneapolis told Law360.

He chairs the U.S. Judicial Conference's Advisory Committee on Evidence Rules, a panel that has been grappling with proposals to change the evidence rules in reaction to AI-related dangers, including digitally altered images and audio known as deepfakes.

Defendants falsely claiming that real evidence against them has been fabricated or manipulated through generative AI presents another challenge.

"You can place almost anything in doubt. It gives you plausible deniability to say, 'That's not me', for anything," said Maura Grossman, an e-discovery lawyer in Buffalo, New York, and research professor at the Cheriton School of Computer Science at the University of Waterloo.

Then there's the issue of authenticating AI evidence and assessing the reliability of AI tools used to analyze evidence.

"Another problem is defining what AI even is," said Judge Schiltz, of the District of Minnesota. "I haven't seen a definition yet that made me say, 'Yeah, that will work'."

He added, "I don't know anything about technology. I would say most judges don't really know much about technology. So there's a lot of education that has to go on."

Proposed Rule Changes

Judge Schiltz said the evidence rules committee's focus on AI is a reaction, in part, to U.S. Chief Justice John Roberts writing in his 2023 year-end report on the federal judiciary that AI has "great potential," but also risks "dehumanizing the law."

"As AI evolves, courts will need to consider its proper uses in litigation," the chief justice said in the report. "In the federal courts, several judicial conference committees—including those dealing with court administration and case management, cybersecurity and the rules of practice and procedure, to name just a few—will be involved in that effort."

The evidence rules committee has held two conferences with experts on AI and evidentiary issues and will revisit the subject when it reconvenes in November, according to Judge Schiltz.

Judge Schiltz's term as chair of the evidence rules committee expires at the end of September and his successor, U.S. District Judge Jesse M. Furman of Manhattan, will take over Oct. 1. Judge Furman, a former federal prosecutor for the Southern District of New York, did not respond to an interview request.

Among the proposals on the table is a new rule on challenging potential deepfake evidence. Challengers would have to show the court not only that a jury "reasonably could find that the evidence has been altered or fabricated, in whole or in part," but also that the evidence's "probative value outweighs its prejudicial effect."

"You're going to have to raise meaningful doubt about the veracity of the evidence," Grossman told Law360.

She and former U.S. District Judge Paul Grimm of the District of Maryland, director of Duke Law School's Bolch Judicial Institute, drafted the proposed new rule, which is a revised version of an earlier proposal that the committee rejected.

The previous version would have required a challenger to convince the court that the evidence in question "more likely than not was fake." The committee believed that put too heavy a burden on the challenger, Judge Grimm said in an interview.

The new rule is an attempt to establish a fair balancing test to prevent or at least dissuade defendants from falsely alleging that evidence is a deepfake — frivolous claims that threaten to cast doubt on the legitimacy of evidence across the board while also preventing fake AI evidence from tainting a jury.

"Right now, there is no real procedure for challenging a deepfake," and the current evidence rules "tilt strongly in favor of letting the evidence go to the jury. But once that happens, it becomes very hard to unring the bell," Grossman said.

Judge Grimm added, "Oftentimes, these deepfakes are so dramatic and impactful that if you let the jury see it to decide if it's real or not, the damage is already done."

Proposed New Rule 901(c) to address "deepfakes"

901(c): Potentially Fabricated or altered electronic evidence.

If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.

He and Grossman also plan to submit to the committee a revised proposal to amend a rule on authenticating evidence "generated by a process or system," which they say covers AI tools.

Under the rule they're drafting, the person seeking to admit the AI-generated evidence would have to detail the "training data and software or program that was used" and show that "they produced valid and reliable results in this instance."

Daniel Capra, a professor at Fordham Law School and a reporter for the evidence rules committee, is working on another draft of a proposed new rule, which would treat "machine-generated evidence" the same as evidence testified to by a human witness.

"The idea is that you would have to have a Rule 702 hearing, what's called a Daubert hearing, and the proponent of the evidence would have to call witnesses to verify that the methodology is appropriate and they relied on the proper databases and so forth," Capra told Law360.

The proposed new rule, he added, "is really intended to treat machine-based learning the same way you would treat testimony from live witnesses."

Others who have weighed in during the evidence rule committee's meetings have questioned whether the evidence rules need to be changed at all to deal with AI. They contend that the

existing rules are sufficient to deal with AI evidence and point to how the courts adapted to authenticating evidence from social media, according to Judge Schiltz.

When social media was taking off, the evidence rules committee faced calls to take action but opted to sit back and see how things played out in the federal courts, which has worked out relatively well.

The courts ended up using common law authority to essentially graft a requirement on the rules to require anyone challenging the veracity of evidence pulled from social media to "make some sort of showing that they have a legitimate concern about the legitimacy of the evidence," Judge Schiltz said.

That's a similar approach to what Judge Grimm and Grossman have put forth in their proposed new deepfake evidence rule.

"The rules, as they exist, are flexible and the courts are inventive, and the question is whether we actually need text language to help the courts do what they're going to do anyway," Capra said.

AI Evidence Creeps Into Courts

Examples of AI-related evidentiary issues popping up in courtrooms are relatively uncommon at this point. But it's happening.

In March, a Washington state judge made headlines when he rejected a defense attorney's attempt to use AI-enhanced cellphone video in a triple murder case stemming from a fight outside a bar.

Judge Leroy McCullough held in his novel ruling that the AI evidence "would lead to a confusion of the issues and a muddling of eyewitness testimony, and could lead to a time-consuming trial within a trial about the non-peer-reviewable process used by the AI model, such that any relevance is substantially outweighed by the danger of unfair prejudice."

The judge's ruling highlights what Anna Gressel, New York-based litigation counsel at Paul Weiss Rifkind Wharton & Garrison LLP who focuses on AI and digital technology, described to Law360 as growing "concern among the courts about how to discern what might be AI-manipulated or AI-generated."

In white collar crime cases, generative AI tools could be used to create deepfake voice recordings, bogus financial records and other potentially incriminating evidence.

"It's only a matter of time before these AI tools are used in white collar cases, because they are complex and have a lot of data and moving points," said Sean Shecter, co-chair of the white collar practice at Lewis Brisbois Bisgaard & Smith LLP.

He added, "This is 'Brave New World' stuff."

Joel Cohen, chair of White & Case LLP's white collar practice group, told Law360 that he had had cases recently in which "documents that were turned over by a regulator appeared to have been altered" based on a review of the underlying data, or metadata, embedded in the records.

The documents in question included financial records and were the subject of U.S. Department of Justice and Securities and Exchange Commission investigations, according to Cohen.

"It's just a reflection of the enhanced availability of tools that allow even amateurs to do this," he said.

Rule Change Happens Slowly

The earliest that any of the proposed AI-related evidence rules could be enacted would be around 2028, according to Capra. During that time, AI could evolve beyond the scope of the rule changes, once again leaving the courts playing catch-up.

"There's also disagreement about whether it's even possible to do anything, because AI is developing so rapidly that if you write rules that are too specific, they will quickly become outdated," Judge Schiltz said.

"But if you write rules that are too general, they'll basically be useless," he added. "So there's an additional problem of how quickly the technology is changing."

Rule changes occur slowly and deliberately by design under the Rules Enabling Act, which gives the U.S. Supreme Court the authority to amend or create evidence rules. First, though, the rules must make it through the committee, then the Judicial Conference, which sends the proposed changes to the high court.

If the Supreme Court approves the rule it gets sent to Congress, which has about seven months to enact or reject the proposed changes. If Congress does nothing, the rule becomes enacted on its own under the Rules Enabling Act.

For now, though, potential AI rule changes are waiting at the starting line with an uncertain finish several years away.

"Judges are going to have to decide these cases without rules specifically designed to help them do that," Judge Grimm said.

--Editing by Karin Roberts.

This article was originally published on *Law360* , providing up-to-the-minute legal news coverage and analysis on the issues that affect attorneys, business leaders, and regulators.

Related Content

Tracker

- *Generative Artificial Intelligence (AI) Federal and State Court Rules Tracker*

Resources Kits

- *Generative Artificial Intelligence (AI) Resource Kit*
- *Civil Litigation Fundamentals Resource Kit (Federal)*

Practice Notes

- *Generative AI in Discovery: GPT Prompt Preservation and Production Best Practices (Federal)*
- *AI and Legal Ethics: What Lawyers Need to Know*
- *Artificial Intelligence: A Judge's View of Generative AI*
- *Lawyers and ChatGPT: Best Practices*
- *Predictive Coding Fundamentals (Federal)*
- *E-discovery Best Practices (Federal)*
- *Metadata in E-discovery (Federal)*
- *Predictive Coding Fundamentals (Federal)*
- *Technology-Assisted Review: Overview (Federal)*

Templates

- *Generative Artificial Intelligence (AI) Use Clause (Federal)*
- *Generative Artificial Intelligence (AI) Use and Compliance Certification (Federal)*

Checklists

- *Generative AI in Litigation: 5 Key Considerations Before Using Generative AI Infographic Checklist*
- *Litigation Technology Competence State Law Survey*
- *ESI Production Formats Chart (Federal)*
- *Email Threading in E-discovery Checklist (Federal)*
- *E-discovery Search Terms Checklist (Federal)*
- *Technology-Assisted Review Learning Methods Visual Checklist (Federal)*
- *E-discovery: What is Metadata and Where Can You Find It? Infographic Checklist*

People v. Destefano

Supreme Court of New York, Nassau County

February 18, 2022, Decided

Ind No. 108N20

Reporter

74 Misc. 3d 858 *; 164 N.Y.S.3d 412 **; 2022 N.Y. Misc. LEXIS 681 ***; 2022 NY Slip Op 22052 ****

[**1]** The People of the State of New York, Plaintiff, v Benjamin Destefano, Defendant.

Subsequent History: As corrected through Wednesday, April 20, 2022

Prior History: [*1]** With a constitutional issue of first impression under New York State law, the defendant, Benjamin Destefano, by counsel, moves to suppress evidence that was the result of a warrantless pole camera video surveillance device placed across the street from the defendant's alleged residence. The determination is hereinafter provided.

Counsel: *Peter E. Brill*, Hempstead, for defendant.

Anne T. Donnelly, *District Attorney*, Mineola (*Chantee Dempsey* of counsel), for plaintiff.

Judges: Robert G. Bogle, J.

Opinion by: Robert G. Bogle

Opinion

[414] [*859]** Robert G. Bogle, J.

With a constitutional issue of first impression under New York State law, the defendant, Benjamin Destefano, by counsel, moves to suppress evidence that was the result of a warrantless pole camera video surveillance device placed across the street from the defendant's alleged residence. The determination is hereinafter provided.

[*860] I. Introduction

The defendant, Benjamin Destefano, is indicted for failure to register or to verify as a sex offender as required by *article 6-C of the Correction Law* no later then 10 calendar days after any change of address under *Correction Law 168-f (4)*. The defendant was arraigned and pleaded not guilty on February 6, 2020.

The current issue before this court concerns a pole camera placed upon a utility pole to observe the front of a particular house on Brewster Gate, North Massapequa, Nassau County, New York. The allegations are that the defendant, who claimed he was homeless, was observed entering the Brewster Gate house each night **[***2]** and leaving the next morning for 14 days, from approximately April 18, 2018, through May 2, 2018. As a result, it is alleged he failed to notify the appropriate law enforcement authorities regarding his change of address under *Correction Law 168-f (4)*. The defendant, due to the fact this was done without a court ordered warrant, moves to suppress this evidence and its "fruit of the poisonous tree."

The People oppose, noting that the motion is not timely made under CPL 255.20 (1). If the court does reach the merits, the People argue that the defendant is without standing and has no reasonable right to privacy as to the observed coming and going in the front of a house on a public street. Thus, no court ordered warrant is needed.

II. Statement of Facts

The following is a review and summary of the facts set forth in the affirmations of both defense counsel and the Assistant District Attorney.

In April of 2018 the Suffolk County Special Victims Squad (Meghan's Law Unit) with the assistance of the Suffolk County Electronics Investigative Unit installed a pole camera and video recording device on a utility pole at the address at Brewster Gate, North Massapequa, Nassau County, New York. The recording was continuous from **[***3]** April 18 to May 2, 2018.

On May 10, 2018, the defendant was arrested and made aware that the utility pole camera footage existed. This information was provided to the defense counsel.

[*861] The defendant was arraigned on the indictment February 6, 2020. On June 5, 2020, an omnibus motion was made by defense counsel, the People filed their opposition on June 9, 2020, and another judge of this court issued a decision on July 30, 2020.

The court notes that, after the defendant provided the District Attorney's office with a "teralyte hard drive," a copy of the pole camera footage was mailed to the defense counsel on or about June 22, 2020. Thereafter, this motion to suppress the pole camera was submitted by defense counsel on November 12, 2020. The People submitted opposition on November 18, 2020. In October of 2021 this case was **[**415]** transferred to the undersigned judge. This court will now review the issues presented.

III. Timeliness of the Motion

The time restrictions for pretrial motions in criminal proceedings are not casual and are based upon the strong public policy to further orderly trial procedures and preserve scarce trial resources. (*People v Jackson, 48 AD3d 891, 851 NYS2d 677 [3d Dept 2008]*.) Under CPL 255.20 (1), all pretrial motions must be served or filed within **[***4]** 45 days of arraignment and before the **[****2]** commencement of trial. This motion particularly pertains to the suppression of evidence to be used at trial under CPL 255.10 (1) (f). All pretrial motions made after 45 days may be summarily denied by the court under CPL 255.20 (3). (*People v Bonilla, 95 AD3d 898, 943 NYS2d 218 [2d Dept 2012]*; *People v Gibbs, 210 AD2d 4, 618 NYS2d 813 [1st Dept 1994]*.)

Here, the defense counsel was informed of the pole video at the time of arrest on May 10, 2018. Although the tape was not available at that time, he was informed of its existence and of the potential issue of the curtilage location.

On February 6, 2020, the defendant was arraigned. His omnibus motion was filed June 5, 2020, and a decision by the court was rendered on July 30, 2020. The motion did not address any discussion of the pole camera.

The defendant received the actual tape on or about June 22, 2020. The defense motion on this issue was filed on November 12, 2020, nearly five months after receipt of the materials, fully beyond the 45 days permitted by statute. Thus, the 45 day period was beyond the receipt of the pole videotape and the defense failed to submit the within suppression motion during that period as well. (CPL 255.20 [1] [c].) The court further reiterates the defendant was made aware of this issue on **[***5]** **[*862]** May 10, 2018, fully 20 months from his arraignment on the indictment.

[1] Defense counsel has failed to show good cause or any serious reason whatsoever for failing to make this supplemental motion within the 45 day period. (*People v Cimino, 49 AD3d 1155, 856 NYS2d 368 [4th Dept 2008]*.) Also, this issue could have, at least on an initial level, been included in the defendant's omnibus motion, which therefore prohibits him from a subsequent remedial motion. It is well established that if a motion is required to be

included in an omnibus motion and is not made at the appropriate time, it is proper to deny the supplemental motion. (*People v Falcon, 281 AD2d 368, 722 NYS2d 538 [1st Dept 2001]*.)

Accordingly, the motion is denied for failure to file within 45 days under *CPL 255.20 (1)*.

IV. Constitutional Issues

A. Standing

Although this motion was made in an untimely manner and is to be denied accordingly, a serious issue of first impression has been presented to this court. Therefore assuming arguendo this court shall review the defendant's application on the merits. Therefore, the court will now consider the defendant's claim of suppression as it concerns the pole camera that video recorded the front of the property from April 18, 2018, to May 2, 2018.

The defendant claims standing for this **[***6]** suppression motion based upon his acknowledgment that he keeps some possessions and his cats and occasionally sleeps over at the Brewster Gate residence.

[416]** Under both New York State and federal law, a defendant moving to suppress evidence on constitutional grounds must establish an expectation of privacy in the place searched which society would recognize as reasonable. (*People v Ramirez-Portoreal, 88 NY2d 99, 666 NE2d 207, 643 NYS2d 502 [1996]*; *United States v Haqq, 278 F3d 44 [2d Cir 2002]*.) Reasonableness can be determined by several **[****3]** examples, such as in *People v Edwards (124 AD3d 988, 1 NYS3d 523 [3d Dept 2015]*), where the Appellate Division accorded standing to a frequent overnight guest in an apartment. However, a different Court denied standing where a visitor had "relatively tenuous ties to [a] house" (*see* *People v Pope, 113 AD3d 1121, 977 NYS2d 866 [4th Dept 2014]* [internal quotation marks omitted]). These are factual issues best resolved at a court hearing. For purposes of review of the defendant's motion, the court will assume the defendant possesses standing as to the North Massapequa house.

[*863] B. Curtilage

One of primary arguments of defense counsel is that by placing a pole camera and video recording device on a utility pole to observe the "curtilage" of the defendant's property without a court ordered warrant, the video contents must be suppressed. The question is whether or not what was observed is in fact curtilage?

The determination of whether **[***7]** an area falls within a house's curtilage may be made by reference to four factors: (1) the proximity of the area claimed to be curtilage to the house; (2) whether the area is included within an enclosure surrounding the house; (3) the nature of uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. (*People v Theodore, 114 AD3d 814, 980 NYS2d 148 [2d Dept 2014]*.) In *Theodore*, the Appellate Division held that a blocked-off rear yard was part of the curtilage, far different facts from the case at bar.

[2] Here, upon review of the four factors set forth in *Theodore*, it is clear that (1) the pole camera was situated on a utility pole across the street; (2) the pole camera was not observing an enclosed area; (3) the area observed was not being personally and secretly used by the defendant; and (4) there were no grounds to protect the area from observation as it is open to the public, and is in the visible front of the premises. Therefore, unlike closed-in areas such as backyards or land purposely blocked by a neighbor's high fence or by significant distance, the pole surveillance camera is clearly not observing the curtilage of the premises. (*People v Morris, 126 AD3d 813, 4 NYS3d 305 [2d Dept 2015]*; *People v Reilly, 195 AD2d 95, 606 NYS2d 836 [3d Dept 1994]*.)

C. Requirement of a Court Ordered Surveillance Warrant

The primary focus of **[***8]** the defendant's motion is directed on the issue of the failure of law enforcement personnel to secure a court ordered warrant to install the surveillance camera across the street from the defendant's alleged residence to observe his comings and goings over a several week period. Defense counsel

argues that this conduct is in violation of both the Federal and New York State Constitutions, and as such, must be suppressed, along with any "fruit of the poisonous tree."

The issue that defense counsel sets forth has not been addressed by the United States Supreme Court or in any New York State court. Thus, this issue is one of essentially first impression under New York case law.

[417]** **[*864]** The *Fourth Amendment to the United States Constitution* consists of just 54 words, and reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against **[****4]** unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article I, § 12 of the New York State Constitution is identical in language. While both constitutions confer similar rights, New York State courts have had a history of expanding the **[***9]** rights of state residents beyond those required by the Federal Constitution when a long-standing state interest is involved. (*People v Robinson, 97 NY2d 341, 767 NE2d 638, 741 NYS2d 147 [2001]*.) Such action by the New York State courts must be "cautiously exercised." (*People v Reynolds, 71 NY2d 552, 557, 523 NE2d 291, 528 NYS2d 15 [1988]*.) However, due to the absence of state or federal controlling authority on this particular issue, it does not appear to be a factor regarding the case at bar, and as such, it can be assumed, at least at the moment, that both constitutions confer similar rights. (*People v Lucas, 183 Misc 2d 639, 704 NYS2d 779 [Sup Ct, Monroe County 1999]*.)

Also, it has been noted that a trial court, such as this court, should not independently interpret the New York State Constitution to expand the rights afforded by the *Fourth Amendment of the Federal Constitution*. (*People v Brewer, 173 Misc 2d 520, 662 NYS2d 172 [Sup Ct, Queens County 1997]*.)

The key to the requirement of a search warrant under both federal and state conditions is based on the judicial concept of the individual's reasonable expectation of privacy, a test that was originated in *Katz v United States (389 US 347, 88 S Ct 507, 19 L Ed 2d 576 [1967]*). The two-part test established in *Katz* states that (1) an individual has exhibited an actual (subjective) expectation of privacy and (2) that expectation is one that society is prepared to recognize as reasonable (*Katz at 361* [Harlan, J., concurring]).

As time has progressed, we now and continue to live in an era of more and more technological advances.

In the landmark **[***10]** case of *United States v Jones (565 US 400 [2012])* the Supreme Court held that installing a global positioning system (GPS) tracking device on a motor vehicle and using the device to monitor the vehicle's movements constitutes a search under the *Fourth Amendment*, thus requiring a warrant. Three years earlier, the New York Court of Appeals **[*865]** reached a similar determination under New York constitutional law in *People v Weaver (12 NY3d 433 [2009]*).

Six years after *Jones*, in its decision in *Carpenter v United States (585 US —, 138 S Ct 2206, 201 L Ed 2d 507 [2018]*) the Supreme Court determined that the government's warrantless inspection of cell site location information (CSLI) to track a person's movements violated that person's reasonable expectation of privacy. Cell site location information is unique, according to the Court, because "[m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts." (*585 US at __, 138 S Ct at 2217*.) Thus, "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' " (*585 US at __, 138 S Ct at 2217*.) **[**418]** The government's use of CSLI provided it with information it would not have otherwise been able to obtain. Commentators have questioned the extent to which the *Carpenter* decision's rationale will **[***11]** permeate *Fourth Amendment* doctrine when applied to other factual contexts.

However, when applied to the factual concerns in the case at bar, there are several distinctions that can be made.

While New York is without case law discussing the issue of pole cameras, several federal circuits have ruled on the subject.

Prior to *Carpenter*, in *United States v Houston (813 F3d 282 [6th Cir 2016]*) the Sixth Circuit Court of Appeals held that the warrantless use of a stationary video camera, installed on the top of a public utility pole, approximately 200 yards from the property on which defendant resided, which recorded the property over an approximate 10 week period, did not violate defendant's rights under the *Fourth Amendment*, since defendant had no reasonable expectation of privacy in video footage in that it captured the same views enjoyed by passersby on public roads, and the officers could have engaged in live surveillance of the property for that 10 week period.

Several post-*Carpenter* decisions have come down from the circuits supporting the opinion set forth in *Houston* as well.

In *United States v Moore-Bush (963 F3d 29 [1st Cir 2020]*) the First Circuit Court of Appeals reversed a U.S. District Court holding that a pole surveillance camera set up across the street that observed a part of the side door, attached garage and driveway, all that could **[***12]** be observed across the street, did **[*866]** not require a court order. The surveillance lasted eight months in 2017 into 2018 and was monitored on occasion, sometimes using the camera's zoom, pan and tilt features to read license plates and facial appearances on individuals. The case is now being heard "en banc" by the entire First Circuit Court of Appeals. (*United States v Moore-Bush, 982 F3d 50 [1st Cir 2020].*)

In *United States v Tuggle (4 F4th 505 [7th Cir 2021]*) the Seventh Circuit Court of Appeals also denied the requirement of a court ordered camera warrant. Here, the period of observation was for 18 months, and consisted of three surveillance cameras: two across the street, and one further down the street. The court noted the cameras "captured events observable to any ordinary passerby." (*4 F4th at 516*.) It should be noted that this case has certiorari pending before the United States Supreme Court.

All of the aforementioned case law focuses on the fact that the observable area in the front of a person's property does not qualify as an area where there would be an expectation of privacy. This police conduct can be distinguished from situations where the observants are intruding into a backyard blocked by a 10 foot metal fence (*United States v Cuevas-Sanchez, 821 F2d 248 [5th Cir 1987]*), or the use of thermal imaging to monitor heat emanating from the interior **[***13]** of a premises. (*Kyllo v United States, 533 US 27, 121 S Ct 2038, 150 L Ed 2d 94 [2001]*.) These cases involve issues where the surveillance would not be readily available to public view.

New York case law provides no direct guidance on these constitutional issues. However, it has been held under New York case law that there was no legitimate expectation of privacy as to the front doorway of a private home "standing there, exposed to public view." (*People v Reynoso, 309 AD2d 769, 770, 765 NYS2d 54 [2d Dept 2003]*.) The New York courts have also reaffirmed their adherence to *Carpenter* regarding the requirement of warrants for cell phone tower searches. (**[**419]** *People v Martinez, 198 AD3d 817, 155 NYS3d 431 [2d Dept 2021]*.) All this, however, does not address this issue of posted surveillance cameras in the New York courts. Therefore, this court will rely on the Federal Circuits in their interpretation of this constitutional issue.

This court concurs with the *Fourth Amendment* holdings set forth in *Houston*, *Moore-Bush* and *Tuggle*.

Accordingly, government's use of a technology in public use, while occupying a place it is lawfully entitled to be, to observe plainly visible happenings, does not run afoul of the *Fourth Amendment of the United States Constitution*.

[*867] [3] The *Fourth Amendment* did not preclude officers' isolated and warrantless use of a stationary video camera installed on top of a public utility pole on public property and directed at the home of defendant. The defendant did not exhibit an actual subjective **[***14]** expectation of privacy in the goings-on outside of the house, as nothing has been erected as to fences nor did he otherwise try to shield the front of the house from public view, which might have signaled he feared the wandering eye or camera lens on the street. The pole camera did not

penetrate walls or windows of defendant's house so as to hear and record confidential information, nor did it explore details of defendant's house that would previously have been unknowable without physical intrusion.

In addition, the technology in the case at bar is far from cutting edge, and has been in existence at least since the 1980s. Also, the "intrusion" allegedly imposed on the defendant was far below the level of the Federal Circuits. *Tuggle* had three separate pole cameras and directly observed the property and far down the street for a period of 18 months. *Moore-Bush* was eight months and the police could "zoom in" for license plates and facial recognition. *Houston*, although less time at 10 weeks, was still greater time than the case at bar. Here, the period of surveillance lasted merely 14 days and there was only one camera, which was stationary without special features.

In **[***15]** addition, the court notes that the government's warrantless use of a stationary video camera installed on top of public utility poles on public property and directed at defendant's home for 14 days was not a "search" under the "mosaic theory" which held that a government could learn more from a given slice of information if it could put that information in context of broader pattern, namely a "mosaic." This was first presented in *United States v Maynard (615 F3d 544, 392 US App DC 291 [DC Cir 2010]*). Here, cameras exposed no details about where defendant traveled, what businesses he frequented, with whom he interacted in public, or whose homes he visited, among many other intimate details of his life. The cameras only highlighted defendant's lack of movement, surveying only the time he spent at home and thus not illuminating what occurred when he moved from his house. Given its immobile nature, the camera could not make out an exhaustive record of defendant's "hitherto routine" because much if not most of the relevant details occurred outside of the immediate area in front of the defendant's house. These circumstances under the "mosaic theory" are applicably **[*868]** different from the case at bar, compared to the United States Supreme Court rulings in **[***16]** *Jones* (car installed GPS) or *Carpenter* (cell phone tower), both of which dealt with facts involving a vast "mosaic" of research on the various daily whereabouts of the defendants in those cases.

V. Conclusion

As technology advances, we as a society are approaching a future of ubiquitous **[**420]** public cameras in numerous locations. As times evolve, this case at bar is but one example of the new challenges to the *Fourth Amendment*. There will clearly be many more to come.

Accordingly, this court holds that (1) defendant failed to make a timely motion under **[****5]** *CPL 255.20* and as such this motion is denied and (2) assuming arguendo this court reaches the merits of the motion, this court holds the United States Constitution and New York State Constitution do not preclude the officers' warrantless use of a stationary camera installed on top of a public utility pole across the street and directed at the defendant's front property for a period of 14 days where the area was clearly visible to the public and could have been observed by a passerby and therefore was not a violation of the defendant's expectation of privacy. Accordingly, the motion is denied in its entirety. As such, there is no necessity to reach the issue of "the fruit **[***17]** of the poisonous tree."

End of Document

People v Oquendo

Supreme Court of New York, Appellate Division, Fourth Department

July 7, 2017, Decided ; July 7, 2017, Entered

863 KA 13-00447

Reporter

152 A.D.3d 1220 *; 57 N.Y.S.3d 872 **; 2017 N.Y. App. Div. LEXIS 5359 ***; 2017 NY Slip Op 05548 ****; 2017 WL 2884590

[**1]** The People of the State of New York, Respondent, v Raheem H. Oquendo, Appellant.

Subsequent History: Leave to appeal denied by *People v Oquendo, 30 NY3d 982, 67 NYS3d 584, 89 NE3d 1264, 2017 N.Y. LEXIS 3675 (N.Y., Oct. 2, 2017)*

Counsel: **[***1]** TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Judges: PRESENT—CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

Opinion

[874]** **[*1220]** Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 24, 2009. The judgment convicted defendant, upon a jury verdict, of petit larceny and grand larceny in the fourth degree (four counts).

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 petit larceny (*Penal Law § 155.25*) and four counts of grand larceny in the fourth degree (§ 155.30 [1]). Defendant contends that he was deprived of a fair trial based on three improper remarks by County Court during jury selection. Defendant failed to preserve for our review his contention with respect to any of the alleged improper remarks (*see* CPL 470.05 [2]; *People v McAvoy, 70 AD3d 1467, 1468, 894 NYS2d 270 [2010]*, *lv denied 14 NY3d 890, 929 NE2d 1013, 903 NYS2d 778 [2010])*. In any event, the remarks do not warrant reversal. Although some of the court's remarks, when isolated and taken out of context, were arguably improper, we conclude that, when they are viewed in their proper context, they did not **[***2]** prevent the jury "from arriving at an impartial judgment on the merits" or deprive defendant of a fair trial (*People v Moulton, 43 NY2d 944, 946, 374 NE2d 1243, 403 NYS2d 892 [1978]*; *see McAvoy, 70 AD3d at 1468*).

We reject the further contention of defendant that the court erred in admitting in evidence video recordings from the **[*1221]** surveillance system of the two stores where defendant allegedly committed the larcenies. "[A] video may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the video accurately represents the subject matter depicted" (*People v Patterson, 93 NY2d 80, 84, 710 NE2d 665, 688 NYS2d 101 [1999]*; *see People v Byrnes, 33 NY2d 343, 347-349, 308 NE2d 435, 352 NYS2d 913 [1974])*. The videos at issue herein were adequately authenticated by the testimony of two store employees who were familiar with the surveillance system, copied the surveillance videos to the DVDs brought to court, and testified to the unaltered condition of the videos. The testimony of the employees supports the conclusion that the videos accurately depict the events at issue. Any gaps in the chain of custody went to the weight

of the evidence, not its admissibility (*see People v Hawkins, 11 NY3d 484, 494, 900 NE2d 946, 872 NYS2d 395 [2008])*.

Defendant further contends that the court erred in permitting one of the store employees to identify him as the individual depicted in two of the surveillance videos. We agree with defendant **[***3]** that the court erred in permitting such opinion testimony inasmuch as there was an insufficient basis for concluding that the employee was more likely to identify defendant correctly from the videos than was the jury (*see People v Myrick, 135 AD3d 1069, 1074, 22 NYS3d 691 [2016]*; *People v Coleman, 78 AD3d 457, 458, 910 NYS2d 69 [2010], lv denied 16 NY3d 829, 946 NE2d 181, 921 NYS2d 193 [2011])*. Nevertheless, we conclude that the error is harmless. The evidence of defendant's guilt is overwhelming and, taking into account the court's limiting instruction to the jury with respect to the testimony, we conclude that there is no significant probability that defendant would have been acquitted but for the error (*see People v Crimmins, 36 NY2d 230, 241-242, 326 NE2d 787, 367 NYS2d 213 [1975]*; *Coleman, 78 AD3d at 458-459*). We reject defendant's contention that the court also erred in permitting the employee to testify to the identity of the **[****2]** stolen items and their value. In addition to viewing the surveillance videos, the employee testified he was able to determine the identity and value of the stolen items by subsequently inspecting the prices posted in the stores (*see generally People v Irrizari, 5 NY2d 142, 145-147, 156 NE2d 69, 182 NYS2d 361 [1959]*; *People v Trilli, 27 AD3d 349, 349-350, 810 NYS2d 660 [2006], lv denied 6 NY3d 899, 850 NE2d 681, 817 NYS2d 634 [2006]* **[**875]** ; *People v Wandell, 285 AD2d 736, 737, 728 NYS2d 578 [2001])*.

Contrary to defendant's further contention, the court did not abuse its discretion in denying his request for an adjournment based on the People's late disclosure of certain surveillance videos, nor did that late disclosure warrant reversal, inasmuch as **[***4]** "[d]efendant failed to establish . . . that he was surprised or prejudiced by the late disclosure" (*People v Collins, 106 AD3d 1544, 1546,* ***[*1222]*** *964 NYS2d 393 [2013], lv denied 21 NY3d 1072, 997 NE2d 146, 974 NYS2d 321 [2013]*; *see People v Resto, 147 AD3d 1331, 1332, 47 NYS3d 522 [2017], lv denied 29 NY3d 1000, 57 NYS3d 722, 80 NE3d 415 [2017]*; *People v Rogers, 103 AD3d 1150, 1151-1152, 958 NYS2d 835 [2013], lv denied 21 NY3d 946, 990 NE2d 142, 968 NYS2d 8 [2013]*; *People v Jacobson, 60 AD3d 1326, 1328, 876 NYS2d 259 [2009], lv denied 12 NY3d 916, 912 NE2d 1078, 884 NYS2d 697 [2009])*. Finally, the sentence is not unduly harsh or severe. Present—Carni, J.P., Curran, Troutman, Winslow and Scudder, JJ.

End of Document

People v Sanders

Supreme Court of New York, Appellate Division, Third Department

July 23, 2020, Decided

109090, 110049

Reporter

185 A.D.3d 1280 *; 128 N.Y.S.3d 350 **; 2020 N.Y. App. Div. LEXIS 4330 ***; 2020 NY Slip Op 04203 ****

[**1]** The People of the State of New York, Respondent, v Rasheen Sanders, Appellant.

Subsequent History: Leave to appeal denied by *People v Sanders, 35 NY3d 1115, 133 NYS3d 517, 158 NE3d 534, 2020 N.Y. LEXIS 2765 (N.Y., Oct. 30, 2020)*

Counsel: **[***1]** John A. Cirando, Syracuse, for appellant.

Michael A. Korchak, District Attorney, Binghamton (Stephen D. Ferri of counsel), for respondent.

Judges: Before: Lynch, J.P., Devine, Aarons, Pritzker and Reynolds Fitzgerald, JJ. Lynch, J.P., Devine, Aarons and Pritzker, JJ., concur.

Opinion by: Reynolds Fitzgerald

Opinion

[353]** **[*1281]** Reynolds Fitzgerald, J. Appeals (1) from a judgment of the County Court of Broome County (Dooley, J.), rendered January 18, 2017, upon a verdict convicting defendant of the crimes of criminal possession of a controlled substance in the third degree (two counts) and tampering with physical evidence, and (2) by permission, from an order of said court, entered January 6, 2018, which denied defendant's motion pursuant to *CPL 440.10* to vacate the judgment of conviction, without a hearing.

On April 26, 2016, State Trooper Bruce Shive was in an unmarked car with his K-9 partner when he noticed a vehicle ahead of him that had excessively tinted windows. There was a minivan behind this vehicle and Shive activated his emergency lights to alert the driver of the minivan that he intended to effectuate a traffic stop. At that point, the vehicle accelerated and then turned down a city street and cut through the parking lot of a **[***2]** KFC, driving the wrong way through the drive-through lane. As Shive navigated through the KFC parking lot, he activated his lights and siren; defendant stopped approximately one block later. After questioning defendant, Shive performed a canine search of the exterior of the vehicle. The subsequent "alert" by the dog led to a search of the KFC parking lot, which resulted in the discovery of a bag containing a substance later determined to be 18.712 grams of heroin. Defendant was arrested and indicted on two counts of criminal possession of a controlled substance in the third degree and one count of tampering with physical evidence.

Defendant moved to suppress, among other things, any oral and/or written statements on the basis that the People failed to comply with *CPL 710.30*, and also to suppress the physical evidence. County Court summarily denied that part of the motion seeking to suppress the heroin found in the KFC parking lot on the ground that defendant abandoned it. Following a hearing, County Court orally granted the motion to preclude defendant's statements and, thereafter, issued a written decision denying suppression of the physical evidence found in defendant's vehicle. At the conclusion **[***3]** of a jury trial, defendant was convicted as charged and sentenced to a concurrent prison term of 12 years, with three years of postrelease supervision, for each criminal possession of a controlled substance conviction and a lesser concurrent prison term for the tampering with physical evidence conviction. Defendant's

subsequent motion to vacate the judgment of conviction on the basis of ineffective assistance of counsel, pursuant to CPL 440.10, was **[*1282]** unsuccessful. Defendant appeals from the judgment of conviction and, by permission, from the order denying his postjudgment motion.

Defendant argues that the search of his vehicle was unlawful as there was no "founded suspicion" of criminal activity to warrant a search. "In *People v De Bour (40 NY2d 210, 352 NE2d 562, 386 NYS2d 375 [1976])*, the Court of Appeals set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes **[***4]** an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; level four, arrest, requires **[**354]** probable cause to believe that the person to be arrested has committed a crime" (*People v Stover, 181 AD3d 1061, 1061-1062, 120 NYS3d 650 [2020]* [internal quotation marks and citations omitted]). At the suppression hearing, Shive testified that, prior to stopping defendant, he had noticed the tinted windows and, when he activated his emergency lights, defendant "rapidly accelerated" and "squared the block." Shive observed defendant cut through the KFC parking lot against the one-way markers and then proceed to "slow roll"* for a block before actually stopping. When explaining the "slow roll," Shive testified that defendant did not immediately stop and that he continued for the distance of a city block before actually coming to a complete stop. He said that when he approached defendant and questioned him, defendant was contentious and evasive in his responses.

Based on the foregoing, we agree with County Court's conclusion that Shive possessed a founded suspicion of criminal activity so as to justify his request to search defendant's vehicle (*see People v Whalen, 101 AD3d 1167, 1167-1168, 956 NYS2d 598 [2012]*, *lv denied* **[***5]** *20 NY3d 1105, 988 NE2d 539, 965 NYS2d 801 [2013])* and, when defendant refused, allowed him to employ the use of his K-9 partner (*see People v Devone, 15 NY3d 106, 113, 931 NE2d 70, 905 NYS2d 101 [2010])*. The subsequent search of the interior of the vehicle was justified by the canine alerting at the driver side window (*see People v Boler, 106 AD3d 1119, 1122, 964 NYS2d 688 [2013]*; *People v Abdur-Rashid, 64 AD3d 1087, 1089, 883 NYS2d 644 [2009]*, *affd 15 NY3d 106,* ***[*1283]*** *931 NE2d 70, 905 NYS2d 101 [2010])*. To the extent that defendant argues that the heroin found in the KFC parking lot should have been suppressed, the record supports County Court's conclusion that it was abandoned (*see People v Boodle, 47 NY2d 398, 404, 391 NE2d 1329, 418 NYS2d 352 [1979]*, *cert denied 444 US 969, 100 S Ct 461, 62 L Ed 2d 383 [1979]*; *People v Smith, 256 AD2d 732, 733, 682 NYS2d 257 [1998]*, *lv denied 93 NY2d 929, 715 NE2d 516, 693 NYS2d 513 [1999])*.

Next, defendant contends that the surveillance footage of the KFC parking lot should not have been admitted into evidence because it was not properly authenticated. "The decision to admit videotape evidence rests within the sound discretion of the trial court and will not be disturbed absent a lack of foundation for its introduction or a demonstrated abuse of the court's discretion" (*People v Carter, 131 AD3d 717, 721, 15 NYS3d 855 [2015]* [internal quotation marks and citations omitted], *lv denied 26 NY3d 1007, 20 NYS3d 548, 42 NE3d 218 [2015])*. "A videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted" (*People v Edmonds, 165 AD3d 1494, 1497, 85 NYS3d 282 [2018]* [internal quotation marks, brackets and citations omitted]; *see People v Junior, 119 AD3d 1228, 1231, 990 NYS2d 689 [2014]*, *lv denied 24 NY3d 1044, 998 NYS2d 314, 23 NE3d 157 [2014])*. A discrepancy between the time of the event and the time stamp upon a surveillance recording goes to the weight of the evidence, not its admissibility (*see Cicco v* ***[**355]*** *Durolek, 171 AD3d 1477, 1477, 99 NYS3d 815 [2019]*; *People v Costello, 128 AD3d 848, 848, 9 NYS3d 132 [2015]*, *lv denied 26 NY3d 927, 17 NYS3d 90, 38 NE3d 836 [2015])*.

---

* Shive testified that he had been a state trooper for approximately 14 years and that, in his experience performing "thousands" of stops, such a maneuver often indicated that the driver or passenger of the vehicle may be trying to hide or obstruct something from plain view prior to stopping.

David Mabus, a general manager of the KFC, provided testimony at trial concerning the surveillance footage. He testified that KFC has a surveillance system consisting of 14 cameras. The data gathered from the surveillance system is stored **[***6]** for 30 days in the general manager's office. The information is recorded digitally and removed via a thumb drive or burned onto a disk. He stated that he was the only employee at the store with access to the place where the surveillance cameras are kept. Mabus testified that the regional manager of KFC made a copy of the surveillance footage at the request of the State Police investigators on April 26, 2016, and he burned a second disk on April 28, 2016, the latter of which was admitted as evidence at trial. He further testified that the two disks were identical, the content was the same as what he watched on the surveillance system at the store on the day of the arrest, and that the video fairly and accurately represented the parking lot of the KFC and the events that were recorded. The record discloses that Mabus, as a maintainer and operator of the surveillance footage, authenticated the tapes by providing **[*1284]** testimony that they accurately represented the subject matter depicted and, as such, the surveillance footage was properly admitted into evidence (*see People v Patterson, 93 NY2d 80, 84, 710 NE2d 665, 688 NYS2d 101 [1999]*; *People v Edmonds, 165 AD3d at 1497*).

Defendant next asserts that the verdict was not supported by legally sufficient evidence and was against the weight of the **[***7]** evidence. Specifically, defendant argues that the evidence at trial did not establish that he had actual or constructive possession of the heroin or that he intended to sell the heroin. With respect to the weight of the evidence, defendant maintains that the only evidence connecting him to the heroin was the unauthenticated surveillance footage.

"When considering a challenge to the legal sufficiency of the evidence, [this Court] view[s] the evidence in the light most favorable to the People and evaluate[s] whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crime charged" (*People v Sostre, 172 AD3d 1623, 1625, 100 NYS3d 768 [2019]* [internal quotation marks and citations omitted], *lv denied 34 NY3d 938, 109 NYS3d 726, 133 NE3d 429 [2019]*; *see People v Small, 174 AD3d 1130, 1131, 105 NYS3d 211 [2019]*, *lv denied 34 NY3d 954, 110 NYS3d 630, 134 NE3d 629 [2019])*. For a weight of the evidence review, this Court "must first determine whether, based on all the credible evidence, a different finding would not have been unreasonable and[, if not,] then weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from **[***8]** the testimony to determine if the verdict is supported by the weight of the evidence" (*People v Creech, 165 AD3d 1491, 1492, 87 NYS3d 384 [2018]* [internal quotation marks and citations omitted]; *see People v Gill, 168 AD3d 1140, 1140, 90 NYS3d 392 [2019])*. Under this review "we consider the evidence in a neutral light and defer to the jury's credibility assessments" (*People v Vega, 170 AD3d 1266, 1268, 95 NYS3d 620 [2019]* [internal quotation marks and citations omitted], *lv denied 33 NY3d 1074,* ***[**356]*** *105 NYS3d 48, 129 NE3d 368 [2019]*; *see People v Anatriello, 161 AD3d 1383, 1386, 77 NYS3d 581 [2018]*, *lv denied 31 NY3d 1144, 83 NYS3d 426, 108 NE3d 500 [2018])*.

As relevant here, "[a] person is guilty of criminal possession of a controlled substance in the third degree when he [or she] knowingly and unlawfully possesses: . . . a narcotic drug with intent to sell it; or . . . one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-half ounce or more" (*Penal Law § 220.16 [1]*, *[12]*). " 'Possess' means to have physical possession or **[*1285]** otherwise to exercise dominion or control over tangible property" (*Penal Law § 10.00 [8]*). When "the People proceed under the theory of constructive possession, the proof must establish that a defendant exercised dominion and control over the property or the person who actually possessed the property" (*People v Palin, 158 AD3d 936, 938, 70 NYS3d 616 [2018]* [internal quotation marks, brackets and citation omitted], *lv denied 31 NY3d 1016, 78 NYS3d 286, 102 NE3d 1067 [2018]*; *see People v Leduc, 140 AD3d 1305, 1306, 34 NYS3d 208 [2016]*, *lv denied 28 NY3d 932, 40 NYS3d 360, 63 NE3d 80 [2016])*. "A person is guilty of **[***9]** tampering with physical evidence when . . . [b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he [or she] suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person" (*Penal Law § 215.40 [2]*).

In addition to the testimony of Mabus and Shive, State Police investigator Scott Pauly testified that Shive had called him during the vehicle stop and told him about defendant's conduct. Pauly stated that his training and experience led him to believe that defendant's behavior was typical of a suspect who is attempting to "get rid of something." As such, he contacted State Police investigator Mark Johnson and asked him to search the KFC parking lot. Pauly testified that while he was driving to KFC, Johnson informed him that he "located that item" in the parking lot. When Pauly arrived at the KFC parking lot, he identified the item as a bag containing what appeared to be heroin. He took photographs of the bag lying on the ground and then secured the bag as evidence. Pauly further testified that he noticed **[***10]** security cameras on the KFC building, and he and Johnson proceeded to speak with management to secure footage from the cameras. He also testified as to the significance of the quantity of heroin discovered, stating that, based on his knowledge and experience, mere drug users usually do not carry that quantity (18 grams) of heroin on them. He testified that each gram of heroin equates to 30 dosage units and, thus, the quantity of heroin that was discovered was approximately 600 dosage units. The street value of that quantity of heroin has a maximum value of $12,000. Lastly, Pauly testified that the evidence log noted that he collected the evidence from the scene and that the next notation in the log was Johnson submitting the evidence into a drop safe. He testified that "[Johnson] failed to document the transfer from [Pauly] to [Johnson]."

Johnson testified that he received a call from Pauly requesting **[*1286]** assistance to search the KFC parking lot. He also testified that he pulled into the KFC lot and noticed something on the ground. He then contacted Pauly to inform him that he found something Pauly "might be interested **[**357]** in." He testified that he received the bag of heroin evidence from Pauly **[***11]** and "made a clerical error" by failing to log his receipt of the evidence. Julie Romano, a forensic scientist assigned to the controlled substance section of the State Police, testified that the substance found in the KFC parking lot was 18.712 grams of heroin, which is more than one half of an ounce.

Viewed in a light most favorable to the People, the evidence was legally sufficient to support the element of possession necessary for criminal possession in the third degree. The surveillance footage depicted an item being flung out of defendant's car window while driving through the KFC parking lot. Shortly thereafter, Johnson located the item that was later verified as a bag of heroin. Discarding the item in such manner satisfies the definition of constructive possession (*see* Penal Law § 10.00 [8]; *People v Palin, 158 AD3d at 938*). As to the intent to sell, the evidence established that defendant did not possess signs of heroin use. Additionally, Pauly's testimony established that the amount and the street value of the heroin recovered was inconsistent with the profile of a heroin user (*see* People v Spencer, 169 AD3d 1268, 1270, 95 NYS3d 435 [2019], *lv denied 34 NY3d 938, 109 NYS3d 727, 133 NE3d 430 [2019])*. As to tampering with physical evidence, the surveillance footage established that defendant attempted to conceal and/or destroy evidence **[***12]** by discarding the heroin (*see* Penal Law § 215.40 [2]). Although a different verdict would not have been unreasonable, as there was no eyewitness to defendant throwing the heroin out the car, and there was a clerical error in the evidence log, we find, when viewing the evidence in a neutral light, that the verdict is not against the weight of the evidence. The surveillance footage was authenticated and confirmed that defendant discarded an item, later identified as 18 grams of heroin, while being followed by Shive.

Defendant contends that County Court erred in denying his CPL article 440 motion as the court failed to give the reasons and conclusion for its determination. The basis for the motion was defendant's claim that his counsel was ineffective for his failure to object to the introduction of identification and testimonial evidence that had previously been precluded in the court's pretrial suppression ruling. Pursuant to CPL 440.30, "[r]egardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its **[*1287]** determination" (CPL 440.30 [7]; *see* People v Sheppard, 119 AD3d 986, 988, 989 NYS2d 168 [2014]). As relevant here, "[t]o prevail on his ineffective assistance of counsel claim on the **[***13]** basis of this single failure to object, defendant must show both that the objection omitted by trial counsel is a winning argument, here one that would have required a mistrial, and that the objection was one that no reasonable defense lawyer, in the context of the trial, could have thought to be not worth raising" (People v Brown, 17 NY3d 742, 743-744, 952 NE2d 1004, 929 NYS2d 12 [2011] [internal quotation marks and citation omitted]; *see* People v Pottorff, 145 AD3d 1095, 1097, 43 NYS3d 169 [2016], *lv denied 30 NY3d 1063, 71 NYS3d 13, 94 NE3d 495 [2017])*. Moreover, "a defendant must demonstrate the absence of strategic or other legitimate

explanations for counsel's failure to pursue colorable claims" (*People v Garcia, 75 NY2d 973, 974, 555 NE2d 902, 556 NYS2d 505 [1990]* [internal quotation marks and citation omitted]).

County Court denied defendant's CPL article 440 motion finding defendant **[**358]** was incorrect that the court precluded identification testimony, as the court, in its suppression holding, only precluded statements and admissions made by defendant. As defendant failed to identify any precluded statements or admissions made by him to which counsel failed to object, County Court did not err in failing to address this argument as part of its postjudgment order. As to defendant's claim of ineffective counsel, for the first time he identifies two incidents where counsel did not object—when Shive testified that defendant was verbally tumultuous **[***14]** and Shive's testimony that defendant refused to consent to a search of his vehicle. However, this testimony had no impact on the ultimate verdict because the most significant proof against defendant was the surveillance footage, not his reaction to Shive (*see People v Cummings, 16 NY3d at 785*). The record establishes that, as a whole, defendant received meaningful representation (*see People v Taylor, 156 AD3d 86, 91, 64 NYS3d 714 [2017], lv denied 30 NY3d 1120, 77 NYS3d 345, 101 NE3d 986 [2018]; People v Wells, 101 AD3d 1250, 1252, 955 NYS2d 684 [2017], lv denied 20 NY3d 1066, 985 NE2d 927, 962 NYS2d 617 [2013]*).

Lastly, defendant argues that his sentence was harsh and excessive. Given defendant's prior drug-related and violent convictions, coupled with his unwillingness to change his behavior, we discern no abuse of discretion or extraordinary circumstances warranting a reduction of the sentence in the interest of justice (*see People v Simmons, 122 AD3d 1169, 1169, 998 NYS2d 472 [2014], lv denied 25 NY3d 1171 [2015]; People v Flower, 173 AD3d 1449, 1458, 105 NYS3d 152 [2019], lv denied 34 NY3d 931, 109 NYS3d 752, 133 NE3d 458 [2019]*). However, defendant correctly asserts that his certificate of conviction and uniform sentence and commitment form should **[*1288]** be amended to reflect the current adjudication as a second felony drug offender as opposed to a second felony offender. Thus, the uniform sentence and commitment form and certificate of conviction should be amended accordingly (*see People v Morton, 173 AD3d 1464, 1466, 103 NYS3d 673 [2019], lv denied 34 NY3d 935, 109 NYS3d 711, 133 NE3d 413 [2019]*).

Lynch, J.P., Devine, Aarons and Pritzker, JJ., concur. Ordered the judgment and order are affirmed, and matter **[***15]** remitted for entry of an amended uniform sentence and commitment form and an amended certificate of conviction.

End of Document