SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4025-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JACQUIM LOVELY, a/k/a JACQUIN LOVLEY and YASIM ANDERSON,

Defendant-Appellant.

Submitted March 21, 2017 – Decided April 21, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment Nos. 13-07-1396 and 13-09-1756.

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

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Erin M. Campbell, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Jacquim Lovely of (1) third-degree possession of heroin, N.J.S.A. 2C:35-10; (2) third-degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5;

and (3) third-degree possession of heroin with intent to distribute in a school zone, N.J.S.A. 2C:35-7. Thereafter, defendant pled guilty to a separate charge of third-degree possession of heroin with intent to distribute in a school zone, N.J.S.A. 2C:35-7; and third-degree bail jumping, N.J.S.A. 2C:29-7.

On the convictions for possession of heroin with intent to distribute in a school zone, defendant was sentenced to concurrent terms of ten years in prison with five years of parole ineligibility. On the other drug-related convictions, defendant was sentenced to terms of three and five years in prison, which were run concurrent to each other and to the ten-year sentences. On the conviction for bail jumping, defendant was sentenced to a consecutive term of three years in prison. Thus, defendant's aggregate sentence was thirteen years in prison with five years of parole ineligibility.

Defendant appeals from his convictions arguing that, at trial, the State's drug expert gave improper opinions that usurped the role of the jury. Defendant also contends that his sentence was excessive, he was not given full jail credits, and certain of his convictions should have merged. We reject defendant's arguments concerning the expert testimony because the opinions offered in this case stayed within permissible bounds. Thus, we affirm defendant's convictions. We also reject defendant's

argument that his sentences were excessive. We remand, however, for resentencing because, as the State concedes, defendant was not given the full amount of jail credits and his convictions for possession of heroin and possession of heroin with intent to distribute should have merged with his conviction for possession of heroin with intent to distribute in a school zone.

I.

Defendant's convictions arose out of his possession of heroin on two separate occasions, one in April 2013, and another in May 2013. Under Indictment 13-07-1396, defendant was charged with third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count two); and third-degree possession of heroin with intent to distribute in a school zone, N.J.S.A. 2C:35-5(a)(1) and -7 (count three). Those charges all related to actions alleged to have occurred on April 3, 2013.

Under Indictment 13-09-1756, defendant was charged with five crimes: third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count two); third-degree possession of heroin with intent to distribute in a school zone, N.J.S.A. 2C:35-5(a)(1) and -7 (count three); third-degree distribution of heroin, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count

four); and third-degree distribution of heroin in a school zone, N.J.S.A. 2C:35-5(a)(1) and -7 (count five). Those charges all relate to actions alleged to have occurred on May 24, 2013.

In September 2014, a jury trial was conducted on the five charges under Indictment 13-09-1756. During that four-day trial, the State presented evidence that included testimony from a police officer and a drug expert.

On May 24, 2013, Jersey City Police Officer Ishmael Cortes was conducting surveillance in an unmarked car. In the early afternoon, Cortes observed a man, later identified as H.W., walking on the street. Cortes saw H.W. look at his cell phone and then look around. Shortly thereafter, Cortes saw another man, later identified as defendant, walk up to and speak with H.W. Cortes then observed H.W. hand defendant money and defendant hand H.W. an object. Defendant and H.W. then walked away from each other in separate directions.

Cortes contacted other officers and directed them to stop both H.W. and defendant. When the other officers responded to the scene, they approached H.W. and defendant and saw H.W. drop one bag and defendant drop twelve bags. The bags were recovered and, at trial, the parties stipulated that the contents of the bags tested positive for heroin.

One of the principal issues at trial was whether defendant possessed the heroin for his own use, as he contended, or whether he possessed the heroin with the intent to distribute, as the State contended. The State called Sergeant Christopher Robateau to testify as an expert in the field of "narcotics and narcotics distribution." Defendant's counsel stipulated to Sergeant Robateau's qualifications and did not object to any of his testimony. Using the model instruction, the trial court instructed the jury on the expert testimony, explaining that the jury was not bound by such expert opinion, they should weigh the testimony, and they could accept or reject the expert's opinions.

Sergeant Robateau then explained to the jury how heroin was generally packaged and sold in Jersey City. In that regard, he explained that heroin in Jersey City was usually sold in powder form in "small glassine envelopes or . . . bags[,]" which generally sold for $10 each bag. The sergeant also opined that twelve bags of heroin could sell for about $120, but he acknowledged that the price could vary. Thereafter, the drug expert testified that, based on his knowledge and experience, a user would on average buy one to three bags, but he acknowledged that the amount could vary "depending on the level of dependency[.]" The expert also opined that users do not generally stockpile narcotics. In that regard, the expert explained:

> Generally in my experience anyway, users will only purchase enough just to satisfy that crave or that need which is usually not only a psychological one but unfortunately a physical dependency that they have on it as well.

Sergeant Robateau also went on to explain how heroin was grouped together in bundles and bricks, how heroin was usually ingested, and the paraphernalia used to ingest heroin. Finally, he described a typical narcotics street transaction as a quick exchange of cash for drugs at a particular location.

Sergeant Robateau was then subject to cross-examination. During that cross-examination, defense counsel focused on whether a person with a long-term addiction to heroin might need more heroin to achieve a high and whether such a person might be expected to have a larger quantity of bags than an average user.

After hearing all of the testimony and considering the evidence presented at trial, the jury convicted defendant of possession of heroin, possession of heroin with intent to distribute, and possession of heroin with intent to distribute in a school zone. Those were the crimes charged under counts one, two, and three of Indictment 13-09-1756. The jury did not find defendant guilty of count four or count five of Indictment 13-09-1756, which had charged defendant with distribution of heroin and distribution of heroin in a school zone.

Thereafter, defendant pled guilty under Indictment 13-07-1396 to a separate charge of third-degree possession of heroin with intent to distribute in a school zone. In 2015, defendant also pled guilty under a separate accusation, to third-degree bail jumping, N.J.S.A. 2C:29-7.

Defendant was sentenced on all of these convictions on February 20, 2015. As summarized earlier, defendant's aggregate sentence was for thirteen years in prison with five years of parole ineligibility. Defendant now appeals his convictions and his sentences.

II.

On appeal, defendant presents two arguments for our consideration:

> POINT I — IN THIS STRAIGHTFORWARD DRUG CASE, THE ADMISSION OF EXPERT TESTIMONY ON THE ULTIMATE ISSUE WAS PLAIN ERROR. U.S. Const. [a]mends. VI, XIV; N.J. Const. [a]rt. I, ¶¶ 1, 9, 10 (Not Raised Below)
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> POINT II — DEFENDANT IS ENTITLED TO ADDITIONAL JAIL CREDITS UNDER STATE V. HERNANDEZ, 208 N.J. 24 (2011); COUNTS ONE, TWO, AND THREE OF INDICTMENT NO. 13-09-1756 SHOULD HAVE MERGED; THE OVERALL SENTENCE WAS EXCESSIVE. U.S. Const. [a]mend. VIII; N.J. Const. [a]rt. I, ¶¶ 1, 12

A. The Drug Expert's Testimony

Defendant focuses his first argument on the charge that he possessed heroin with the intent to distribute. He argues that

Sergeant Robateau effectively told the jury that defendant possessed twelve bags of heroin with the intent to distribute when he opined that a heroin user would normally only possess one to three bags of heroin at a time, and would not stockpile greater amounts of heroin. We disagree because, in this case, the drug expert's testimony stayed within permissible bounds and did not offer an opinion on defendant's state of mind.

Trial courts have considerable discretion in acting as gatekeepers to determine whether to allow expert testimony and the scope of such expert testimony. Townsend v. Pierre, 221 N.J. 36, 52 (2015) (citing State v. Berry, 140 N.J. 280, 293 (1995)). Appellate courts use an abuse of discretion standard in reviewing the admission of expert testimony. Ibid.

Under the rules of evidence, expert testimony is permissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue[.]" N.J.R.E. 702. Expert testimony "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.J.R.E. 704. Nevertheless, an expert opinion is not admissible unless the "testimony concerns a subject matter beyond the ken of an average juror[.]" State v. Reeds, 197 N.J. 280, 290 (2009).

> Thus, expert testimony on the ultimate issue of whether a defendant intended to distribute drugs is permissible only if it "will assist the trier of fact to understand the evidence or determine a fact in issue," N.J.R.E. 702, and "may be excluded if its probative value is substantially outweighed by the risk of . . . undue prejudice," N.J.R.E. 403; State v. Sowell, 213 N.J. 89, 100 . . . (2013).
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> [State v. Cain, 224 N.J. 410, 421 (2016) (first alteration in original).]

Expert testimony in drug cases is allowable. Id. at 426. Our Supreme Court, however, has recently placed certain limitations on the scope of drug expert testimony in criminal cases. Id. at 426-27; State v. Sims, 224 N.J. 393, 403-04 (2016). For example, experts can explain how drug traffickers package and process drugs for distribution. Cain, supra, 224 N.J. at 426. Experts can also explain the quantities and concentration of drugs, the value of drugs, the use of identifiable logos and drug packaging, and the function of drug paraphernalia. Ibid.

"Experts may also provide insight into the roles played by individuals in street-level drug transactions, and into the various machinations used by drug dealers to thwart detection[.]" Ibid. (citing Berry, supra, 140 N.J. at 301-02 and State v. Nesbitt, 185 N.J. 504, 515 (2016)). Thus, the Court has explained:

> The average juror is not knowledgeable about the arcana of drug-distribution schemes. Law enforcement officers with extensive training, education, and experience of the drug world

> have "specialized knowledge [that] will assist the trier of fact to understand the evidence or determine a fact in issue." Experts can help jurors understand the indicia of a distribution operation, such as how drug traffickers package and process drugs for distribution.
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> [Ibid. (alteration in original) (quoting N.J.R.E. 702) (citing State v. Odom, 116 N.J. 65, 73-75 (1989)).]

Drug experts, however, "should not express an opinion on matters that fall within the ken of the average juror or offer an opinion about the defendant's guilt." Ibid. (citing Nesbitt, supra, 185 N.J. at 512-14). "Nor should an expert be used to bolster a fact witness's 'testimony about straightforward, but disputed, facts.'" Id. at 426-27 (citing State v. McLean, 205 N.J. 438, 455 (2011)).

Accordingly, the Court has curtailed the permissible scope of drug experts and has held that "[g]oing forward, in drug cases, an expert witness may not opine on the defendant's state of mind. Whether a defendant possessed a controlled dangerous substance with the intent to distribute is an ultimate issue of fact to be decided by the jury." Id. at 429. In that regard, the Court has explained:

> We have come to the conclusion that an expert is no better qualified than a juror to determine the defendant's state of mind after the expert has given testimony on the peculiar characteristics of drug distribution that are

> beyond the juror's common understanding. In drug cases, such ultimate-issue testimony may be viewed as an expert's quasi-pronouncement of guilt that intrudes on the exclusive domain of the jury as factfinder and may result in impermissible bolstering of fact witnesses. The prejudice and potential confusion caused by such testimony substantially outweighs any probative value it may possess.
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> [Id. at 427-28.]

Our Supreme Court has also placed limitations on the use of hypothetical questions posed to experts. Id. at 429. Thus, the court has explained: "To the extent possible, questions posed to an expert witness in a drug case should be compact and easy to understand and should not take the form of a summation." Id. at 430. The court has also explained that, "[w]hen the evidence is straightforward and the facts are not in dispute, there is no need to resort to a hypothetical." Id. at 429.

Applying the principles recently set forth by our Supreme Court in Cain, Sims, and the cases leading up to those decisions, we discern no error in allowing the expert testimony in this case. The expert here, Sergeant Robateau, did not offer any opinion concerning defendant's state of mind or defendant's intent. The expert testimony was appropriately limited to explaining to the jury how heroin was packaged, the value of bags of heroin, and how a street-level drug transaction might occur. The expert was not asked whether defendant had or did not have an intention to

distribute the heroin. Nor was the expert asked any hypothetical questions concerning the facts of defendant's case.

Defendant argues that this case is similar to State v. Reeds, supra, 197 N.J. 280. We disagree. In Reeds, the defendant was convicted of possession of heroin and possession with intent to distribute. Id. at 289. At trial, in response to a hypothetical question posed by the prosecutor, the drug expert offered the opinion that the defendant and the two occupants in defendant's car constructively possessed heroin with the intent to distribute based on the quantity of heroin found in the car after a police stop. Id. at 286-88. Our Supreme Court reversed defendant's conviction of possession of heroin with the intent to distribute and the lesser charge of possession because the expert's testimony was "tantamount to a legal conclusion, resulting in a veritable pronouncement of guilt on the two possession crimes." Id. at 297.

Here, the State's expert offered no similar type of ultimate conclusion regarding defendant's intent. Instead, as already summarized, the State's expert stayed well within the bounds of a drug expert and gave general background information that would allow the jury to understand drug transactions in general. The jury was then left free to make the ultimate determination of whether defendant possessed the heroin with the intent to distribute.

B. Sentences

Defendant challenges his sentences on three grounds, arguing that (1) his sentences were excessive; (2) certain of his convictions should have merged; and (3) he was not given full jail credits. We reject the first ground, but agree with the second and third grounds.

We review sentencing decisions for an abuse of discretion. State v. Blackmon, 202 N.J. 283, 297 (2010). Accordingly, if a sentencing court finds and balances the aggravating and mitigating factors based on competent, credible evidence in the record and imposes a sentence within the range established by statute, we will generally affirm such a sentence unless it shocks the judicial conscience. State v. Fuentes, 217 N.J. 57, 70 (2014).

1. Excessiveness

Defendant was sentenced to ten years in prison with five years of parole ineligibility for both his convictions for possession of heroin with intent to distribute in a school zone. Those sentences were run concurrent to each other.

Defendant argues that his ten-year sentences were excessive. We disagree. Both convictions for possession of heroin with the intent to distribute in a school zone were third-degree crimes. Defendant, however, was subject to a mandatory extended term because of his extensive prior criminal record. N.J.S.A. 2C:43-

6(f). His prior criminal record began in 1997, when he was a juvenile and continued when he became an adult. Defendant had four prior convictions for third-degree possession of illegal drugs with the intent to distribute in a school zone. He also had a prior conviction for second-degree possession of a firearm for an unlawful purpose. Thus, defendant was subject to be sentenced in the second-degree range, which allows a sentence between five and ten years in prison.

In sentencing defendant, the judge found aggravating factors, three, he was likely to commit additional offenses, N.J.S.A. 2C:44-1(a)(3); six, he had a prior criminal record, N.J.S.A. 2C:44-1(a)(6); and nine, the need to deter further criminal activity, N.J.S.A. 2C:44-1(a)(9). There were facts in the record supporting each of those aggravating factors. The judge also found mitigating factor six, defendant would compensate the victim or perform community service, N.J.S.A. 2C:44-1(b)(6).[1] The judge then balanced those factors and found that the aggravating factors outweighed the mitigating factor. We discern no abuse of

[1] The sentencing court found mitigating factor six, reasoning that defendant was willing to perform community service. Defendant, however, was not sentenced to perform community service. As defendant will not actually be performing community service, the sentencing court erred in applying this factor. Nevertheless, because the aggravating factors substantially outweighed this single mitigating factor, we conclude that this error had no impact on defendant's sentence.

discretion in the sentencing judge's decision to sentence defendant to the maximum time for second-degree crimes. In that regard, we note that defendant had previously been incarcerated for his prior convictions, but those incarcerations did not deter further criminal activity.

2. Merger

The jury convicted defendant of three crimes under Indictment 13-09-1756. Defendant was then sentenced to ten years in prison with five years of parole ineligibility for his conviction for possession of heroin with intent to distribute in a school zone (count three). He was also sentenced to five years in prison with three years of parole ineligibility for possession of heroin with the intent to distribute (count two) and three years in prison for possession of heroin (count one). The sentences for counts one and two were run concurrent to the sentence on count three. Nevertheless, as all three of those convictions involved the same incident -- the possession of heroin on May 24, 2013 -- the convictions for counts one and two should have merged with count three. See State v. Hill, 182 N.J. 532, 542-43 (2005) (explaining that "[c]onvictions for lesser-included offenses, offenses that are a necessary component of the commission of another offense, or offenses that merely offer an alternative basis for punishing the same criminal conduct will merge" (quoting State v. Brown, 138

N.J. 481, 561 (1994), overruled on other grounds, State v. Cooper, 151 N.J. 326 (1997))). Indeed, the State concedes that these counts should have merged.

3. Jail Credits

Defendant was given 124 days of jail credit for his sentence under Indictment 13-09-1756. He was then given 127 days of jail credit for his sentence under Indictment 13-07-1396. The State acknowledges that defendant was entitled to 133 days of jail credit under Indictment 13-09-1756 and 135 days of jail credit under Indictment 13-07-1396. In that regard, the State concedes that the jail credits were correctly identified in defendant's presentence reports. We therefore remand for correction of the judgments of convictions.

In summary, we affirm defendant's sentence for his convictions for possession of heroin with the intent to distribute in a school zone. We remand for resentencing to merge counts one and two of Indictment 13-09-1756 into count three and for correction of the judgments of convictions to reflect the correct jail credits.

Affirmed and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.