SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0534-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DIM AKOPIAN,

Defendant-Appellant.

Submitted December 8, 2016 – Decided February 22, 2017

Before Judges Hoffman, O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 14-09-1386.

Faugno & Associates, L.L.C., attorneys for appellant (Paul Faugno, on the brief).

Gurbir S. Grewal, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from an August 28, 2015 judgment of conviction following a jury trial. We affirm.

Patrol Officer Mattessich of the New Milford Police Department was in a marked police car on June 6, 2014, when he observed an occupied, white Ford Mustang (Mustang) with New York plates. There had been reports from residents in the area of suspicious activity, which taken together with Mattessich's observations of the occupant's "furtive movements," prompted him to ask Detective Van Saders to surveille the Mustang from unmarked police car. Mattessich turned onto a side street to avoid detection.

Van Saders arrived and observed a black male with a red shirt standing in front of the Mustang. Van Saders positioned his unmarked police car approximately two car lengths behind the Mustang and observed a white Nissan Versa (Nissan) double park on the street next to the Mustang. Van Saders observed the black male lean towards the Nissan, speak with the driver, then make hand-to-hand contact, "two hands touching and then kind of separating with closed hands." The Nissan then drove away at a high rate of speed. Based upon his experience, Van Saders thought this behavior was indicative of a narcotics transaction.

Van Saders followed the Nissan and called Mattessich, instructing him to stop the car. Mattessich then observed the Nissan speed by at a very high rate of speed and make turns in such a manner Mattessich believed the driver was attempting to get

away or avoid him. The driver pulled into an apartment parking lot and quickly exited the vehicle. Mattessich identified defendant as the driver. Mattessich stopped defendant and advised him of his careless driving and suspicious activity. Van Saders arrived moments later.

Mattessich testified defendant appeared very nervous, his legs were shaking, he was sweating profusely, and he had his hands in his pockets. Defendant's nervous behavior led Mattessich to conduct a pat down for officer safety, which revealed a bulge in his front pocket, found to be $200 in a rubber band. Defendant told the officers he had been meeting with a friend to get something to eat. The officers asked permission to search his car, but defendant refused. Defendant was advised a Bergen County K-9 unit was in route to do an exterior check of the car. The exterior check of the vehicle resulted in a positive indication. The officers told defendant his vehicle would be impounded, an application for a search warrant to search the vehicle would be made, and he was free to go. Defendant stated he wanted to go to his apartment, grab something to drink, and come back. When he returned five minutes later, defendant gave the officers his consent to search the vehicle. Defendant was read the New Milford Police Department Consent to Search Form, advising him of his right to deny consent, and defendant signed it.

Officers found $4550 in the glove compartment, and after the K-9 unit searched the interior of the vehicle, officers found a trap in the center console secured by a bolt, where approximately 336 various prescription pills, packaged in groups of ten, were discovered. Defendant was then arrested.

After confirming defendant's address, Mattessich and Van Saders went to defendant's apartment and were met by his then girlfriend, E.W.[1] E.W. did not reside there and was asked to leave in order for the officers to secure the apartment. After obtaining a search warrant, officers entered the apartment and opened a cabinet and found narcotics, a scale, money, and a computer. The officers also found a bag of white powder in the freezer and a Taser in the kitchen. The K-9 unit indicated contraband was located in a furniture ottoman in the living room. After breaking open the ottoman, the officers found a trap compartment containing more pills, money, and a Silver Taurus .44 revolver, ten full metal jacket bullets, and four 380 hollow point bullets. The handgun and bullets were admitted into evidence but no testimony was presented at trial, on either direct or cross-examination, regarding whether the bullets were compatible with the handgun

[1] Non-police witnesses at trial will be referred to by their initials to protect their identity.

found in the ottoman or whether the handgun was found loaded. In total, $10,583 was seized from both defendant's vehicle and home.

A Grand Jury returned an indictment, charging defendant with twenty-seven counts of possession of various controlled dangerous substances, intent to distribute various controlled substances, and possession of a firearm in the course of committing, attempting to commit, or conspiring to commit a drug offense. Defendant's motion to suppress evidence found in his home and vehicle was denied by the trial court.

At trial, a police expert in forensic firearms analysis testified he tested the firearm from defendant's home and found it to be operable. A police expert in narcotics investigations and financial facilitation of criminal activity opined the presence of traps, pills, and empty baggies demonstrated the pills were possessed with intent to distribute. He further testified drug distributors carry a firearm for protection because of the large amount of money involved.

The defense called D.B., who testified he had rented a white Ford Mustang on the date defendant was arrested. D.B. testified he got into an argument with his girlfriend so he called defendant to get something to eat. D.B. testified defendant pulled up alongside his parked Mustang and motioned for him to come around to the driver's side of the door. D.B. informed defendant of his

fight with his girlfriend and defendant told him he had a few errands to run but would be back. D.B. testified they ended their conversation with a "dap," two hands touching, sliding together, then grabbing at the end. E.W. testified defendant always carries money wrapped in a rubber band in his front pocket and never carries a wallet.

Defendant was convicted of two counts of second-degree possession with intent to distribute; four counts of third-degree drug possession and possession with intent to distribute; second-degree possession of a firearm in the course of committing a drug crime; fourth-degree possession with intent to distribute drug paraphernalia; and fourth-degree possession of a stun gun.

Defendant was sentenced to fourteen years of imprisonment with seven years of parole ineligibility. This appeal followed.

On appeal defendant argues:

> I. GIVEN THE FACTS OF THIS CASE AN UNLOADED FIREARM SHOULD NOT HAVE BEEN THE BASIS TO SUBMIT TO THE JURY AN ALLEGED VIOLATION OF N.J.S.A. 2C:39-4.1.
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> II. BY DEFENSE COUNSEL'S FAILURE TO ELICIT FROM ANY WITNESS THAT THE FIREARM WAS UNLOADED CLEARLY CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.
>
> III. THE POLICE PRIOR TO OBTAINING CONSENT TO SEARCH THE DEFENDANT'S VEHICLE DID NOT HAVE A REASONABLE AND ARTICULABLE SUSPICION THAT A CRIME WAS BEING COMMITTED.

IV. THE POLICE CONDUCT VITIATED AGAINST ANY CONSENT GIVEN BY DEFENDANT TO SEARCH HIS VEHICLE.

V. DEFENDANT WAS NEITHER APPRISED OF NOR AWARE OF HIS UNEQUIVOCAL RIGHT TO REFUSE CONSENT.

I.

Defendant argues his conviction cannot stand because the firearm found in his home was unloaded, and does not provide the basis for a violation of N.J.S.A. 2C:39-4.1. We disagree.

N.J.S.A. 2C:39-4.1(a) states, "[a]ny person who has in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit" an enumerated drug offense, "is guilty of a crime of the second degree." The statute does not differentiate between loaded or unloaded firearms but simply states the possession of a firearm used in furtherance of a drug crime violates the statute. Based upon the plain meaning of the statute, defendant's possession of a firearm, loaded or not, violated the statute.

We have never held a firearm must be loaded in order for a defendant to be guilty of N.J.S.A. 2C:39-4.1. We have stated "the loaded or unloaded status of a firearm has not been a factor in offenses involving weapons." State v. Jules, 345 N.J. Super. 185, 191 (App. Div. 2001), certif. denied, 171 N.J. 337 (2002). In Jules, a defendant argued an unloaded firearm in the commission

of an attempted robbery should not warrant imposing a sentence pursuant to the No Early Release Act (NERA). Id. at 187. We found a "firearm to be no less 'ordinarily capable' of injury by virtue" of being unloaded. Id. at 192. We found an unloaded but operable firearm to be within the definition of a deadly weapon pursuant to the NERA. Ibid. Moreover, in State v. Bill, 194 N.J. Super. 192, 198 (App. Div. 1984), we found "the Legislature intended that both loaded and unloaded firearms be considered when ascertaining guilt for pointing a firearm at another."

Defendant asks us to draw guidance from our Supreme Court's specific emphasis on the firearm being loaded when it found a defendant guilty of N.J.S.A. 2C:39-4.1(a) in State v. Spivey, 179 N.J. 229 (2004). The Spivey holding does not rest on whether the firearm was loaded. The Court in Spivey found a defendant who was arrested outside of his home guilty of N.J.S.A. 2C:39-4.1(a), as he had constructive possession of a loaded .22 caliber revolver and drugs found in his kitchen cabinet. Id. at 237. Nothing in that opinion infers had the firearm been unloaded, the Court would have come to a different conclusion. Whether or not defendant's firearm was in fact unloaded bears no relevance to whether defendant was guilty under N.J.S.A. 2C:39-4.1.

II.

We reject defendant's assertion his trial counsel was ineffective for failing to elicit exculpatory evidence regarding the weapon being unloaded and the bullets in his home being incompatible with the firearm.

This court does not normally hear ineffective assistance of counsel claims on direct appeal. However, when the trial record discloses all facts essential to a defendant's ineffective assistance claim, the defendant may raise the claim on direct appeal. State v. Allah, 170 N.J. 269, 285 (2009).

Nonetheless, defendant has not presented any evidence his trial counsel acted outside the range of professionally competent assistance. Trial counsel cross-examined each witness, presented witnesses on behalf of the defense, and was engaged throughout the trial. Additionally, as previously stated, there is no case law requiring the firearm be loaded in order to be found guilty of N.J.S.A. 2C:39-4.1. "The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel." State v. Worlock, 117 N.J. 596, 625 (1990).

III.

We also reject defendant's argument the trial judge erred in finding reasonable and articulable suspicion justifying the police's request for consent to search defendant's car.

To justify an investigative stop, there must be "specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity." State v. Pineiro, 181 N.J. 13, 20 (2004) (citing State v. Nishina, 175 N.J. 502, 510-11 (2003)). Whether or not there is a reasonable suspicion is a fact-sensitive inquiry. Id. at 22. We view the totality of the circumstances, including considering an officer's experience and knowledge, in determining whether the officer had reasonable suspicion to conduct the investigatory stop. Ibid. An officer needs to articulate something more than a "hunch," but only has to show "some minimal level of objective justification" for the stop. United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (citing Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 217, 104 S. Ct. 1758, 1763, 80 L. Ed. 2d 247, 255 (1984)).

Our review of the record finds support for the trial judge's determination the officers had a reasonable and articulable suspicion defendant was involved in criminal activity when they stopped and detained him for a limited time. Reports of suspected drug activity in that neighborhood, observation of defendant's "hand-to-hand" contact with D.B., then driving away at a high rate of speed, as well as the level of experience both officers had in

narcotics investigations formed the basis of their suspicion to stop defendant.

"In order for a consent to search a motor vehicle . . . to be valid, law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle." State v. Carty, 170 N.J. 632, 635 (2002). There is no bright-line rule for how long an investigative detention can last, but there are factors to help determine whether the investigative stop has become a de facto arrest. Those factors include whether the delay was necessary for the legitimate investigation of the officers, the degree of fear and humiliation the officers conduct prompts, whether or not the defendant was transported to another location, and whether the defendant was handcuffed and placed in a police car. State v. Dickey, 152 N.J. 468, 479 (1998) (citing United States v. Bloomfield, 40 F.3d 910, 917 (8th Cir. 1994), cert. denied, 514 U.S. 1113, 115 S. Ct. 1970, 131 L. Ed. 2d 859 (1995)).

Here, the investigative stop was not unduly intrusive, nor was it a de facto arrest. After defendant was initially stopped, he was informed the basis for the stop was the suspicious drug activity and careless driving. Based upon defendant's nervous behavior and the bulge in his front pocket, defendant was patted down and found to have $200 in a rubber band. After asking

defendant for consent to search his vehicle, which he refused, a K-9 unit conducted a sweep of the vehicle's exterior. Defendant was advised his vehicle would be impounded in order to obtain a search warrant. Defendant was told he was free to go, at which time he left to go back to his apartment, only to come back a few minutes later and give the officers consent to search his vehicle.

Defendant argues his nervous behavior should not have been the basis for the continued detention. A police officer should consider "whether a defendant's actions are more consistent with innocence than guilt; however, simply because a defendant's actions might have some speculative innocent explanation does not mean that they cannot support articulable suspicions if a reasonable person would find the actions consistent with guilt." State v. Mann, 203 N.J. 328, 339 (2010) (quoting State v. Arthur, 149 N.J. 1, 11 (1997)). The Court in Mann affirmed the trial court, which found a defendant's nervous behavior alone would not warrant an investigatory stop; however, when viewing all of the circumstances, there was reasonable suspicion warranting the stop. Id. at 339-40. Here, defendant's nervous behavior was not the only basis for the detention.

IV.

Defendant argues by "threatening" to bring a drug-sniffing dog to the scene, defendant's consent for the officers to search his vehicle was not voluntary. We disagree.

As previously stated, the Court in Carty, supra, 170 N.J. at 635, held in order for consent to search a vehicle to be valid, there must be reasonable and articulable suspicion of criminal activity. The State bears the burden of "demonstrating knowledge on the part of the person involved" that he knew he had the right to refuse consent to the search. State v. Johnson, 68 N.J. 349, 354 (1975); see State v. King, 44 N.J. 346, 352-53 (1965) (listing factors to consider in determining whether consent to search was coerced).

Defendant was not handcuffed, did not specifically deny guilt, nor was he under arrest when consent was obtained. When defendant refused consent initially, he was not threatened with arrest; he was simply told the K-9 unit was on its way. Additionally, once the K-9 unit made a positive indication, defendant was told he was free to go and the officers would be impounding his car. There is little evidence suggesting unlawful coercion in defendant's consent to search.

V.

Finally, defendant argues the standard language on the New Milford Police Department Consent to Search Form is ambiguous and he was not advised of his right to refuse consent; therefore, the consent to search was not made knowingly.

The State has the burden "of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." Johnson, supra, 68 N.J. at 354. The State has met its burden. As previously mentioned, defendant initially refused consent to search his vehicle. After the K-9 unit made a positive indication of the exterior of the vehicle, defendant went into his home, only to come back minutes later and give consent. Once defendant gave consent, he was read and subsequently signed the New Milford Police Department Consent to Search Form, which states, "I have been advised that the Officers do not possess a search warrant and of my right to refuse to this search or to withdraw my consent at any time during the search." Defendant argues the language "right to refuse to this search" is ambiguous and does not tell a defendant he has the "right to refuse consent." We disagree. The language in the form is clear and is not ambiguous. Defendant was advised of his right to refuse consent when he was read the form and subsequently signed it.

Affirmed.