SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3703-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD HARRIS,

Defendant-Appellant.

Submitted October 17, 2017 – Decided December 21, 2017

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 14-07-0826 and 14-07-0813.

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

Christopher S. Porrino, Attorney General, attorney for respondent (Sarah C. Hunt, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant was tried before a jury and found guilty of second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(b), and other offenses. He also pled guilty to second-degree certain persons not to have weapons, contrary to N.J.S.A. 2C:39-7(b). He appeals from a judgment of conviction dated March 23, 2016. We affirm in part, reverse in part, and remand for resentencing.

I.

Defendant was charged under Indictment No. 14-07-0813 with: second-degree unlawful possession of a weapon, a .25 caliber automatic pistol, N.J.S.A. 2C:39-5(b) (count one); fourth-degree unlawful possession of a weapon, a sword, N.J.S.A. 2C:39-5(d) (count two); two counts of second-degree possession of a weapon during the distribution of a controlled dangerous substance (CDS), N.J.S.A. 2C:39-4.1(a) to (c) (counts three and four); three counts of third-degree possession of CDS, specifically, heroin, Oxycodone, and Xanax, N.J.S.A. 2C:35-10(a)(1) (counts five, seven, and nine); three counts of third-degree possession of CDS with the intent to distribute, specifically, heroin, Oxycodone, and Xanax, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) to (13) (counts six, eight, and ten); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count eleven). In addition, defendant was charged

under Indictment No. 14-07-0826 with second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b).

The CDS distribution-related charges in counts three, four, six, eight, and ten of Indictment No. 14-07-0813 were dismissed. Defendant was tried before a jury on the remaining charges in that indictment.

At the trial, Officer George Vit of the South Brunswick police testified that at around 10:40 p.m. on November 9, 2013, he observed defendant driving a Chevrolet Trailblazer out of a hotel with "no regard for safety." Defendant's vehicle was swerving back and forth. Vit turned on the overhead lights on his marked police vehicle, activating his mobile video recorder (MVR). Vit followed defendant, noting that he was swerving over the dashed lines in the road and coming close to hitting the concrete divider.

Vit turned on his vehicle's sirens, but defendant did not pull over. Defendant stopped at a red light, but when the light turned green, he continued driving. Vit activated the public address system in his vehicle and told defendant to "pull over to the right." Defendant continued to drive without stopping for approximately one mile, before driving up onto a curb, then back onto the road, and ultimately coming to a stop.

Vit ran a check on the plates of the car defendant was driving, and it showed the car was registered in the name of a

"middle-aged male" named M.Z.[1] Vit then called for a backup unit to assist him, and he approached defendant's vehicle on the driver's side. Vit saw there was only one person in the car, and he was not a middle-aged man, but a younger "black male."

Vit also observed a white powdery substance underneath defendant's nose. Vit asked defendant for his license, registration, and proof of insurance. Vit said defendant was moving about, making it look like he was complying with the request, "but he was just acting busy." Vit asked defendant to exit the car and he grabbed the door handle, but it was locked.

The vehicle began to roll forward, and Vit thought defendant was trying to get away or run him over. Vit drew his weapon and told defendant to put the vehicle in "park." Defendant complied and unlocked the door. Vit told defendant to exit and walk to the rear of the car. Defendant got out but he walked to the passenger side of the car. Vit thought defendant might try to flee.

Vit was uneasy and frisked defendant for weapons. His pat down revealed a cylindrical object that felt suspicious. Vit pulled the object out. It was later determined to be a container with twenty-two tablets of Oxycodone. Vit then administered a sobriety test to defendant. He testified that defendant needed to be

[1] We use initials to protect the identity of this individual.

continuously corrected, was not following instructions, and "just started walking around." During the test, Officer John Niper arrived on the scene.

Vit approached defendant with handcuffs and told defendant he was under arrest for driving while intoxicated. Defendant ran off, with Vit and Niper in pursuit. Niper caught defendant. Vit then handcuffed defendant and searched his person, finding $745 in cash. Vit had injured his ankle while pursuing defendant, and he requested additional assistance. Other officers responded. Vit placed defendant in an officer's patrol car. Defendant was transported to the police station, and Vit called a towing company to retrieve defendant's car. Vit deactivated his MVR.

Vit and Officer Gassman checked the car for any form of identification so that they could inform the tow-truck driver who owned the car. Immediately after opening the car door, Gassman noted a handgun between the passenger seat and center console. Gassman testified that he was one hundred percent certain the gun was between the passenger seat and the center console, and he would "bet [his] five-year-old's life on it." Gassman secured the weapon by clearing the chamber and "dropping the magazine."

Vit continued to look in the car with a flashlight. He found another fully loaded magazine where the gun had been recovered. Vit had the car towed to police headquarters. There, Vit had

defendant provide a urine sample, which came back positive for Oxycodone, Xanax, and cocaine.

Vit conducted a further search of the vehicle. He found: (1) two amphetamine pills in the cup-holder; (2) a marijuana grinder in the center console; (3) a .25 caliber bullet on the passenger-side seat; (4) a five-hour energy bottle that contained Xanax pills; (5) a "sword along the backseat"; (6) four folds of heroin beneath the passenger seat; and (7) twenty-two shotgun shells underneath the backseat.

On cross-examination, defendant's attorney asked Vit whether he had ever investigated a "hotel party" in South Brunswick where "somebody rents a room and they have a lot of people go there." Vit responded that he had. He said the police usually investigate a hotel party if hotel management calls and informs the police a party is out of control. Vit said he did not investigate the hotel that defendant was seen leaving because he was "kind of tied up with [his] arrest." When asked if all the other members of the South Brunswick police force were tied up as well, Vit responded "I don't know what the other officers were doing."

Sergeant James Napp was responsible for checking the .25 caliber gun, two magazines, and eleven cartridges for fingerprints. Napp testified that he was unable to retrieve any fingerprints from these items. He explained to the jury the various

reasons why this was not unusual, given the materials that the items were made of.

M.Z., the owner of the car defendant was driving when he was arrested, testified. He stated that he is the grandfather of defendant's son and that his daughter had possessed the car for two to three years before defendant's arrest. M.Z. further testified that the gun, sword, and drugs found in the vehicle did not belong to him.

Defendant was found not guilty on counts two (unlawful possession of a weapon – a sword) and five (possession of CDS - heroin). He was convicted on counts one (unlawful possession of a weapon – a handgun), seven (possession of CDS - Oxycodone), nine (possession of CDS - Xanax), and eleven (resisting arrest). Defendant then pled guilty to certain persons not to possess weapons, as charged in Indictment No. 14-07-0826.

Defendant was sentenced on March 18, 2016. On the charges in Indictment No. 14-07-0813, the judge sentenced defendant to an eight-year prison term, with four years of parole ineligibility, on count one. The judge merged counts nine and seven, and sentenced defendant to a consecutive five-year term, with two years of parole ineligibility on count seven. The judge also imposed a one-year concurrent term on count eleven. In addition, the judge sentenced defendant to a concurrent six-year term, with five years of parole

ineligibility, for the certain persons offense charged in Indictment No. 14-07-0826. This appeal followed.

On appeal, defendant argues:

> POINT I
> THE JUDGE IMPROPERLY PREVENTED DEFENSE COUNSEL FROM ARGUING TO THE JURY THAT THE POLICE WERE TOO EASILY SATISFIED THAT DEFENDANT WAS THE POSSESSOR OF ALL THE CONTRABAND IN THE CAR WHEN THEY COULD HAVE USED BROADER INVESTIGATIVE TECHNIQUES.
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> POINT II
> DEFENDANT POSSESSED A WEAPON DURING THE GUN-AMNESTY PERIOD OF LATE 2013; CONSEQUENTLY, HIS CONVICTION FOR POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE SHOULD BE REVERSED (PARTIALLY RAISED BELOW).
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> POINT III
> THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE.

II.

Defendant argues that the trial judge erred by preventing his attorney from arguing to the jury in summation that while he was found with twenty-two tablets of Oxycodone, the police were otherwise too easily satisfied that defendant possessed the remaining contraband recovered from the vehicle. Defendant notes that on cross-examination, Officer Vit was questioned about hotel parties and he conceded that he and the other South Brunswick police officers did not go back to investigate whether such a party had taken place at the hotel from which defendant was seen leaving on the night of his arrest.

In his closing argument, defense counsel challenged Vit's credibility. He then stated

> Officer Vit . . . he was the first guy that testifies. He said he's . . . been working in . . . South Brunswick for many years, he knows about these hotel parties as I alluded to before. He never went back and checked it out . . . . Could be weapons, there could be drugs, there could be knives . . . . Obtain some video, obtain some statements, obtain some witnesses . . . . Let's do a proper investigation. But, see, when you got a guy, a young black kid with dreadlocks, there's no reason to do anything else, and that's what happened here. There's no reason to do anything else, just stop right there, and that's what they did.

The assistant prosecutor objected to these remarks, asserting that there was no evidence of any racial discrimination in the case. The judge agreed, pointing out that Vit had testified he could not see who was operating the vehicle until he walked up to the window of the car after he stopped it. Defense counsel continued, asserting:

> I'm not saying that they profiled him at night when he's driving in the car because they couldn't see it was him. I'm saying once they saw it was him they (indecipherable) . . . . If that was Donald Trump, I told you, or Hillary Clinton in the front seat of that car, you tell me they're going to handle it the same way. Tell me that. Go ahead and tell me that with a straight face.

The assistant prosecutor objected again and the trial judge sustained the objection.

In the context of summations, it is understood that "[c]ounsel's arguments are expected to be passionate, 'for indeed it is the duty of a trial attorney to advocate.'" Jackowitz v. Lang, 408 N.J. Super. 495, 504-05 (quoting Geler v. Akawie, 358 N.J. Super. 437, 463 (App. Div.), certif. denied, 177 N.J. 223 (2003)). However, "[t]he scope of defendant's summation argument must not exceed the 'four corners of the evidence.'" State v. Loftin, 146 N.J. 295, 347 (1996) (citing State v. Reynolds, 41 N.J. 163, 176, cert. denied, 377 U.S. 1000 (1964)).

"A trial court must exclude from summation those arguments that the evidence does not reasonably support." State v. Reddish, 181 N.J. 553, 629 (2004). Thus, "it is proper for a trial court to preclude references in closing arguments to matters that have no basis in the evidence." State v. Jones, 308 N.J. Super. 174, 185 (App. Div.), certif. denied, 156 N.J. 380 (1998).

We are convinced that the trial judge did not err by sustaining the prosecutor's objection to the aforementioned comments of defendant's attorney. As the judge found, the evidence did not reasonably support an inference that Vit and the other officers decided not to conduct an investigation at the hotel because they had arrested an African-American male. There was no evidence that there had been a party at the hotel or that defendant had attended it. There was no support in the evidence to suggest

that the police would have investigated the hotel if defendant had not been an African-American. Furthermore, there was no evidence from which an inference of racial discrimination could have been reasonably drawn.

III.

Next, defendant argues that his conviction for unlawful possession of a handgun should be reversed because he possessed the weapon during the amnesty period established by L. 2013, c. 117, § 1, which provides:

> Any person who has in his possession a handgun in violation of subsection b. of [N.J.S.A.] 2C:39-5 or a rifle or shotgun in violation of subsection c. of [N.J.S.A.] 2C:39-5 on the effective date of this act may retain possession of that handgun, rifle, or shotgun for a period of not more than 180 days after the effective date of this act.
>
> During that time period, the possessor of that handgun, rifle, or shotgun shall:
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> 1) transfer that firearm to any person lawfully entitled to own or possess it; or
>
> 2) voluntarily surrender that firearm pursuant to the provisions of [N.J.S.A.] 2C:39-12.
>
> [(emphasis added).]

In this case, defendant made a motion for acquittal at trial pursuant to Rule 3:18-1. He argued that the State had not presented sufficient evidence to support his conviction. Defendant did not,

however, raise the amnesty issue. In any event, defendant's argument is entirely without merit.

Here, defendant was convicted under N.J.S.A. 2C:39-5(b), which makes it an offense to possess a handgun without first obtaining a permit to carry. In State v. Harper, the Court held that "[a] defendant charged under that statute for possession during the amnesty period may raise the amnesty law as an affirmative defense." 229 N.J. 228, 241 (2017). Defendant must, however, establish:

> 1) that he possessed a handgun in violation of N.J.S.A. 2C:39-5(b) or (c) "on the effective date of this act" -- in other words, that he unlawfully possessed a handgun on August 8, 2013; and
>
> 2) that he took steps to transfer the firearm or voluntarily surrender it during the 180-day period beginning on August 8, 2013 . . . that is, before authorities brought any charges or began to investigate his unlawful possession.
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> [Ibid. (citing L. 2013, c. 117, § 1; N.J.S.A. 2C39-12).]

A defendant must also give pretrial notice of his intention to rely on the amnesty provision. Ibid. (citing R. 3:12-1). Moreover, "[a]s with other affirmative defenses, a defendant must timely assert the defense or it is waived." Id. at 242.

Here, defendant waived his right to raise this affirmative defense on appeal because he failed to assert the defense prior

to trial. Even if he had timely asserted the defense in the trial court, defendant did not present any evidence showing that he (1) unlawfully possessed the gun on August 8, 2013 — the effective date of the amnesty law, or (2) that he took steps to transfer or voluntarily surrender the gun before he was charged under N.J.S.A. 2C:39-5(b). Therefore, defendant failed to establish either of the criteria under Harper for the amnesty defense.

IV.

Defendant further argues that his sentences are manifestly excessive. In this case, the judge found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will commit another offense); six, N.J.S.A. 2C:44-1(a)(6) (extent of defendant's prior criminal record); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law). The judge found no mitigating factors.

As stated previously, with regard to the charges in Indictment No. 14-07-0813, on count one (unlawful possession of a handgun), the judge sentenced defendant to an eight-year prison term, with four years of parole ineligibility. The judge merged count nine with count seven (possession of CDS, Oxycodone), and sentenced defendant on that count to a consecutive five-year term, with two years of parole ineligibility. The judge imposed a concurrent one-year term on count eleven (resisting arrest). In addition, the

judge sentenced defendant to a concurrent six-year term, with five years of parole ineligibility, on the certain persons offense, charged in Indictment No. 14-07-0826.

Defendant contends the judge improperly omitted two mitigating factors from his analysis. Defendant argues that the balancing of the aggravating and mitigating factors does not support the parole-ineligibility periods imposed by the judge. He also argues that the judge erred because he did not engage in an analysis of the relevant factors for determining whether a sentence should be concurrent or consecutive.

An appellate court's review of the trial court's "sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). When reviewing a sentence, we consider "whether the trial court has made findings of fact that are grounded in competent, reasonably credible evidence and whether the 'factfinder [has applied] correct legal principles in exercising its discretion.'" Ibid. (quoting State v. Roth, 95 N.J. 334, 363 (1984)).

An appellate court should not set aside a trial court's sentence "unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s]

the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting Roth, 95 N.J. at 364-65).

Defendant argues that the judge erred by failing to find mitigating factor one, N.J.S.A. 2C:44-1(b)(1) (defendant's conduct did not cause or threaten serious harm); and mitigating factor two, N.J.S.A. 2C:44-1(b)(2) (defendant did not contemplate that his conduct would cause or threaten serious harm). Defendant asserts that no one was injured or threatened by his possession of the gun or the CDS. We disagree.

Possession of a handgun and illegal drugs, by their very nature, threaten serious harm. Moreover, a defendant who engages in this conduct can fairly be said to have contemplated that it would cause or threaten serious harm. See State v. Tarver, 272 N.J. Super. 414, 434-35 (App. Div. 1994). We therefore reject defendant's contention that the judge erred by failing to find mitigating factors one and two.

Defendant also argues that the judge erred by failing to properly balance the aggravating factors and mitigating factors in establishing the periods of parole ineligibility. On count one, the judge was required to impose a period of parole ineligibility equal to one-half of the overall term, or forty-two months, whichever is greater. N.J.S.A. 2C:43-6(c). Here, the judge sentenced defendant to eight years of incarceration. Therefore,

the four-year period of parole ineligibility on count one was the legal minimum and was consistent with the sentencing guidelines.

On count seven, the judge sentenced defendant to a two-year period of parole ineligibility. The judge was authorized to impose a period of parole ineligibility "not to exceed one-half of the term set" if the judge is "clearly convinced that the aggravating factors substantially outweigh the mitigating factors." N.J.S.A. 2C:43-6(b).

Although the judge did not articulate his reasons for the two-year period of parole ineligibility, the judge found no mitigating factors. Therefore, the aggravating factors substantially outweighed the mitigating factors. Thus, the two-year parole ineligibility period imposed on count seven was consistent with the sentencing guidelines and not an abuse of the judge's sentencing discretion.

Defendant further argues that the judge erred by imposing a consecutive sentence on count seven. In State v. Yarbough, 100 N.J. 627, 644 (1985), cert. denied, 475 U.S. 1014, 106 (1986), the Court established criteria to be applied by the trial courts in determining whether to impose a consecutive sentence. Among other things, the trial court should consider whether

> 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.

[Ibid.]

"A trial court is expected to give 'a separate statement of reasons for its decision to impose consecutive sentences.'" State v. Molina, 168 N.J. 436, 442 (2001) (quoting State v. Miller, 108 N.J. 112, 122 (1987)).

Here, the trial judge did not provide any reasons for imposing a consecutive sentence on count seven. Therefore, we are constrained to reverse and remand for resentencing on count seven. On remand, the judge shall consider the Yarbough factors. If the judge decides that a consecutive sentence should be imposed, he shall provide a statement of reasons for that decision.

Accordingly, defendant's convictions and the sentences imposed on counts one and eleven of Indictment No. 14-07-0813, and for the certain persons offense charged in Indictment No. 14-07-0826 are affirmed. The sentence imposed on count seven of

Indictment No. 14-07-0813 is reversed and the matter remanded to the trial court for resentencing on that count.

Affirmed in part, reversed in part, and remanded for resentencing on count seven of Indictment No. 14-07-0813. We do not retain jurisdiction.