

State of New York Court of Appeals

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 68
The People &c.,
Respondent,
v.
Michael Cubero,
Appellant.

George J. Hoffman, Jr., for appellant.
Caitlin J. Halligan, for respondent.
Barbara D. Underwood, for intervenor-respondent State of New York.
New York County Lawyers Association Committee on Appellate Courts, et al., amici curiae.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

It is undisputed that defendant failed to preserve for our review his contention that Executive Law § 552 violates the State Constitution (see CPL 470.05 [2]; People v

Davidson, 27 NY3d 1083, 1086 [2016]). The Appellate Division declined to exercise its power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]), and we cannot reach that discretionary decision (see CPL 470.35 [1]). Defendant's further contention that he was denied meaningful representation is better addressed in a motion pursuant to CPL article 440 (see CPL 440.10 [1] [f]; People v Benevento, 91 NY2d 708, 712 [1998]).

Defendant's additional contention that his statements to investigators should have been suppressed as involuntary presents a mixed question of law and fact (see Matter of Jimmy D., 15 NY3d 417, 423 [2010]). Inasmuch as there is record support for the determination of the suppression court that those statements were voluntary, that issue is beyond further review by this Court (see Matter of Luis P., 32 NY3d 1165, 1166 [2018]).

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RIVERA, J. (concurring):

I agree the Appellate Division should be affirmed and join the majority's analysis with one exception. In my view, whether the Appellate Division may remit to create a record that it deems necessary to reach defendant's unpreserved claim presents a question

of law reviewable in this appeal (CPL 470.35 [1]). On the merits, I perceive no error in the analysis below warranting reversal (see CPL 470.10; 470.15 [3] [c], [6] [a]; 470.20).

* * * * *

Order affirmed, in a memorandum. Judges Stein, Fahey, Garcia, Wilson and Feinman concur. Judge Rivera concurs in result in an opinion. Chief Judge DiFiore took no part.

Decided October 24, 2019