SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5597-14T1
A-0414-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TAHIR T. SUTTON, a/k/a
TAHIR TIQUAN SUTTON,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DIONTE POWELL, a/k/a
DIONTE MONTEL POWELL,
DIANTE S POWELL, HOTTIE,

Defendant-Appellant.

Submitted September 14, 2017 – Decided September 22, 2017

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Indictment No. 13-09-0422.

Joseph E. Krakora, Public Defender, attorney for appellant in A-5597-14 (Frank M. Gennaro, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant in A-0414-15 (Tamar Y. Lerer, Assistant Deputy Public Defender, of counsel and on the briefs).

Richard T. Burke, Warren County Prosecutor, attorney for respondent in A-5597-14 and A-0414-15 (Kelly Anne Shelton, of counsel and on the briefs).

PER CURIAM

In these back-to-back appeals, which we now consolidate for purposes of this opinion, defendants Tahir Sutton and Dionte Powell challenge their convictions and sentences following a joint jury trial involving robbery, burglary, and other charges. We affirm in part, reverse in part, and remand for further proceedings.

I.

In the early morning hours of March 15, 2013, two men wearing dark clothing, hoodies, masks, and gloves entered the employee breakroom of a convenience store gas station. Both were carrying handguns and one held a backpack. Once inside, the men encountered two employees and demanded money. The two men took approximately $1000 from the employees and some cigarettes and cigar packages from the store shelves. As the men ran from the store, one of them dropped his gun and a piece of it broke off when it hit the

floor. The man retrieved the gun, but left the broken piece behind.

Approximately forty minutes later, a patrol officer using a radar device observed a car traveling over the speed limit. The officer activated his overhead lights and siren, but the driver of the car refused to stop. The officer pursued the vehicle until it crashed into a telephone pole. Four occupants got out of the car and all but one ran away. The officer was able to detain a female passenger. The officer saw that the rear window of the car was broken, there was a small sledgehammer on the backseat, and the ignition had been broken with a screwdriver. The officer also observed a backpack on the rear floor of the car.

At the police station, the female passenger identified Powell as the driver of the car and Sutton as one of the passengers. She told the police that she called Powell to ask for a ride to her mother's house. Shortly after she got into the car, the police chase began.

The police located the registered owner of the car, who gave his written consent to a police search of the vehicle and all of its contents, including "[a]ny and all containers found therein." Inside the backpack, the police found two handguns, packages of cigars and cigarettes, two ski masks, and other clothing. One of the guns was broken and the piece found at the store fit the

missing part of the gun. Sutton's thumb print was found on the exterior of the car. DNA found on one of the ski masks matched Sutton, and DNA on the other mask matched Powell. DNA on cigarette butts found in the car also matched Sutton.

The police set up a surveillance outside the female passenger's home. At approximately 6:00 a.m., the police saw Powell and Sutton walking down the street. Their physical characteristics and clothing matched the robbery suspects. The police arrested defendants. A search incident to that arrest disclosed that each defendant was carrying approximately $500.

II.

A Warren County grand jury subsequently returned a nine-count indictment charging Sutton and Powell with second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:15-1(a)(1) (count one); second-degree burglary, N.J.S.A. 2C:18-2(b) (count two); first-degree robbery, N.J.S.A. 2C:15-1(a)(1) (count three); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count four); third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count five); third-degree theft of an automobile, N.J.S.A. 2C:20-3 (count six); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a) (count eight); and fourth-degree obstructing administration of law or other governmental function, N.J.S.A. 2C:29-1 (count nine).

The indictment also separately charged Powell with second-degree eluding, N.J.S.A. 2C:29-2(b) (count seven).

Prior to trial, the judge denied defendants' motion to suppress the items the police seized from the backpack they abandoned in the stolen car when they ran from the scene of the accident. Following a multi-day trial, the jury convicted defendants of all of the charges contained in the indictment.

At Powell's sentencing, the judge merged count one into count three, and count nine into count eight. The judge sentenced Powell to twelve years in prison on count three, subject to the 85% parole ineligibility provisions of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2; concurrent ten-year terms on counts two and four; a concurrent five-year term with a three-year period of parole ineligibility on count five; a concurrent three-year term on count six; a consecutive six-year term on count seven; and a concurrent eighteen-month term on count eight. Thus, Powell's aggregate sentence was eighteen years.

At Sutton's sentencing, the judge also merged count one into count three, and count nine into count eight. The judge sentenced Sutton to twelve years in prison subject to NERA on count three; concurrent ten-year terms on counts two and four; a concurrent five-year term with a three-year period of parole ineligibility on count five; a consecutive three-year term on count six; and a

concurrent eighteen-month term on count eight. Accordingly, Sutton's aggregate sentence was fifteen years. These appeals followed.

On appeal, Sutton raises the following contentions:

> POINT I
>
> THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.
>
> A. Standing.
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> B. Automobile Exception.
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> C. The Consent Search.
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> D. Reliance On Facts Not Known Before The Search.
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> POINT II
>
> THE TRIAL COURT WRONGFULLY DENIED DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.
>
> POINT III
>
> THE TRIAL COURT'S JURY INSTRUCTION ON THE CRIME OF BURGLARY CONSTITUTED PLAIN ERROR. (Not Raised Below).
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> POINT IV
>
> THE TRIAL COURT'S JURY INSTRUCTION ON THE DOCTRINE OF FLIGHT WAS PLAIN ERROR. (Not Raised Below).
>
> POINT V
>
> THE IMPOSITION OF CONSECUTIVE SENTENCES WAS INAPPROPRIATE, AND THE IMPOSITION OF A SENTENCE FOR SECOND[-]DEGREE BURGLARY WAS IMPROPER.

Powell presents the following arguments:

POINT I

THE TRIAL COURT DENIED DEFENDANT HIS RIGHT TO AN IMPARTIAL AND COMPETENT JURY WHEN IT FAILED TO CONDUCT ANY INQUIRY INTO TWO JURY IRREGULARITIES THAT AROSE DURING TRIAL.

A. Introduction

B. These Incidents Triggered The Trial Court's Independent Obligation To Ensure That The Jury Panel Was Impartial And Competent. Its Failure To Do So Necessitates Reversal Of Defendant's Convictions.

C. Conclusion.

POINT II

OFFICERS' TESTIMONY THAT DEFENDANTS "MATCHED" THE VIDEO OF THE ROBBERS AND THAT ITEMS FOUND AT THE SCENE OF THE ELUDING "MATCHED" ITEMS TAKEN BY THE ROBBERS WAS INAPPROPRIATE ULTIMATE-ISSUE TESTIMONY, UNHELPFUL TO THE JURY, AND HIGHLY PREJUDICIAL. ITS ADMISSION NECESSITATES REVERSAL OF DEFENDANT'S CONVICTIONS RELATED TO THE ROBBERY. (Not Raised Below).

POINT III

THE TRIAL COURT COMMITTED NUMEROUS ERRORS AT SENTENCING, RENDERING THE SENTENCE EXCESSIVE AND REQUIRING A REMAND FOR RESENTENCING.

A. The Trial Court Improperly Rejected The Applicability Of Mitigating Factor 11.

B. The Trial Court Improperly Imposed Consecutive Sentences.

C. The Conviction For Possession Of A Weapon For An Unlawful Purpose Must Merge Into The Robbery Or Burglary Conviction.

D. The Judgment Of Conviction Must Be Amended To Accurately Reflect Defendant's Sentence.

POINT IV

DEFENDANT JOINS POINTS ONE THROUGH FIVE OF CO-DEFENDANT'S BRIEF.

III.

We find insufficient merit in Sutton's Points I, II, and III, and in Powell's Points I and II to warrant discussion in a written opinion. R. 2:11-3(e)(2). Therefore, we proceed to discuss the arguments raised by Sutton in Point IV of his brief concerning his convictions for resisting arrest and obstruction, and Powell's arguments in Point IV of his brief, incorporating Sutton's positions concerning his own convictions for eluding, resisting arrest, and obstruction.

Defendants assert that the general flight charge given to the jury by the trial judge, while conforming to the model jury charge on flight, constituted plain error because it failed to distinguish among the charges listed in the indictment and did not instruct the jury that the inference of consciousness of guilt did not apply to the eluding, resisting arrest, and obstruction charges. We agree.

It is well settled that "[a]ppropriate and proper charges are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (alteration in original) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Jury instructions must give a "comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Id. at 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "[I]n reviewing any claim of error relating to a jury charge, the 'charge must be read as a whole in determining whether there was any error[.]'" State v. Gonzalez, 444 N.J. Super. 62, 70-71 (App. Div.) (quoting State v. Torres, 183 N.J. 554, 564 (2005)), certif. denied, 226 N.J. 209 (2016). If, like here, defense counsel did not object to the jury charge at trial, the plain error standard applies. State v. Singleton, 211 N.J. 157, 182-83 (2012).

Under that standard, we reverse only if the error was "clearly capable of producing an unjust result," id. at 182 (quoting R. 2:10-2), and consider the totality of the circumstances when making this determination. State v. Marshall, 123 N.J. 1, 145 (1991), cert. denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993). However, the Supreme Court has repeatedly cautioned that in a criminal trial, "erroneous jury charges presumptively constitute reversible error . . . and are poor candidates for

rehabilitation under the harmless error philosophy." Singleton, supra, 211 N.J. at 196 (citations omitted).

Applying these standards, we are satisfied that the trial judge's general instruction on flight clearly had the capacity to confuse the jury in its consideration of the specific eluding offense in count seven, resisting arrest by flight offense in count eight, and the obstruction offense in count nine. Flight from custody or the scene of a crime, if carried out with the purpose of avoiding apprehension, prosecution, or arrest, is generally admissible to draw an inference of guilt. State v. Mann, 132 N.J. 410, 418-19 (1993). However, although evidence of flight may be admissible, "[t]he potential for prejudice to the defendant and the marginal probative value of evidence of flight" requires the court to carefully consider the manner in which such evidence is presented to a jury. Id. at 420.

Here, the trial judge instructed the jury as follows on the evidentiary value of a defendant's flight after the commission of an offense:

> Now, there's also been testimony in this case from which you may infer that one or both of the defendants fled shortly after the alleged commission of the crime. Both defendants deny any flight and deny any actions they took constituting flight. The question you must decide is whether either or both defendants fled after the commission of

> the crime. That's another question of fact for you to determine.
>
> Mere departure from a place where a crime has been committed does not constitute flight. If you find that a defendant, fearing an arrest or accusation would be made against him on the charges involved in this case, that he, therefore, took refuge in flight for the purpose of evading arrest or accusation, then you may consider such flight in connection with all the other evidence as an indication of proof of consciousness of guilt.
>
> Flight may only be considered as evidence of consciousness of guilt if you determine that a defendant's purpose was to evade accusation or arrest for the offense or offenses charged in the indictment. It is for you, as the judges of the facts, to decide whether or not the evidence of flight shows a consciousness of guilt, and decide the weight to be given such evidence in light of all of the other evidence in the case.

Although this instruction followed the relevant model charge on flight,[1] the trial judge failed to specify the offenses to which the jury could apply it. This omission was an error, which was clearly capable of producing an unjust result. See R. 2:10-2.

This is so because the flight charge is only applicable to a flight from the scene, which occurs after the commission of an offense for which the defendant is charged. In this case, the offenses submitted to the jury for disposition included burglary, robbery, gun possession, and theft in counts one through six,

[1] Model Jury Charges (Criminal), "Flight" (2010).

together with eluding, resisting arrest, and obstruction in counts seven through nine. The judge properly presented the jury with the flight charge concerning counts one through six, which were the only offenses that allegedly occurred before defendant's flight from the scene of their commission.

However, the flight charge was clearly not applicable to the separate and distinct charges of eluding (count seven)[2], resisting arrest (count eight)[3], and obstruction (count nine)[4], each of which requires the State to prove flight as an essential element of the offense. Because the judge did not instruct the jury that the flight instruction only applied to counts one through six, the jury could have inappropriately considered evidence of flight as tending to prove that defendants acted knowingly in their alleged attempt to elude the police, resist arrest by flight, or obstruct justice.

In view of this plain error in presenting the question of flight to the jury, we are constrained to reverse Sutton's convictions under counts eight and nine for resisting arrest and

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[2] Model Jury Charges (Criminal), "Eluding An Officer" (2004).

[3] Model Jury Charges (Criminal), "Resisting Arrest-Flight Alleged" (2007).

[4] Model Jury Charges (Criminal), "Obstructing Administration of Law or Other Governmental Function" (2000).

obstruction. See Mann, supra, 132 N.J. at 420. We also reverse Powell's convictions under counts seven, eight, and nine for eluding, resisting arrest, and obstruction. Ibid. Therefore, we also vacate each defendant's sentences for these offenses, and remand for further proceedings.

IV.

Moving on to the excessive sentence arguments raised by Sutton and Powell in Points V and III of their respective briefs, we note at the outset that this matter must be remanded to the trial court to correct three mistakes made at the time of sentencing.

First, the parties agree, and we concur, that defendants' convictions under count four for unlawful possession of a weapon for an unlawful purpose should have been merged into their convictions for armed robbery under count three. See State v. Diaz, 144 N.J. 628, 636 (1995) (holding that "[w]hen the only unlawful purpose in possessing the gun is to use it to commit the substantive offense, merger is required"). Second, each defendant's judgment of conviction fails to state that the sentences the judge imposed for second-degree burglary under count two are subject to NERA. See N.J.S.A. 2C:43-7.2(a) and N.J.S.A. 2C:43-7.2(d)(12).

Third, when the trial judge sentenced Powell to a three-year term on count six, he specifically stated that this was a

concurrent, rather than a consecutive, sentence. However, Powell's judgment of conviction mistakenly states that this sentence should run consecutively. When a trial judge's oral opinion reflects a proper sentence, it controls over the judgment of conviction. State v. Warmbrun, 277 N.J. Super. 51, 58 n.2 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995). Therefore, Powell's judgment of conviction is incorrect.

Therefore, we remand these matters for the entry of amended judgments of conviction correcting these three mistakes.

In all other respects, we discern no basis for disturbing the sentences imposed by the trial judge upon each defendant. Trial judges have broad sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500 (2005). Judges must identify and consider "any relevant aggravating and mitigating factors" that "are called to the court's attention[,]" and "explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 64-65 (2014) (quoting State v. Blackmon, 202 N.J. 283, 297 (2010)). "Appellate review of sentencing is deferential," and we therefore avoid substituting our judgment for the judgment of the trial court. Id. at 65; State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365 (1984).

We are satisfied the judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record, and applied the correct sentencing guidelines enunciated in the Code. Accordingly, there is no basis to second-guess the sentences.

In sum, we affirm defendants' convictions under counts one through six. We reverse Sutton's convictions for counts eight and nine, and Powell's convictions for counts seven, eight, and nine, vacate their sentences on these charges, and remand for further proceedings. Finally, we also remand for correction of defendants' judgments of conviction as determined above. The sentences imposed by the trial judge are otherwise affirmed.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.