SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0396-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT B. ANSTATT,

Defendant-Appellant.

Submitted January 31, 2017 – Decided March 8, 2017

Before Judges Fasciale and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 14-02-0254.

W. Curtis Dowell, attorney for appellant.

Joseph D. Coronato, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Roberta DiBiase, Senior Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Robert B. Anstatt pled guilty to fourth-degree operating a motor vehicle while his license was suspended for a second or subsequent conviction for driving under the influence

(DUI), N.J.S.A. 2C:40-26(b). He was sentenced to a year of probation with the condition that he serve 180 days in the county jail without the possibility of parole. Defendant appeals (1) an October 24, 2014 order denying his application to compel his entry into the pre-trial intervention program (PTI) over the prosecutor's objection; (2) a July 16, 2015 order denying his motion to suppress his statement to the police; and (3) his sentence. We affirm.

I.

In November 2011, defendant was convicted of his fourth DUI. Consequently, his driver's license was revoked for ten years. See N.J.S.A. 39:4-50(a)(3). On September 1, 2013, a motor vehicle struck a parked car causing damage. The driver left the scene. A witness, however, observed the accident and noted the vehicle's license, which was reported to the police. The vehicle was registered to defendant's wife.

The police responded to defendant's home, observed damage to a vehicle parked in the driveway, and spoke to defendant and his wife outside their home. Defendant admitted that he had driven the car involved in the accident and that he had left the scene of the accident.

Defendant was, thereafter, charged with leaving the scene of an accident, N.J.S.A. 39:4-129(d); careless driving, 39:4-97;

failure to maintain a lane, N.J.S.A. 39:4-88(d); and driving with a suspended license, N.J.S.A. 39:3-40. Defendant was also indicted for fourth-degree operating a motor vehicle while his license was suspended for more than two prior DUI convictions.

Defendant applied for PTI, was interviewed, but rejected. The director of the county PTI program issued a letter explaining the reasons for defendant's rejection. The letter reviewed defendant's personal circumstances and potential mitigating factors, but found that he was not suitable for PTI because the public need for prosecution outweighed the value of supervisory treatment, N.J.S.A. 2C:43-12(e)(14), and society would be harmed by abandoning criminal prosecution, N.J.S.A. 2C:43-12(e)(17). The prosecutor also rejected defendant's PTI application and joined in the reasons identified by the PTI director.

Defendant appealed his rejection from PTI to the Law Division. Following oral argument, on October 24, 2014, the Law Division entered an order denying defendant's application to compel his admission into PTI over the prosecutor's objection. In a written opinion, the court explained that the prosecutor had reviewed the relevant factors and there was no showing of a patent or gross abuse of discretion by the prosecutor.

Defendant, thereafter, moved to suppress the statement he had made to the police. At an evidentiary hearing, three witnesses

testified: one of the investigating police officers, defendant's wife, and defendant. The police officer testified that following the report of the hit and run, he responded to defendant's address to investigate. When he arrived, he observed a vehicle in the driveway with damage. The officer then heard defendant and his wife arguing inside their home. He knocked on the door and spoke with both the wife and defendant outside the home. Defendant admitted to driving the vehicle and leaving the scene of the accident. The officer did not place defendant under arrest nor did he advise defendant of his Miranda[1] rights. Defendant was also not given any tickets or charged with any offense that evening.

Defendant's wife testified that when the police arrived she went out by herself to speak with them. Initially, she told the police that she caused the damage to the car. She then testified that she was directed to have her husband come down to speak with the police. When her husband came down, he initially denied driving the vehicle, but one of the officers repeatedly yelled "be a man, fess up[.]" Thereafter, defendant admitted to driving the vehicle. Defendant's wife also acknowledged that she had initially

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

lied to the police when she told them that she had caused the damage to the vehicle.

Defendant also testified. He explained that he was awakened by his wife and informed that the police wanted to speak to him. He then came down and spoke with the police. He was not advised that he was free to leave or that he did not have to answer questions. Defendant went on to testify that he felt compelled to answer the police's questions.

After hearing the testimony, the trial court found the officer's testimony credible. Based on the officer's testimony, the court found that while defendant was never advised of his Miranda rights, he was never placed in custody and a reasonable person would not have believed that he was in custody. Accordingly, the court found that the questioning was non-coercive and lawful. The court then issued an order on July 16, 2015, denying defendant's motion to suppress his statement.

Thereafter, on July 22, 2015, defendant pled guilty to operating a motor vehicle while his license was suspended for a second or subsequent conviction for DUI. The State agreed to recommend that the remaining charges be dismissed and defendant reserved his right to appeal. Defendant was sentenced to one year of probation with the condition that he serve 180 days in jail without the possibility of parole. In accordance with the plea

agreement, the remaining charges against defendant were dismissed. Defendant was granted bail pending this appeal.

II.

On appeal, defendant makes four arguments:

> POINT I — THE REJECTION OF DEFENDANT FROM PTI CONSTITUTED A PATENT AND GROSS ABUSE OF DISCRETION, NECESSITATING REVERSAL AND HIS ADMISSION TO [PTI].
>
> POINT II — THE LAW DIVISION ERRED IN NOT SUPPRESSING DEFENDANT'S STATEMENTS TO THE POLICE IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS AND MIRANDA.
>
> POINT III — DEFENDANT'S N.J.S.A. 2C:40-26b CHARGE SHOULD HAVE BEEN DISMISSED BECAUSE TRIAL AND/OR PUNISHMENT FOR THIS OFFENSE VIOLATES THE FEDERAL AND STATE CONSTITUTIONAL DOUBLE JEOPARDY PROVISIONS.
>
> POINT IV — THE SENTENCE BELOW IS ILLEGAL BECAUSE A SENTENCE OF IMPRISONMENT AND PROBATION MAY NOT BE IMPOSED SIMULTANEOUSLY.

We find no merit in any of defendant's arguments.

A. PTI

PTI "is a diversionary program through which certain offenders are able to avoid criminal prosecution by receiving early rehabilitative services expected to deter future criminal behavior." State v. Nwobu, 139 N.J. 236, 240 (1995). The program is governed by statute and court rule. See N.J.S.A. 2C:43-12 to -22; R. 3:28; Pressler & Verniero, Current N.J. Court Rules, guidelines to R. 3:28 (2017). Deciding whether to permit diversion

to PTI "is a quintessentially prosecutorial function." State v. Wallace, 146 N.J. 576, 582 (1996). Accordingly, "prosecutors are granted broad discretion to determine if a defendant should be diverted" to PTI instead of being prosecuted. State v. K.S., 220 N.J. 190, 199 (2005) (citing Wallace, supra, 146 N.J. at 582); see also State v. Negran, 178 N.J. 73, 82 (2003) (stating that courts must "allow prosecutors wide latitude").

"Thus, the scope of [judicial] review is severely limited." Negran, supra, 178 N.J. at 82 (citing Nwobu, supra, 139 N.J. at 246). To overturn a prosecutor's rejection, a defendant must "clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion." State v. Watkins, 390 N.J. Super. 302, 305 (App. Div. 2007), aff'd, 193 N.J. 507 (2008).

Having reviewed the record, we, like the Law Division, find no patent or gross abuse of discretion on the part of the prosecutor. The prosecutor and the PTI director considered defendant's individual circumstances. A review of the letter that informed defendant of his rejection reflects that the prosecutor considered the appropriate factors, including mitigating circumstances. The prosecutor found, however, that defendant was not qualified for PTI because society would be better served if

defendant was prosecuted. New Jersey has a strong public policy against driving while under the influence.

Accordingly, the penalties for DUI convictions are appropriately severe and progressive. N.J.S.A. 39:4-50(a)(3). The Legislature has also mandated that there should be penalties for driving while suspended if the suspension was for a second or subsequent DUI conviction. See N.J.S.A. 2C:40-26(b) (mandating a 180-day term of incarceration); see also State v. Perry, 439 N.J. Super. 514, 525 (App. Div.), certif. denied, 222 N.J. 306 (2015). The record in this case establishes that the prosecutor appropriately exercised his discretion in denying defendant's application for PTI.

B. Defendant's Statement to the Police

In reviewing a motion to suppress, we defer to the factual and credibility findings of the trial court, "so long as those findings are supported by sufficient credible evidence in the record." State v. Handy, 206 N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). "An appellate court should disregard those findings only when a trial court's findings of fact are clearly mistaken." State v. Hubbard, 222 N.J. 249, 262 (2015). The legal conclusions of the trial court "are reviewed de novo." Id. at 263.

The Fifth Amendment of the United States Constitution guarantees all persons with the privilege against self-incrimination. This privilege applies to the State through the Fourteenth Amendment. Moreover, in New Jersey, there is a common law privilege against self-incrimination, which has been codified in statutes and rules of evidence. N.J.S.A. 2A:84A-19; N.J.R.E. 503; State v. Reed, 133 N.J. 237, 250 (1993).

Miranda warnings are necessary when an individual is in custody and subject to questioning by law enforcement. State v. Smith, 374 N.J. Super. 425, 431 (App. Div. 2005). Whether a suspect is in custody is an objective determination based on "how a reasonable [person] in the suspect's position would have understood his [or her] situation." State v. Carlucci, 217 N.J. 129, 144 (2014) (first alteration in original) (quoting Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984)).

Custody does not require arrest; rather, the critical question is whether there has been a deprivation of a suspect's freedom of action under the totality of objective circumstances. Ibid. The relevant circumstances include the time and place of interrogation, the nature and duration of the detention, the status of the interrogator and suspect, and language used by law enforcement. Stansbury v. California, 511 U.S. 318, 325, 114 S.

Ct. 1526, 1530, 128 L. Ed. 2d 293, 300 (1994); Carlucci, supra, 217 N.J. at 144.

Here, the motion court found that defendant was not in custody when the police questioned him. The court also found that a reasonable person in defendant's position would not have believed that he was in custody. The court then went on to find that the questioning of defendant by the police was non-coercive. The record amply supports those fact-findings and we discern no basis for disagreeing with the motion court. The court then correctly applied the facts to the law to conclude that there was no requirement for giving Miranda warnings. Thus, there was no basis to suppress defendant's statement to the police.

C. Double Jeopardy

Defendant contends that his prosecution for driving while his license was suspended for a second or subsequent DUI conviction constitutes a second prosecution for DUI in violation of double jeopardy principles. We reject this argument because the act of driving with a suspended license is a new offense and is not the same as the predicate DUI conviction.

Double jeopardy analysis involves consideration of one of two prongs: "(1) the 'same offense' test, which focuses upon the statutory elements of a crime rather than proofs proffered for conviction; or (2), alternatively, the 'same evidence' test, which

focuses upon whether the same evidence used to prove the first offense is necessary to prove the second offense." State v. Hand, 416 N.J. Super. 622, 627 (App. Div. 2010) (citing State v. De Luca, 108 N.J. 98, 107, cert. denied, 484 U.S. 944, 108 S. Ct. 331, 98 L. Ed. 2d 358 (1987)).

The plain wording of N.J.S.A. 2C:40-26(b) establishes that the statute is intended to impose penalties for the act of driving with a suspended license. It is not the prior DUI convictions that are being revisited or enhanced with an additional penalty. Instead, the Legislature has mandated that when a person with more than two DUI convictions drives a vehicle while his or her license is suspended, that new and separate act of driving with a suspended license is a fourth-degree crime subject to penalties.

Accordingly, the statute states that it "shall be a crime of the fourth-degree to operate a motor vehicle during the period of license suspension." N.J.S.A. 2C:40-26(b). We have previously recognized that the violation of N.J.S.A. 2C:40-26(b) constitutes a new and separate crime from the predicate DUI convictions. See State v. Carrigan, 428 N.J. Super. 609, 620-21 (App. Div. 2012) (holding that a conviction under N.J.S.A. 2C:40-26(b) does not violate ex post facto constitutional principles), certif. denied, 213 N.J. 539 (2013).

Here, defendant is not being prosecuted a second time for the DUI convictions. Moreover, defendant is not being punished for his prior DUI convictions. Instead, defendant is being punished for committing a new act for driving a vehicle while his license was suspended for prior DUI convictions. While the DUI convictions are predicates to the violation of driving while suspended, the act being punished is a new act. Thus, there is no double jeopardy.

D. The Sentence

Finally, defendant argues that his sentence is illegal because he received separate sentences of probation and imprisonment. We reject this argument because defendant is misinterpreting his sentence.

N.J.S.A. 2C:43-2(b)(2) authorizes a split sentence of up to 364 days of imprisonment as a condition of probation for a criminal conviction. That statute allows various types of sentences, including "in the case of a person convicted of a crime, to imprisonment for a term fixed by the court not exceeding 364 days to be served as a condition of probation[.]" See State v. Crawford, 379 N.J. Super. 250, 259 (App. Div. 2005) (explaining that a court may sentence a defendant, upon conviction for a fourth-degree crime, to "up to five years [of] probation, which could include a term of imprisonment (not exceeding 364 days) to be served in a county jail as a condition of probation").

N.J.S.A. 2C:40-26(c) provides that "if a person is convicted of a crime under this section the sentence imposed shall include a fixed minimum sentence of not less than 180 days during which the defendant shall not be eligible for parole." That subsection does not prevent a court from imposing a sentence of probation. Instead, the subsection mandates that any sentence imposed "shall include" at least 180 days of incarceration.

Here, the court imposed a legal sentence by sentencing defendant to one year of probation with the condition that 180 days be spent in county jail. That sentence is authorized by N.J.S.A. 2C:43-2(b)(2) and complies with the requirements of N.J.S.A. 2C:40-26. Thus, defendant's sentence was legal.

Affirmed.