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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0825-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIWAN M. FLAGLER, a/k/a
TUQAUN ASHLEY,

Defendant-Appellant.

Submitted March 22, 2017 – Decided April 6, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New
Jersey, Law Division, Hudson County,
Indictment No. 14-10-1779.

Joseph E. Krakora, Public Defender, attorney
for appellant (Stephen W. Kirsch, Assistant
Deputy Public Defender, of counsel and on the
brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Eric P. Knowles,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Tiwan M. Flagler appeals from the denial of his motion to suppress evidence seized after a motor vehicle stop and from his sentence. On appeal, defendant raises the following contentions:

POINT I

THE ORDER DENYING THE MOTION TO SUPPRESS SHOULD BE REVERSED AND THE MATTER REMANDED FOR A NEW MOTION HEARING IN FRONT OF A DIFFERENT JUDGE. THE MOTION JUDGE INEXPLICABLY DECLARED THAT SHE WAS OBLIGATED TO "VIEW THE TESTIMONY AND THE FACTS IN THE LIGHT MOST FAVORABLE TO THE . . . STATE" WHEN EVALUATING A WARRANTLESS SEARCH, THEREBY IRREPARABLY TAINTING ALL OF HER OTHER FINDINGS ON THE MATTER.

POINT II

THE MATTER SHOULD BE REMANDED FOR RESENTENCING.

We derive the following facts from the record. A grand jury indicted defendant for second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count one); second-degree possession of a firearm, N.J.S.A. 2C:39-4.1(a) (count two); fourth-degree possession of dum-dum bullets, N.J.S.A. 2C:39-3(f) (count three); third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (count four); first-degree possession with the intent to distribute a (CDS), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count five); third-degree distribution of CDS within 1,000 feet of school property, N.J.S.A.

2C:35-7 (count six); and third-degree receiving stolen property, N.J.S.A. 2C:20-7 (count seven). The charges stemmed from a handgun and Phencyclidine (PCP) the police found on defendant after stopping the vehicle in which he was a passenger for allegedly driving through a red light.

Defendant filed a motion to suppress, arguing that the stop was illegal because the driver, Jasmar Boyd, did not drive through a red light. Defendant also argued there was no legal basis for the police to order him from the vehicle.

Police Officer Gabriel Moreano from the Jersey City Police Department testified at the motion hearing that at approximately 8:30 p.m. on May 18, 2014, he and Officer Christopher Viera were traveling in an unmarked patrol car near the area of Clinton Avenue and Kennedy Boulevard. As they approached the intersection at Clinton Avenue and Kennedy Boulevard, they saw a vehicle slow down and then continue through the intersection without stopping for the red light. They activated their overhead lights, followed behind the vehicle, and stopped it. Upon approaching the vehicle, they smelled a strong odor of PCP emanating from it. Officer Viera asked Boyd to exit the vehicle after Boyd could not present a driver's license. A pat down search of Boyd revealed nothing noteworthy. Officer Moreano then asked defendant to exit the vehicle. Upon exiting, defendant advised the officer there was a

handgun in his right cargo pocket and PCP in his right front pocket. The officer placed defendant under arrest and seized the handgun and PCP. Boyd testified that the light was green at the time he drove through the intersection.

In denying the motion, the motion judge stated that "because this is a motion to suppress, the court must view the testimony and the facts in the light most favorable to the non-moving party, which would be the State here[.]" The judge then applied this standard in making credibility determinations.

The judge applied the wrong standard in assessing the State's burden of proof. To justify a warrantless search, the State must prove by a preponderance of the evidence that the search fell within one of the exceptions to the warrant requirement. State v. Brown, 216 N.J. 508, 527 (2014) (citation omitted). Because the judge applied the wrong standard and has made credibility determinations, we are constrained to vacate the denial of defendant's motion to suppress and remand to a different judge for a new suppression hearing. If defendant prevails, he shall be afforded an opportunity to withdraw his guilty plea. See R. 3:9-3(f).

We next address defendant's sentence. Following the denial of his motion, defendant pled guilty to second-degree unlawful possession of a weapon (count one), and first-degree possession

with intent to distribute a CDS (count five). On count one, the State agreed to recommend a mandatory extended-term of ten years with a five-year period of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c), and a concurrent term of ten years with a three and one-half-year period of parole ineligibility on count two.

The State specifically reserved the right to request imposition of the sentence consecutively to a thirty-year sentence defendant was then serving for a prior armed robbery conviction. The State noted that defendant committed the present offenses while out on bail for the armed robbery.

At sentencing, the judge found aggravating factor N.J.S.A. 2C:44-1(a)(3), "[t]he risk that the defendant will commit another offense[,]" based on evidence that every year since 2004, defendant either committed a new offense or violated his probation. The judge noted that defendant's offenses continued to escalate, and therefore, his risk to commit another offense was high.

The judge found aggravating factor N.J.S.A. 2C:44-1(a)(6), "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted[,]" based on defendant's extensive juvenile criminal history, and his extensive adult criminal history, which included convictions for aggravated assault, armed robbery, possession of a weapon for an

unlawful purpose, unlawful possession of a weapon, possession of a CDS, and possession with intent to distribute a CDS.

The judge also found aggravating factor N.J.S.A. 2C:44-1(a)(9), "[t]he need for deterring the defendant and others from violating the law[,]" based on defendant's failure to be deterred by his prior terms of imprisonment and probation. The judge found no mitigating factors. The judge sentenced defendant to an aggregate ten-year term of imprisonment with a five-year period of parole ineligibility to run consecutively to the armed robbery sentence. In imposing the consecutive sentence the judge stated,

In essence to allow the sentence to run concurrent to the sentence he is currently serving is basically telling defendant that you can continue to commit additional crimes and have those crimes serve as free crimes because the sentence you were serving on a more serious offense happens to be more serious and so the additional crimes that you commit thereafter aren't as serious and therefore should basically be free crimes.

The court does not find that that is appropriate, nor does the court find that there is any basis in the law to warrant such a concurrent sentence.

On appeal, defendant does not challenge the judge's findings of aggravating and mitigating factors. Rather, he contends that the judge failed to address the factors in State v. Yarbough, 100 N.J. 627, 630 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986) in imposing the consecutive sentence.

We review a judge's sentencing decision under an abuse of discretion standard. State v. Fuentes, 217 N.J. 57, 70 (2014).

As directed by the Court, we must determine whether:

- (1) the sentencing guidelines were violated;
- (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or
- (3) the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.

[Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

In determining whether consecutive sentences are appropriate, New Jersey courts have applied the guidelines delineated in Yarbough, supra, 100 N.J. at 643-44:

- (1) there can be no free crimes in a system for which the punishment shall fit the crime;
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
 - (a) the crimes and their objectives were predominantly independent of each other;
 - (b) the crimes involved separate acts of violence or threats of violence;
 - (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and

place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and

(6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.

The court is to apply these factors qualitatively, rather than quantitatively. A consecutive sentence can be imposed, even if a majority of the Yarbough factors support concurrent sentences. State v. Carey, 168 N.J. 413, 427-28 (2001). The fairness of the overall sentence should be considered in reviewing the imposition of consecutive sentences. State v. Sutton, 132 N.J. 471, 485 (1993).

Although "[t]he 'no free crimes' guideline does not require the court automatically to impose consecutive sentences for multiple offenses[,]" State v. Rogers, 124 N.J. 113, 121 (1991), the Court has recognized that the first guideline tilts in favor

of the imposition of consecutive sentences. Carey, supra, 168 N.J. at 423. The third guideline lists five facts that the court should consider, including whether the crimes were independent of one another, involved separate acts, were committed at different times or places as opposed to a single period of behavior. Yarbough, supra, 100 N.J. at 643-44.

Reviewing the Yarbough factors qualitatively, we discern no reason to disturb the consecutive sentence. Defendant's crimes were completely independent of one another, as defendant was out on bail for the armed robbery when he committed the present crimes. In addition, the crimes were committed at different times and places, did not indicate a single period of criminal behavior, and the armed robbery conviction involved a victim.

The denial of defendant's motion to suppress is reversed and the matter is remanded for further proceedings consistent with this opinion. Defendant's sentence is affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION