SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0447-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARINA L. BARTLOM,

Defendant-Appellant.

Submitted March 21, 2017 – Decided April 5, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-06-1009.

Joseph E. Krakora, Public Defender, attorney for appellant (Seon Jeong Lee, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Paul H. Heinzel, Senior Assistant Prosecutor, of counsel; Lisa Sarnoff Gochman, Legal Assistant, on the brief).

PER CURIAM

Defendant appeals from her convictions for two counts of third-degree possession of a controlled dangerous substance (CDS),

N.J.S.A. 2C:35-10(a)(1); and a disorderly persons possession of drug paraphernalia, N.J.S.A. 2C:36-2. We affirm the convictions, but remand for re-sentencing.

A Sergeant and two police officers were on duty in an unmarked vehicle when they noticed a Honda Ridgeline "take off" in front of them. One officer noticed the driver was not wearing his seat belt. As a result, and because of the way the Ridgeline pulled in front of them, the officer followed the Ridgeline and conducted a motor vehicle stop.

The officer approached the front passenger side of the Ridgeline and asked defendant to roll down her window. As defendant did this using her right hand, she used her left hand to put an item on the front dashboard. The officer observed the item, which was a glassine packet with the words "my, my, my" stamped in green ink on it. The officer grabbed the item, which also had a cut straw sticking out of it, and defendant admitted it was hers.

Co-defendant, the driver of the Ridgeline, told the police defendant owned the vehicle. The officer asked defendant for her credentials. As defendant reached for her license and registration in the glove compartment, the officer observed multi-colored paper wrapped around a small bundle of white bags with the same marking on each bag as the item defendant claimed had been hers. The

bundle consisted of thirty-six packets of heroin and a folded piece of paper containing cocaine.

A grand jury indicted defendant, co-defendant, and the two back-seated passengers of the Ridgeline, with two counts of third-degree possession of CDS. A judge and jury tried all four individuals together. Defendant testified that someone left the CDS in the Ridgeline before the stop, and that she never admitted the drugs were hers. After defendant rested, the court dismissed the charges against the back-seat passengers.

Thereafter, and for the first time, defendant wanted to produce testimony from one of the back-seat passengers. Defendant filed a motion to re-open her case before summations and contended that the passenger would have contradicted the officer's testimony about the circumstances of the initial motor vehicle stop. The judge found such testimony would be cumulative and denied the motion.

The jury acquitted the driver, but found defendant guilty of the CDS offenses and possession of drug paraphernalia. Defendant filed a motion for a new trial and produced an affidavit from the back-seat passenger, which indicated he would testify that defendant did not have the straw in her nose when the officer pulled over the Ridgeline, and defendant did not admit the drugs were hers. The judge concluded the proffered testimony was

immaterial and cumulative, determined the affidavit failed to produce newly discovered evidence, and denied the motion for a new trial.

Without merging the CDS convictions, the judge sentenced defendant to two concurrent one-year probationary terms. He also imposed two $1000 Drug Enforcement and Demand Reduction (DEDR) fines. The judge also fined defendant $750.

On appeal, defendant raises the following arguments:

> POINT I
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> THE TRIAL COURT'S DENIAL OF THE MOTION TO REOPEN AND THE MOTION FOR NEW TRIAL DEPRIVED DEFENDANT OF A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE, VIOLATING HER CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL AND COMPULSORY PROCESS. [U.S. CONST.] AMENDS. VI, XIV; [N.J. CONST.] ART. 1, [¶] 10.
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> POINT II
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> THE TRIAL COURT'S IMPOSITION OF $750 IN FINES WITHOUT ARTICULATING A SPECIFIC REASON AND ITS REFUSAL TO MERGE THE TWO $1000 DEDR PENALTIES WERE ERRONEOUS.

We begin by addressing defendant's contentions that the judge erred by denying two motions: defendant's motion to re-open her case after the judge acquitted the back-seat passengers; and defendant's related motion for a new trial after the jury found her guilty.

The decision to re-open the case rests in the discretion of the trial court. State v. Menke, 25 N.J. 66, 70-71 (1957). The question here is whether the judge abused his discretion by denying defendant's request to allow the back-seat passenger to testify. Of course, we consider this question fully understanding that defendant did not make the request until the judge granted the back-seat passenger's motion for acquittal.

Defendant and co-defendants filed motions for acquittal after the State rested. The judge reserved decision until the close of defendant's case in chief. At that point, the judge granted only the back-seat passengers' motions. Now that they were no longer co-defendants, and before summations, defendant made her motion to re-open the case.

> [Defense counsel]: I am going to make the application now . . . to re[-]open [defendant's] case . . . . [The back-seat passenger] is ready, willing and able to testify.
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> . . . .
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> [Assistant Prosecutor]: [The back-seat passenger] could have testified [before the acquittal] . . . [and h]is attorney indicated [before the acquittal] that he was not going to testify.
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> . . . .
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> [Defense counsel]: [I]t [is] our hope that [the back-seat passenger will] be able to provide information . . . with regard to what did in fact happen [during the stop].

> The court: [W]hat's the proffer that the testimony [would have] been?
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> [Defense counsel]: I don't have all of it because I didn't speak at length [to the back-seat passenger].
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> The court: [T]hat would be helpful if this [c]ourt is being asked to make a decision whether or not[,] after I've dismissed the jury for the day [and] after I've sent two [co-]defendants home[,] and now I'm being asked to re[-]open the case. So it would be helpful for me to know . . . what exactly the testimony would be.
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> [Defense counsel]: I don't have it . . . .

Defense counsel then suggested that the back-seat passenger would have contradicted the officer's testimony. The judge emphasized, however, that the general reference to the proffered testimony would be cumulative. The assistant prosecutor agreed and further argued that the back-seat passenger "could come in here and take the weight for everything because he would . . . he couldn't be charged." We see no abuse of discretion by denying defendant's motion to re-open the case under the facts presented on this record.

On the motion for a new trial, defense counsel produced an affidavit from the back-seat passenger indicating the scope of the proffered testimony. The affidavit, which contained no new information, presented cumulative evidence, such as the Ridgeline driver wore his seat belt and did not abruptly drive away in front

of the officers; defendant did not have the straw to her nose; and defendant did not admit the heroin was hers.

Our standard of review is well-settled. Pursuant to Rule 2:10-1, a trial court's ruling on a motion for a new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." Pursuant to Rule 3:20-1, the trial judge shall not set aside a jury verdict unless "it clearly and convincingly appears that there was a manifest denial of justice under the law." In this context, there is no difference between "miscarriage of justice" and "manifest denial of justice under the law." See Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 3:20-1 (2017) (citing State v. Perez, 177 N.J. 540, 555 (2003)). "[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div.) (alteration in original) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)), certif. denied, __ N.J. __ (2016).

We conclude there was no abuse of discretion by denying defendant's motion for a new trial. The back-seat passenger proffered no information as to the heroin and cocaine found in the glove compartment. The State predicated its charges on defendant

possessing the thirty-six packets of heroin and the fold of cocaine. The judge charged the jury as to the CDS offenses by focusing on the thirty-six bags of heroin and folded white paper containing cocaine. The defense offered no proffered testimony pertaining to the CDS in the glove compartment.

We appreciate defense counsel was unable to communicate with the back-seat passenger before the judge granted the motion for acquittal. That is so because he was still a co-defendant who had legal representation. Defense counsel's inability to do so therefore hampered his proffer during the colloquy with the court before summations of what the witness would say. However, if we analyze whether the judge abused his discretion using the newly discovered evidence standard on motions for a new trial, we reach the same conclusion.

To prevail on this argument, defendant must establish all three of the following criteria. The evidence must be "(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted." State v. Nash, 212 N.J. 518, 549 (2013) (quoting State v. Carter, 85 N.J. 300, 314 (1981)). "[P]rongs one and three are inextricably intertwined." Ibid. As to these prongs, "[t]he power of the

newly discovered evidence to alter the verdict is the central issue[.]" Id. at 549-50 (quoting State v. Ways, 180 N.J. 171, 191-92 (2004)).

The proposed testimony was immaterial to the crimes charged. The focal point of the trial was on the possession of the CDS found in the glove compartment. The proffer, however, was limited to attacking the credibility of the officer. And the post-trial proffer offered no new evidence that had not been presented to the jury.

On the sentencing issue, defendant argues that the judge erred by imposing two DEDR penalties. The State concedes that the third-degree convictions should have been merged because the unlawful possession of the heroin and cocaine occurred simultaneously. Had the court done so, it would have issued only one DEDR penalty. As a result, we remand for merger and imposition of the correct fine.

After considering the record and the briefs, we conclude that defendant's remaining argument, that the judge erred by failing to articulate a reason for the $750 fine, is "without sufficient merit to warrant discussion in a written opinion[.]" R. 2:11-3(e)(2).

Affirmed, but remanded to correct the sentence. We do not retain jurisdiction.