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Although it is posted on the internet, this opinion is binding only on the
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-5511-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID J. ZUKOWSKI,

Defendant-Appellant.

Submitted January 10, 2017 – Decided February 21, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New
Jersey, Law Division, Sussex County, Municipal
Appeal No. 04-03-15.

McGivney & Kluger, P.C., attorneys for
appellant (Nicholas C. DeMattheis, Jr. and
Samuel P. Reisen, on the briefs).

Francis A. Koch, Sussex County Prosecutor,
attorney for respondent (Shaina Brenner,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Following a trial de novo of his municipal court appeal in
the Law Division, defendant David J. Zukowski was found guilty of
the disorderly persons offense of resisting arrest, N.J.S.A.

2C:29-2(a)(1). The judge imposed a \$300 fine and various financial penalties.

We begin by noting "appellate review of a municipal appeal to the Law Division is limited to 'the action of the Law Division and not that of the municipal court.'" State v. Palma, 219 N.J. 584, 591-92 (2014) (quoting State v. Joas, 34 N.J. 179, 184 (1961); State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001)). In conducting our review, "[w]e defer to the judge's fact finding, and our 'review is limited to whether the findings made could reasonably have been reached on sufficient credible evidence present in the record.'" State v. L.S., 444 N.J. Super. 241, 247-48 (App. Div. 2016) (quoting State v. Kuropchak, 221 N.J. 368, 382-83 (2015)) (other internal quotations and citation omitted). "We owe no deference, however, to the 'trial court's interpretation of the law . . . and the consequences that flow from established facts[,]'" which we review de novo." Id. at 248 (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

The Law Division judge gave deference to the credibility determinations of the municipal court judge and independently found the law enforcement witnesses were credible. See Kuropchak, supra, 221 N.J. at 382 ("The Law Division reviews the municipal court's decision de novo, but defers to credibility findings of the municipal court.") (citing State v. Johnson, 42 N.J. 146, 157

(1964)). We briefly summarize the testimony before the municipal court.

On August 13, 2013, New Jersey State Police (NJSP) Troopers Wallace Zosche Jr., and Louis Jacinto arrived at defendant's home dressed in plain clothes to serve an arrest warrant. Jacinto knocked on the front door, at which point the troopers heard a voice coming from the deck on the side of the house ask, "Can I help you?" The troopers saw defendant standing on the deck.

They informed defendant they had an arrest warrant issued by the Wantage Municipal Court, and they showed their badges and a copy of the warrant to defendant. Jacinto testified they were highly cautious due to prior instances involving defendant and did not want him to return inside his home. Defendant repeatedly told the troopers he did not believe they were law enforcement officers and requested they show other identification.

As defendant began to move toward the sliding glass door of his home and out of the troopers' sight, Zosche climbed over the railing of the deck and told defendant not to enter the home. As defendant attempted to open the sliding glass door, Zosche grabbed him, but defendant refused to comply with the troopers' orders. Eventually defendant and the two troopers were inside defendant's home, where a struggle ensued before defendant was subdued, handcuffed and led away.

Defendant's daughter was the only defense witness. She was home at the time and testified that when she heard the front doorknob "jiggle," she opened the door, saw two men outside who she did not recognize and closed the door. She also saw the troopers arrest her father but stated that he never struck or kicked either officer.

Defendant was initially charged with indictable offenses and appeared in the Wantage/Sussex/Stillwater Municipal Court before venue was transferred to the Kinnelon Municipal Court and the charges downgraded.¹ Defense counsel requested discovery prior to appearing on February 11, 2014, including tapes of the 9-1-1 calls made by defendant's daughter and wife on the date of the incident. Defendant had also filed a request under the Open Public Records Act (OPRA). The prosecutor indicated the tapes would be available in two weeks. When they were not supplied by March, the judge issued an order compelling their production.

In early April, with the tapes still not having been produced, the judge granted the prosecutor's request for an adjournment over defense counsel's objection. The parties returned to court on April 29, 2014. It was revealed then that defendant's request had

¹ The apparent reason for the change of venue was defendant's complaint that he could not receive a fair trial in the municipal court where the offenses occurred.

been made to the civil, not the criminal, records division of the NJSP. The judge denied defendant's request to dismiss the case.

By the next appearance on May 20, the requested discovery had been produced, but the trial was postponed because defense counsel, the second private counsel defendant had retained, asked to be relieved. Defendant did not object. Thereafter, the judge assisted defendant in applying for the services of the municipal public defender. However, after the public defender was appointed, defendant moved to discharge him and proceed pro se. The judge granted defendant's request.

By the time the parties appeared in court in July, defendant had filed an interlocutory appeal to the Law Division and another motion to dismiss in municipal court, alleging the tapes of all 9-1-1 calls had not been produced. The judge ruled that the State had provided all discovery and, even though the trial could not proceed because of the interlocutory appeal, the judge scheduled a special court appearance for August 12 to take defendant's daughter's testimony, since she was scheduled to leave for college. On August 12, defendant's daughter was on vacation and did not appear.

Defendant filed another motion to dismiss alleging violation of his right to a speedy trial. The judge heard the motion on December 12, 2014, and denied it. The trial took place on January

9, 2015, and defendant was found guilty of resisting arrest, N.J.S.A. 2C:29-2(a)(1), but was acquitted of another count of resisting arrest by attempting to flee, N.J.S.A. 2C:29-2(a)(1), and obstruction, N.J.S.A. 2C:29-1(a). The judge imposed various financial penalties and fined defendant \$500.

Defendant represented himself in the Law Division. The judge reviewed the testimony and found defendant guilty. He reduced the fine to \$300, and this appeal followed.

Before us, defendant makes the following arguments:

Appellant Was Denied His Right To A Speedy Trial

Appellant Was Denied Effective Assistance of Counsel

Cumulative Errors Committed By The Trial Court Prevented A Fundamentally Fair And Impartial Trial²

Having considered these arguments in light of the record and applicable legal standards, we affirm.

The appellate record does not include the briefs filed in the Law Division. Although Rule 2:6-1(a)(2) generally prohibits including the briefs in the appellant's appendix, an exception is made where "the question of whether an issue was raised in the trial court is germane to the appeal." "For sound jurisprudential

² We have omitted defendant's first point, which merely asserts the purported standard of review.

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 a presentation is available.'" State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 19 (2009)).

As noted, defendant represented himself in the Law Division, and, although he argued in a general sense that the State's failure to provide discovery led to numerous delays, he never specifically asserted a denial of his speedy trial rights, the argument made in his first point on appeal. The prosecutor never made an argument addressing the issue, other than in a context of an alleged discovery violation, and the Law Division judge never discussed the speedy trial claim in his oral decision. For the sake of completeness and fairness, we consider the argument and affirm.

In State v. Cahill, 213 N.J. 253, 258 (2013), the Court reiterated "that the four-factor balancing analysis of Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), remains the governing standard to evaluate claims of a denial of the federal and state constitutional right to a speedy trial" Those four factors are: "length of the delay, reason for the delay, assertion of the right by a defendant, and prejudice to the defendant." Id. at 264 (citing Barker, supra, 407 U.S. at

530, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117). "None of the Barker factors is determinative, and the absence of one or some of the factors is not conclusive of the ultimate determination of whether the right has been violated." Id. at 267 (citing Barker, supra, 407 U.S. at 533, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118).

"[T]he factors are interrelated, and each must be considered in light of the relevant circumstances of each particular case." State v. Tsetsekas, 411 N.J. Super. 1, 10 (App. Div. 2009) (citing Barker, supra, 407 U.S. at 533, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118). "[W]e reverse only if the court's determination is clearly erroneous." Ibid. (citing State v. Merlino, 153 N.J. Super. 12, 17 (App. Div. 1977)).

Here, although there was a lengthy delay between defendant's arrest, August 13, 2013, and trial, January 9, 2015, the reasons for the delay were innumerable and attributable to both sides. There was a transfer of venue, meaning that defendant's first substantive appearance in court did not occur until November 2013. Thereafter, discovery issues were responsible for repeated adjournments, but other delays were occasioned by second defense counsel's motion to be relieved, defendant's decision to forego representation by the municipal public defender and his filing of

an unsuccessful interlocutory municipal appeal.³ The judge attempted to accommodate defendant's daughter's schedule but she failed to appear because she was on vacation. In short, we reject any claim that the State violated defendant's right to a speedy trial.

We choose to be less indulgent regarding defendant's second point, which essentially argues the municipal court judge failed to conduct a thorough, searching inquiry regarding defendant's decision to represent himself. See State v. Crisafi, 128 N.J. 499, 509 (1992) (explaining a defendant may "exercise the right to self-representation only by first knowingly and intelligently waiving the right to counsel"). As noted, defendant represented himself on appeal in the Law Division, and he never raised the issue. We refuse to consider the argument any further. Witt, supra, 223 N.J. at 419.

Lastly, defendant argues cumulative errors during the municipal court proceedings resulted in a fundamentally unfair trial. The Law Division judge considered a number of specific claims defendant made during the trial de novo and implicitly rejected those arguments.

³ The record does not include any of the motions brought by defense counsel or defendant pro se before the municipal court or the Law Division.

The cumulative error doctrine recognizes "that even when an individual error or series of errors does not rise to reversible error, when considered in combination, their cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 473 (2008) (citing State v. Koskovich, 168 N.J. 448, 540 (2001)). Nevertheless, "the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." State v. Weaver, 219 N.J. 131, 155 (2014).

Defendant asserts other errors at trial in support of his cumulative error claim. On the January 9, 2015 trial date, defendant objected to proceeding and alluded to motions he filed regarding subpoenas duces tecum served on the NJSP on or about December 20, 2014, that sought, among other things, video recordings from the holding cell where defendant was detained after arrest.⁴ The judge denied defendant's request for an adjournment, noting he received the motions the day before trial and refused to consider the issue further. Additionally, defendant sought to admit certain photographs into evidence during trial. The judge sustained the prosecutor's objection because defendant had failed to produce them before trial, contrary to a prior court order.

⁴ These motions are not part of the appellate record.

Defendant argues these two rulings "likely prevented [him] from introducing important evidence at time of trial, which may have had an impact on the verdict." He argues the "booking photos" and "holding cell videos . . . may have had an impact on issues of credibility of the troopers relating to the extent of [defendant's] alleged resistance and [the] amount of force he used." The argument lacks sufficient merit to warrant extensive discussion. R. 2:11-3(e)(2).

Both the municipal court judge and the Law Division judge found the testimony of the troopers to be credible. See State v. Locurto, 157 N.J. 463, 474 (1999) ("Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error.") (citing Midler v. Heinowitz, 10 N.J. 123, 128-29 (1952)). That testimony established defendant's guilt, and the trial errors cited by defendant do not raise a reasonable doubt that exclusion of the disputed evidence denied defendant a fair trial. State v. Mohammed, 226 N.J. 71, 86-87 (2016).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION