SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4425-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NAADIR I. MUHAMMAD, a/k/a
CLAYTON JONES,

Defendant-Appellant.

Submitted December 20, 2016 – Decided April 7, 2017

Before Judges Yannotti and Kennedy.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 13-04-0991.

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for appellant (Jane C. Schuster, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

After the trial court denied defendant's motion to suppress evidence seized from the motel room where he had been staying,

defendant pled guilty to first-degree possession of ten grams or more of Phencyclidine (PCP) with intent to distribute, contrary to N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(6). The trial court thereafter sentenced defendant to ten years of incarceration, with fifty-one months of parole ineligibility. Defendant appeals from the judgment of conviction signed on January 14, 2014, and challenges the denial of his suppression motion. We affirm.

I.

Defendant was charged by an Atlantic County grand jury with first-degree possession of ten grams or more of a controlled dangerous substance (CDS) with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(6) (count one); second-degree conspiracy to possess ten grams or more of a CDS with intent to distribute, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a), and N.J.S.A. 2C:35-5(b)(6) (count two); second-degree possession of a CDS with intent to distribute within 500 feet of a public housing facility, park or building, N.J.S.A. 2C:35-7.1 (count three); third-degree possession of a CDS with intent to distribute in a school zone, N.J.S.A. 2C:35-7 (count four); third-degree unlawful possession of a CDS, N.J.S.A. 2C:35-10(a)(1) (count five); and fourth-degree tampering with physical evidence, N.J.S.A. 2C:28-6(1) (count six). Co-defendant Michael J. Showell was also charged in counts one to five.

Thereafter, defendant filed a motion to suppress, and the trial court conducted an evidentiary hearing on the motion.

At the hearing, Lieutenant James A. Sarkos of the Atlantic City Police Department (ACPD) testified that an informant had reported CDS activity around a motel at a specific location on Route 30 in the City. The informant told Sarkos that a man staying in room twenty-three of the motel had been selling large quantities of PCP in the area for a month. Detective Howard Mason also had received confidential information attesting to similar activity.

On January 25, 2012, Sarkos and members of the New Jersey State Police conducted a joint operation looking for criminal activity in the area around the motel, which was known for high-drug/high-crime activity. Sarkos and the officers went to the motel and asked the front-desk clerk who was staying in room twenty-three. The clerk provided the officers with a copy of the room registration card, which listed the name "Naadir Muhammad," as well as defendant's identification information.

Sarkos testified that when he saw defendant's name, he immediately recalled that another division of the ACPD had received information that someone by the name of "Naadir Muhammad," who is also known as Clayton Jones, was distributing large quantities of PCP in the City. Sarkos then used his "smart phone" to obtain a photograph of defendant so he would recognize him on sight. Sarkos

spoke with an officer at the ACPD and asked the officer to conduct a warrant check on defendant. The check revealed that defendant had an outstanding warrant out of Cumberland County for unpaid child support.

Sarkos and two officers then conducted surveillance of room twenty-three at the motel from their vehicle. They observed two persons leave the room and walk across the parking lot. The two individuals walked directly towards the car. The officers were concerned the individuals would see them.

The officers backed the car out of the parking spot and drove out of the lot. Sarkos testified that in his rearview mirror, he observed the two individuals stop abruptly and return to room twenty-three. Sarkos was concerned that the individuals were conducting counter-surveillance, and would alert others involved in criminal activity of possible police presence.

The officers then drove around the block and parked in a different location to continue their surveillance of the room. Sarkos saw defendant exit the room with a trash can, dispose of its contents into a dumpster, look around, observe the officers' car, and reenter the room. Sarkos recognized defendant from the photo on his phone.

The officers did not arrest defendant at this time because they did not believe they could reach him before he reentered the

room. They called for backup. Seven other officers responded to the scene. Sarkos parked the car near the room and noticed that its door was wide open. He exited the car, holding his radio. He was wearing a bulletproof vest with the words "POLICE" written upon it in large letters. He displayed his badge.

Sarkos and the other officers approached the room. Sarkos observed defendant standing in the doorway. According to Sarkos, defendant had a "frantic expression on his face." Defendant slammed the door shut. The officers ran up to the door and Sarkos yelled, "police, open the door." Sarkos banged on the door and heard a commotion from inside the room and the sound of running water.

After about thirty seconds, defendant opened the door. Sarkos entered the room. Sarkos noticed that defendant was breathing heavily, he was wearing a jacket that was wet from his elbow to his wrist, and his shorts had water-splash marks on them. Co-defendant Showell also was in the room.

Sarkos testified that, once inside the room, he was overwhelmed by a chemical odor. Based on his training and experience, Sarkos recognized the odor to be PCP. The odor gave him a headache and made him feel nauseous. Sarkos placed defendant under arrest. He did a brief search of the room to ensure that no one else was present, who could harm the officers. He said the strongest odor emanated from the bathroom, where the door had been

left wide open. The officers found that the water in the bathroom sink had been left running, and there were bottle caps and red funnels in the sink.

Sarkos testified that these items were consistent with paraphernalia used to transfer liquid PCP from large to small bottles. The officers found water all over the bathroom floor. They also found four bottles in the trash, three of which contained liquid. Sarkos believed the three bottles still contained PCP. He took caps from the sink and sealed the bottles found in the trash.

According to Sarkos, defendant stated that "there's just water in there," but Sarkos told defendant that he thought the liquid was PCP or "wak," which is what PCP is commonly called in the City. Defendant replied, "I ain't saying what used to be in there. I'm just saying there's water in there."

Sarkos searched defendant. In his pocket, he found $381 in small denominations, which Sarkos said was consistent with street-level distributions of PCP. Sarkos also seized a bottle that smelled as if it might have contained PCP. The officers also arrested Showell. Before leaving for the police station, Showell asked to retrieve his "long-john underwear" from one of the drawers in the dresser.

Sarkos noticed the drawer was filled with clothing and that Showell had several forms of identification, which were scattered

around the room. Sarkos believed that Showell had been staying in the motel room with defendant. Defendant also asked to retrieve his pants from a drawer before leaving, and Sarkos assisted him in retrieving them. The officers did not conduct any further search of the room.

Defendant testified that he had been chatting with members of his family when eight or nine police officers pulled up in cars and ran towards the room. He ran inside the room, slammed the door closed, and disposed of all of the contraband he had. Defendant testified that he let the officers into the room only after he was satisfied that all of the contraband had been destroyed. Defendant said the contraband he was referring to was PCP.

Defendant further testified that the police ran into the room and immediately arrested him and Showell. He said the police "raided" the room and seemed "stumped" and frustrated because they did not find any contraband.

Defendant stated that after the officers had entered and "turned the room upside down," they contacted the ACPD to determine if defendant had any outstanding warrants. Defendant claims he overheard the call while he was detained in the room. He said the officer contacted the ACPD five minutes after he was placed under arrest.

After hearing arguments from the attorneys, the judge placed an oral decision on the record. The judge found that "the balance of credibility" weighed strongly in favor of Sarkos. The judge stated that Sarkos's account of defendant's arrest made sense under the circumstances, while defendant's version was not credible.

The judge noted that defendant's testimony indicated that he had "little regard for the laws of this State," since he had readily admitted that he had possessed PCP and destroyed the evidence before allowing the officers into the room. The judge also stated that defendant's lawless behavior indicated that he had "little incentive to meet his obligation to tell the truth even under oath." The judge denied defendant's motion to suppress the CDS and CDS-related paraphernalia.

On October 22, 2013, defendant pled guilty to count one of the indictment, which charged him with possession with intent to distribute ten grams or more of PCP. The judge sentenced defendant on December 20, 2013, and later entered the judgment of conviction signed on January 14, 2014.

Defendant's appeal followed. On appeal, defendant raises the following arguments:

POINT I

THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AS GUARANTEED BY ART. I, PAR. 7 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED.

POINT II

THE DEFENDANT'S SENTENCE IS EXCESSIVE: THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING AND MITIGATING FACTORS.

II.

We turn first to defendant's contention that the trial court erred by denying his motion to suppress. He contends the officers violated his right under the New Jersey Constitution to be free from unreasonable searches and seizures by obtaining his personal information from the motel's front-desk clerk.

We note that defendant did not raise this issue at the suppression hearing. There, defendant only argued that the officers unlawfully entered his motel room because, at the time they did so, they allegedly did not know that he had an outstanding warrant in Cumberland County.

The State contends that because defendant did not assert at the hearing that the officers unlawfully obtained personal information about him from the motel clerk, we should not consider this argument on appeal.

> Generally, 'the points of divergence in proceedings before a trial court define the

> metes and bounds of appellate review.' Parties must make known their positions at the suppression hearing so that the trial court can rule on the issues before it. For sound jurisprudential reasons, with few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such presentation is available.'
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> [State v. Witt, 223 N.J. 409, 419 (2015) (internal citation omitted) (quoting State v. Robinson, 200 N.J. 1, 19-20 (2009)).]

In Witt, the Court refused to consider one of defendant's constitutional arguments because the issue had not been raised at the suppression hearing, thereby depriving the State of the opportunity to elicit testimony that might have resolved the issue. Ibid. Here, however, defendant is raising a legal issue based on essentially undisputed facts. We therefore elect to address defendant's argument.

Article I, Paragraph 7 of the New Jersey Constitution protects citizens from unreasonable searches and seizures. To invoke these protections, a defendant must show that he or she has a reasonable expectation of privacy, which was violated by the government's action. State v. Evers, 175 N.J. 355, 368-69 (2003) (citations omitted). Ordinarily, a person "surrenders a reasonable expectation of privacy to information revealed to a third-party." Ibid.

Indeed, we have held that hotel guests do not have a right of privacy under the New Jersey Constitution to information in a hotel registry. State v. Lopez, 395 N.J. Super. 98, 106 (App. Div.), certif. denied, 192 N.J. 596 (2007). In Lopez, we stated that:

> [n]o violation of defendant's constitutional rights occurred in the police investigation that disclosed his identity, particularly in the inquiry to a hotel employee for the room number and name of the occupant who had placed a telephone call . . . As a matter of law, defendant had no reasonable expectation of privacy as to his identity when he registered as a guest of the hotel. See N.J.S.A. 29:4-1. The police had engaged in a perfectly valid investigation to discover defendant's identity and location.
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> [Id. at 106.]

The statute referenced in Lopez requires hotel registries to contain the names and addresses of hotel guests, and the rooms that the guests are occupying. N.J.S.A. 29:4-1. The statute provides that the hotel's register "shall be available to all duly authorized peace officers upon request." Ibid. The statute does not apply to hotels that have more than ten sleeping rooms. N.J.S.A. 29:4-2.

However, the court's conclusion in Lopez that citizens do not have a reasonable expectation of privacy in the information in a hotel or motel registry, did not turn on the application of

N.J.S.A. 29:4-1. The court did not suggest that persons who stay in hotels with more than ten sleeping rooms have a reasonable expectation of privacy in the information in the hotel registry, while persons who stay in hotels or motels with less than ten sleeping rooms do not. Lopez stands for the broad principle that hotel guests do not have a recognized privacy interest in the information about them in the hotel's registry. Id. at 106.

Defendant cites several cases in which the court has recognized privacy interests in certain personal information that was provided to third parties. See State v. Reid, 194 N.J. 386, 389 (2008) (holding that New Jersey Constitution protects a citizen's privacy interest in subscriber information given to an internet service provider); State v. McCallister, 184 N.J. 17, 32-33 (2005) (finding that New Jersey Constitution protects bank account holder's expectations of privacy in their banking records); and State v. Hunt, 114 N.J. 329, 341-42 (1989) (finding that persons have a strong expectation of privacy in their telephone billing records).

In Reid, the Court noted that the records of internet service providers "share much in common with long distance billing information and bank records." Reid, supra, 194 N.J. at 398. The Court observed that all of these records relate to activities

"integrally connected to essential activities of today's society." Ibid.

However, information in hotel and motel registries is not comparable. Persons who use the internet, make phone calls, or engage in banking transactions "have reason to expect that their actions are confidential." Ibid. Persons who register in motels or hotels do not have similar expectations of privacy. The registry merely records basic personal information, such as the guest's name and the room in which the guest is staying.

We therefore conclude that under Lopez, the officers did not violate defendant's rights under Article I, Paragraph 7 of the New Jersey Constitution when they obtained his personal information from the motel's desk clerk.

Defendant further argues that the motion judge erred in assessing his credibility. Defendant asserts that the judge improperly discredited his testimony because he admitted that before he allowed the officers into the motel room, he had possessed PCP and destroyed it. Defendant contends his statement could not be used to assess his credibility because he had not yet been convicted of possessing PCP or destroying evidence.

When reviewing the trial court's decision on a motion to suppress, we must uphold the court's factual findings if they are "supported by sufficient credible evidence in the record." State

v. Elders, 192 N.J. 224, 243 (2007) (quoting State v. Elders, 386 N.J. Super. 208, 228 (2006)). We must give deference to the findings which are "substantially influenced" by the judge's "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

We reject defendant's contention that the judge erred in assessing his credibility. The judge had the opportunity to see and hear Sarkos and defendant testify. The judge found Sarkos's testimony more credible than defendant's testimony. The judge rejected defendant's assertion that the officers did not know of his outstanding warrant until after they entered the room, arrested defendant, and seized the evidence. The judge properly considered defendant's admission that he had possessed the PCP and destroyed it in determining whether his testimony was credible.

III.

Defendant also argues that his sentence is excessive. He contends the court did not properly balance the aggravating and mitigating factors. We disagree.

Here, defendant pled guilty and the State agreed to recommend a ten-year custodial sentence, with fifty-one months of parole ineligibility. At sentencing, the judge observed that he had reviewed the pre-sentence report, and was satisfied that the

negotiated plea agreement was fair to the State and defendant. The judge stated that, in the interest of justice, he would follow the recommendations in the plea agreement.

The judge noted that defendant was then forty-three years old, and soon to be forty-four. He had three prior disorderly convictions and three indictable convictions, the most serious of which was for attempted murder in 1990, for which he had received a twenty-year sentence. Defendant also had been arrested eleven times in the previous twenty-two years.

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) (defendant's prior criminal record and the seriousness of the offenses of which he has been convicted); 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 noted, the judge sentenced defendant to ten years of incarceration, with fifty-one months of parole ineligibility.

On appeal, defendant argues that other than his conviction in this matter and his prior criminal record, there was no support for the court's conclusion that there was a risk that he would commit another offense. He contends the court impermissibly used his prior record to support the risk factor, thereby erroneously double-counting aggravating factors.

Defendant further argues that the judge gave too much weight to the need to deter, since that factor applies to all crimes. He also contends that the judge should have found mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11) (defendant's incarceration will result in excessive hardship). He notes that he has one minor child, and his incarceration will prevent him from making his previously owed child-support payments.

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). An appellate court should not set aside a sentence unless (1) the trial court did not follow the sentencing guidelines; (2) the court's findings of aggravating and mitigating factors were not based upon sufficient credible evidence in the record; or (3) the court's application of the sentencing 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 State v. Roth, 95 N.J. 334, 364-65 (1984)).

We reject defendant's contention that his sentence is excessive. There is sufficient credible evidence in the record to support the judge's findings regarding the aggravating and mitigating factors. The judge followed the sentencing guidelines,

and the sentence imposed represents a reasonable exercise of the court's sentencing discretion.

Affirmed.