SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5547-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH HOLLEY,

Defendant-Appellant.

Submitted November 29, 2017 – Decided December 19, 2017

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 14-11-0987, 14-12-1005, and 14-12-1052.

Joseph E. Krakora, Public Defender, attorney for appellant (Joshua D. Sanders, Assistant Deputy Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Sara M. Quigley and Lila B. Leonard, Deputy Attorneys General, of counsel and on the brief).

PER CURIAM

Defendant Joseph Holley appeals a December 7, 2015 order denying his motion to suppress physical evidence, two June 30,

2016 judgments of conviction and sentences, and an amended July 27, 2016 judgment of conviction and sentence. We affirm.

I.

We derive the following facts from the record. On July 24, 2014, defendant and two others were investigated for possessing controlled dangerous substances in Elizabeth, New Jersey. A Union County Grand Jury returned Indictment No. 14-11-0987, charging defendant with third-degree possession of a controlled dangerous substance (heroin), N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession with intent to distribute a controlled dangerous substance (heroin), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count three); third-degree possession with intent to distribute a controlled dangerous substance (heroin) within 1000 feet of a school zone, N.J.S.A. 2C:35-7 (count five); second-degree possession with intent to distribute a controlled dangerous substance (heroin) within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (count six); second-degree conspiracy to distribute a controlled dangerous substance, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(3) (count eight); and second-

degree abuse and neglect of a child, N.J.S.A. 2C:24-4(a) (count nine).[1]

Defendant moved to suppress physical evidence seized during the execution of a search warrant. He also moved to reveal the identity of a confidential informant used in two controlled buys. Defense counsel conceded during oral argument of the suppression motion that defendant could not prevail because his defense was that he was not involved in the alleged drug transactions. The motion judge denied the motions in a December 22, 2015 oral decision, finding there was probable cause for the issuance of the search warrant and defendant had not met his burden to compel the State to reveal the identity of the informant because the charges did not arise out of the controlled buys. Defendant does not raise any issues on appeal regarding the denial of those motions.

On September 9, 2014, Elizabeth police detectives stationed themselves in an unmarked police car in the parking lot of a gas station on the corner of Third and Pine Streets. While conducting a narcotics surveillance, one of the detectives observed a man walking from Third Street into the parking lot, looking around nervously while talking on his cell phone.

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[1] Defendant was not charged under counts two, four, and seven of Ind. No. 14-11-0987. Codefendants Jayaita T. Atkinson and Guraryeh B. Yehudah are not parties to this appeal.

A few moments later, one of the detectives noticed another man, later identified as defendant, walk from Pine Street into the parking lot while talking on his phone. The detective recognized defendant from a previous narcotics investigation. After defendant looked at the other man and motioned with his head and body toward the gas station's minimart, the two men entered the building together. The detective followed.

The detective saw the men talking about five feet in front of the counter. He then saw that the other man was holding money and defendant was holding a small white item, which the detective suspected was heroin. At that point, the detective arrested defendant. A search incident to arrest revealed six glassine envelopes containing suspected heroin wrapped together in a rubber band in defendant's hand and additional drugs in his right pants pocket.

A Union County Grand Jury returned Indictment No. 14-12-1005, charging defendant with third-degree possession of a controlled substance (heroin), N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession with intent to distribute a controlled dangerous substance (heroin), N.J.S.A. 2C:35-5(b)(3) and N.J.S.A. 2C:35-5(a)(1) (count two); third-degree possession with intent to distribute a controlled dangerous substance (heroin) within 1000 feet of a school zone, N.J.S.A. 2C:35-7 (count three); and second-

degree possession with intent to distribute a controlled dangerous substance (heroin) within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (count four).

Less than a month later, on October 6, 2014, Elizabeth police officers observed bright headlights from a car in their rear-view mirror as they drove west on Elizabeth Avenue in their marked police car with the windows rolled down. The officers pulled to the side of the road to let the car pass them since its headlights were distracting. As the car passed, one of the officers noticed that the driver side window was rolled down, the driver was not wearing his seatbelt, and the officer could smell an overwhelming odor of burnt marijuana.

When the officers stopped the car, they saw a large amount of money in the center cup holder and smelled the odor of burnt marijuana. During the stop, the rear passenger tried to hand an officer her driver's license with her left hand, while attempting to go into her right pocket with her right hand. At that point, the other officer removed the rear passenger and handcuffed her for officer safety.

A different passenger stepped out of the car and explained to the officers that the car was a rental in her name, that the money belonged to defendant, and that they smoked marijuana earlier that night. She also consented to a search of the vehicle and

stated that she did not have marijuana in the car. An officer removed defendant from the car and searched him due to the overpowering smell of marijuana emanating from him. The search revealed three glassine envelopes of suspected heroin. A search of the two female passengers did not reveal any contraband. Defendant was then arrested.

A canine unit arrived at the scene and "did a sniff around the car;" the dog indicated contraband in the driver's seat and door panel. Officers found an additional glassine envelope with suspected heroin on the door handle. The officers then released the car to the female passenger who had rented the car and transported defendant to headquarters. At headquarters, an officer noticed defendant attempting to reach into his groin area. A search of defendant revealed seventy-seven glassine envelopes with suspected heroin.

A Union County Grand Jury returned Indictment No. 14-12-1052, charging defendant with third-degree possession of a controlled dangerous substance (heroin), N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession with intent to distribute a controlled dangerous substance (heroin), N.J.S.A. 2C:35-5(b)(3) and N.J.S.A. 2C:35-5(a)(1) (count two); third-degree possession with intent to distribute a controlled dangerous substance (heroin) within 1000 feet of a school zone, N.J.S.A. 2C:35-7 (count three); and second-

degree possession with intent to distribute a controlled dangerous substance (heroin) within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (count four).

Defendant applied for admission to Drug Court. The prosecutor rejected the application, primarily on the grounds that defendant possessed a firearm during the commission of the offense and had been previously adjudicated delinquent for committing an aggravated assault while a minor. Defendant appealed the prosecutor's legal rejection to the trial court. On August 18, 2015, the trial court denied the appeal.

On November 19, 2015, the trial court heard defendant's motion to suppress the physical evidence under Indictment No. 14-12-1005. Detective Jose Martinez testified on behalf of the State. Defendant did not present any witnesses. On December 7, 2015, the trial court denied that motion. On December 22, 2015, the trial court denied defendant's motion to suppress with a warrant.

On April 11, 2016, defendant pled guilty in an open plea to every count in the three indictments without any sentencing recommendation. Defendant was sentenced on June 24, 2016. The trial court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (likelihood of committing another offense); six, N.J.S.A. 2C:44-1(a)(6) (prior criminal record); and nine, N.J.S.A. 2C:44-1(a)(9) (need for deterrence); and no mitigating factors. The court

determined that the aggravating factors outweighed the non-existent mitigating factors and sentenced defendant to an aggregate sixteen-year prison term with a six-year period of parole ineligibility. The court also imposed appropriate penalties, assessments, and fines. This appeal followed.

On appeal, defendant raises the following points:

> POINT I
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> AS MARIJUANA IS NO LONGER PER SE CONTRABAND, THE CASE LAW REGARDING "PLAIN SMELL" MUST BE MODIFIED AND THE EVIDENCE SEIZED RELATIVE TO INDICTMENT 14-12-1052 MUST BE SUPPRESSED (Not Raised Below).
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> POINT II
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> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE RELATIVE TO INDICTMENT 14-12-1005 BECAUSE THE TESTIFYING OFFICER WAS NOT CREDIBLE.
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> POINT III
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> THE SENTENCE SHOULD BE REMANDED BECAUSE THIS WAS MR. HOLLEY'S FIRST INDICTABLE OFFENSE AND THE COURT ERRED IN FAILING TO WEIGH MITIGATING FACTOR N.J.S.A. 2C:44-1b(7).

II.

We first address defendant's argument regarding Indictment No. 14-12-1052, which was not raised below, that the plain smell doctrine must be modified because marijuana is no longer per se contraband in light of the passage of the New Jersey Compassionate

Use Medical Marijuana Act (CUMMA), N.J.S.A. 24:6I-1 to –16. We disagree.

Defendant's reliance on CUMMA is misplaced. CUMMA affords an affirmative defense to patients who are properly registered under the statute and are subsequently arrested and charged with possession of marijuana. N.J.S.A. 2C:35-18(a). The burden is on the defendant to prove the affirmative defense by a preponderance of the evidence. Ibid. The State is under no obligation to negate an exemption under CUMMA or N.J.S.A. 2C:35-18(a). Ibid. Possession of a registry identification card under CUMMA "is an affirmative defense, not an element of the offense." State v. Myers, 442 N.J. Super. 287, 302 (App. Div. 2015) (citing N.J.S.A. 2C:35-18(a)), certif. denied, 224 N.J. 123 (2016).

Defendant's argument that marijuana is no longer per se contraband is meritless. Marijuana remains a controlled dangerous substance. N.J.S.A. 2C:35-2 and 2C:35-5(b)(10) to (12). "[T]he possession, consumption, and sale of marijuana remains illegal except in the instance of a registered qualifying patient who obtains medical marijuana from one of the limited number of [medical marijuana alternative treatment centers]." Myers, 442 N.J. Super. at 302 (citing Caporusso v. N.J. Dep't of Health & Human Servs., 434 N.J. Super. 88, 95-96 (App. Div. 2014)). Therefore, the detection of an odor of marijuana continues to

provide probable cause to believe that the crime of unlawful possession of marijuana has been committed. Id. at 303.

The law is well-settled that "the smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Nishina, 175 N.J. 502, 515-16 (2003) (alteration in original) (quoting State v. Vanderveer, 285 N.J. Super. 475, 479 (App. Div. 1995)). Therefore, "absent evidence the person suspected of possessing or using marijuana has a registry identification card, detection of marijuana by the sense of smell, or by other senses, provides probable cause to believe that the crime of unlawful possession of marijuana has been committed." Myers, 442 N.J. Super. at 303.

Here, no claim has been made that defendant or anyone else in the vehicle was a registered qualifying patient or otherwise authorized to possess marijuana under CUMMA. "In that situation, [the officer's] smell of the odor of marijuana . . . gave him probable cause, which justified his arrest of defendant." Id. at 304. The trial court's denial of the suppression motion is supported by substantial credible evidence in the record and is in accordance with applicable legal principles.

III.

We next address defendant's argument regarding Indictment No. 14-12-1005 that the trial court erred in denying the motion to suppress because the testifying officer was not credible. We are unpersuaded by this argument.

"Our standard of review requires that we accord deference to the factual findings of the trial court, which had the opportunity to hear and see the sole witness at the suppression hearing and to evaluate the credibility of his testimony." State v. Scriven, 226 N.J. 20, 32 (2016) (citing State v. Elders, 192 N.J. 224, 244 (2007). Reviewing courts defer to a trial court's credibility findings because they "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999) (citing State v. Jamerson, 153 N.J. 318, 341 (1998); Dolson v. Anastasia, 55 N.J. 2, 7 (1969); State v. Johnson, 42 N.J. 146, 161 (1964)). "Accordingly, we must respect factual findings that are supported by sufficient credible evidence at the suppression hearing, even if we would have made contrary findings had we sat as the motion court." Scriven, 226 N.J. at 32-33 (citations omitted). "A trial court's findings should be disturbed only if they are so clearly mistaken 'that the

interests of justice demand intervention and correction.'" Elders, 192 N.J. at 244 (quoting Johnson, 42 N.J. at 162).

Detective Martinez testified as the sole witness at the hearing. Even after being subjected to cross-examination, the motion judge found Martinez credible. The judge's findings are amply supported by the record, and, thus, entitled to deference. See State v. Walker, 213 N.J. 281, 290 (2013). We discern no basis to disturb the court's determination that Detective Martinez testified credibly. His testimony established that probable cause existed to arrest and search defendant. The search incident to arrest revealed defendant was in possession of heroin. On that basis, the motion judge properly denied the suppression motion.

IV.

Finally, we consider whether the court abused its discretion when sentencing defendant. The trial court found aggravating factors three, six, and nine applied, and that the aggravating factors outweighed the non-existent mitigating factors. Because he had no prior indictable convictions, defendant argues the trial court erred by not considering and giving appropriate weight to mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), which applies where "[t]he defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense[.]"

He contends his sentence should be vacated because it is excessive and unduly punitive.

A reviewing court must not substitute its judgment for that of the sentencing court and must affirm a sentence as long as the judge properly identified and balanced the relevant aggravating and mitigating factors. State v. Cassady, 198 N.J. 165, 180 (2009) (citing State v. Evers, 175 N.J. 355, 386 (2003)); State v. Natale, 184 N.J. 458, 489 (2005). "That standard is one of great deference, and [j]udges who exercise discretion and comply with the principles of sentencing remain free from the fear of second guessing." State v. Dalziel, 182 N.J. 494, 501 (2005) (alteration in original) (citations omitted). If the judge properly followed the guidelines, an appellate court may modify the sentence only if it shocks the judicial conscience. Cassady, 198 N.J. at 181.

The record supports the judge's decision not to apply mitigating factor seven. Although he had no prior indictable convictions, defendant had a history of prior delinquency and criminal activity. As a juvenile, he was adjudicated delinquent for committing offenses that if committed by an adult would have constituted robbery, N.J.S.A. 2C:15-1(a), third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2), unlawful possession of a weapon, 2C:39-5(d), and two counts of possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d). As an adult, a Pre-Trial

Intervention diversion was terminated as unsuccessful and he has been convicted of five disorderly persons offenses.

The judge imposed consecutive terms on two counts of separate indictments, committed on different dates, at separate locations. "There can be no free crimes, and separate crimes ordinarily deserve separate punishment." State v. Johnson, 309 N.J. Super. 237, 271 (App. Div. 1998). Consecutive sentences are not an abuse of discretion when the convictions for which the sentences are being imposed are numerous, the crimes and their objectives were independent of each other, and the crimes involve separate times and places. See State v. Carey, 168 N.J. 413, 422-23 (2001); State v. Baylass, 114 N.J. 169, 180 (1989); State v. Yarbough, 100 N.J. 627, 643-44 (1985). The record supports the imposition of consecutive, not concurrent, sentences.

On count three of Indictment No. 14-12-1052, the judge imposed the three-year period of parole ineligibility mandated by N.J.S.A. 2C:35-7(a). On count six of Indictment No. 14-11-0987, the judge imposed a discretionary three-year period of parole ineligibility pursuant to N.J.S.A. 2C:43-6(b), based on his finding that the aggravating factors outweighed the non-existent mitigating factors.

The aggregate sentence of a sixteen-year prison term, subject to a six-year period of parole ineligibility, was a reasonable

exercise of discretion, properly balancing the relevant factors, and squarely accords with the law. The sentence was well within the permissible range. Both three-year periods of parole ineligibility were appropriate. The sentence is not manifestly excessive or unduly punitive. It does not shock our conscience.

Affirmed.