SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0045-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EVAN KOCHAV, a/k/a EVAN MATTHEW KOCHAV,

Defendant-Appellant.

Submitted January 10, 2018 – Decided February 7, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Indictment No. 15-03-0035.

Jef Henninger, attorney for appellant.

Christopher S. Porrino, Attorney General, attorney for respondent (Emily R. Anderson, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Evan Konchav appeals from an April 7, 2016 conviction and sentence. For the reasons that follow, we affirm defendant's conviction but remand for resentencing.

I.

On March 23, 2015, a State grand jury charged defendant with second-degree theft by deception, N.J.S.A. 2C:20-4(a); second-degree financial facilitation of criminal activity (money laundering), N.J.S.A. 2C:21-25(b)(2)(a); four counts of third-degree bad checks, N.J.S.A. 2C:21-5; and second-degree misconduct by a corporate official, N.J.S.A. 2C:21-9(c).

On December 16, 2015, defendant pled guilty to second-degree theft by deception and second-degree money laundering. In exchange for the guilty plea, the State agreed to recommend defendant be sentenced as a third-degree offender, to a five-year prison term on the theft by deception count, and to a consecutive three-year prison term on the money laundering count. In addition, if defendant paid at least twenty percent of the agreed upon restitution — $561,745.10l — before sentencing, the State would allow defendant to withdraw his guilty plea to money laundering, reducing the recommended sentence to a flat five-year term, and would not object to an early application by defendant for entry into the Intensive Supervision Program (ISP) pursuant to Rule 3:21-10(b)(6) and N.J.S.A. 2C:43-11.

During the plea hearing, defendant testified he was not under the influence of any intoxicants and did not suffer from any physical or mental impairment. He stated he was thirty-four years

old, able to read and write the English language, and was a college graduate. He testified he reviewed the plea form in its entirety with his attorney, had signed or initialed each page, and understood its contents. Defendant stated the answers on the plea form were his and they were truthful and accurate. Defendant indicated he understood the charges he was pleading guilty to, his sentencing exposure on each, and that he had committed each offense. He further indicated he understood the exact terms of the recommended sentence.

Defendant further testified he understood the State's burden of proof beyond a reasonable doubt, and that by pleading guilty, he understood he was giving up the right to a jury trial, the right to remain silent, the right to confront witnesses, the right to compel testimony, and the right to file certain motions. He also stated he understood he would have a criminal record.

The trial court then engaged in the following colloquy with defendant:

> Q Okay. And now we've already gone over the contents of the plea agreement. So other than what has been spelled out for you in terms of the plea agreement were there any other promises that anyone made to you in order to cause you to waive your rights or to plead guilty?
>
> A No, Your Honor.

Q Has anyone forced or threatened you in order to cause you to waive your right to plead guilty?

A No, your Honor.

Q Do you understand the [c]ourt is not bound by any promises or recommendations of the State and that the Court has the right to reject the plea before sentencing you and the right to impose a more severe sentence?

A Yes, Your Honor.

Q Do you also understand that if that occurs you would have the right to withdraw your guilty plea and anything you said here today could not be used against you at trial?

A Yes, Your Honor.

Q During the course of these proceedings you've been represented by an attorney. Have you had enough time to consult with him and anyone else you wanted to consult with before making your decision to plead guilty?

A Yes, Your Honor.

Q Has your attorney advised you of all the charges, the discovery, the evidence, the potential consequences of conviction after trial and the consequences of entering a guilty plea pursuant to this plea agreement?

A He has, Your Honor.

Q Has your attorney answered all your questions to your satisfaction?

A Yes, Your Honor.

Q Are you satisfied with his services in general?

A Yes, I am, Your Honor.

Q Do you have any questions you'd like to ask your attorney or the [c]ourt before we proceed?

A No, I don't.

. . . .

Q Mr. Kochav, have you understood all of the questions that have been asked of you?

A I have, Your Honor.

Q You've been asked many questions under oath today to insure that you're entering this guilty plea knowingly, intelligently, and voluntarily. Do you understand that once I'm satisfied your guilty plea is knowing, intelligent, and voluntary and I accept that plea it will be extraordinarily difficult for you to seek to withdraw that guilt[y] plea?

A Yes, I do, Your Honor.

Q In other words, if after today you simply change your mind and wish to proceed to trial you will not be permitted to withdraw your guilty plea, do you understand?

A Yes, I do, Your Honor.

Q Well, sir, if you come back after I accept the guilty plea and claim that you did not understand these proceedings the charges, your rights, your attorney's advice it would be very difficult for me to believe you because you've testified under oath in open court and on the record today that you understood all these things, do you understand?

A Yes, Your Honor.

> Q Moreover, if you come back later and claim that you were forced or threatened to enter the guilty plea or that your attorney told you you had no choice but to plead guilty or that you did not have sufficient time to speak with your attorney or you were unhappy with your attorney's services, or that someone promised you something that is not set forth on the record or contained in the plea form, again, I would have great difficulty believing you because you testified today that none of these circumstances occurred, do you understand?
>
> A I do, Your Honor.
>
> Q Understanding all these things you want more time to consider this matter or do you want the [c]ourt to accept your guilty [plea]?
>
> A I'd like the [c]ourt to accept my guilty plea.
>
> Q Are you sure?
>
> A Yes, Your Honor.

Defendant provided a factual basis for each charge. As to the theft by deception, defendant admitted that between October 2012 and April 2014, he obtained at least $75,000 from multiple victims by creating a false impression he would be investing the funds on their behalf. He admitted to purposely deceiving the victims to obtain their money. As to the money laundering, defendant admitted that during the same period he conducted financial transactions with the victims in excess of $75,000,

knowing the transactions were undertaken to conceal the source of the money.

Finding defendant's testimony to be credible, the trial court concluded his guilty pleas were entered knowingly, intelligently, and voluntarily, without threat or outside promise, upon receiving advice from competent counsel, with whom defendant was satisfied.

Trial counsel requested an extended sentencing date to provide defendant additional time to secure funds for restitution. The judge scheduled sentencing for March 25, 2016, a date to which trial counsel agreed. Sentencing was subsequently rescheduled to April 1, 2016.

When defendant appeared for sentencing, he was able to secure only ten percent of the restitution amount prior to sentencing. The trial court denied defendant's request for an eight-week adjournment of sentencing to allow him to secure additional funds for restitution. As a result, the sentencing proceeded without defendant withdrawing his guilty plea to money laundering.

The trial court found aggravating factors one (nature and circumstances of the offense), N.J.S.A. 2C:44-1(a)(1); three (risk defendant will commit another offense), N.J.S.A. 2C:44-1(a)(3); four (lesser sentence will depreciate the seriousness of defendant's offense because defendant took advantage of a position of trust), N.J.S.A. 2C:44-1(a)(4); and nine (need for deterring

defendant and others from violating the law) applied. The trial court also found mitigating factors six (defendant will compensate victim for the damage he sustained), N.J.S.A. 2C:44-1(b)(6); seven (defendant has no history or prior delinquency or criminal activity), N.J.S.A. 2C:44-1(b)(7); eleven (imprisonment of defendant would entail excessive hardship), N.J.S.A. 2C:44-1(b)(11); and twelve (willingness of defendant to cooperate with law enforcement authorities), N.J.S.A. 2C:44-1(b)(12) applied. The court further found the aggravating factors outweighed the mitigating factors "principally based on the magnitude of the financial and economic harm" suffered by the victims.

The judge noted the recommended sentence of a five-year term on the second-degree theft by deception was at "the bottom of the second[-]degree range." He further noted the recommended sentence of a three-year term on the third-degree money laundering was also at the bottom of the downgraded third-degree range, although it was to be consecutive to the sentence on the theft by deception. The judge found the recommended sentence to be "sensible in the overall scheme of the case."

Defendant was sentenced in accordance with the plea agreement to an aggregate eight-year prison term, receiving a five-year term on the theft by deception and a consecutive three-year term on the

money laundering. Appropriate fines and penalties were also assessed, and restitution in the amount of $464,966.82 was ordered.

Defendant contends he entered into the plea agreement as a result of ineffective assistance of counsel. He claims he wanted to go to trial, but his trial counsel advised against it and coerced him into accepting the plea agreement. He also claims his trial counsel never advised him a different sentence was a possibility or that the two charges could potentially be merged for sentencing purposes. He alleges to have had difficulty communicating with his trial counsel, who purportedly did not return his phone messages. Defendant further contends his attorney stated he "should just do his time and not appeal this case."

Defendant did not move to withdraw his guilty plea either before or after sentencing. Nor did he file a petition for post-conviction relief (PCR). On appeal, defendant raises the following points:

> POINT I
>
> DEFENDANT PLED GUILTY AS A RESULT OF INEFFECTIVE ASSI[S]TANCE OF COUNSEL UNDER THE STRICKLAND V. WASHINGTON TEST (Not Raised Below).
>
> > A. Defendant felt coerced to enter into a plea agreement with the State and forego a trial, was never made aware of any other consequences or sentencing outside the plea agreement, and was unable to reach his counsel to file an

appeal with[in] the forty-five day time period. (Not Raised Below).

POINT II

THE TRIAL COURT ERRED IN SENTENCING DEFENDANT TO A CONSECUTIVE SENTENCE UNDER STATE OF NEW JERSEY v. JOHN YARBOUGH.

II.

In this direct appeal, defendant claims he pled guilty as a result of ineffective assistance of trial counsel. Among other claims, he contends he was coerced by trial counsel into waiving his right to trial, accepting the plea agreement, and pleading guilty.

The trial court conducted a painstaking plea hearing and found plaintiff's "credible" testimony confirmed he was satisfied with the services of his trial counsel; read, understood, and agreed to the terms of the plea agreement; waived his right to trial and associated constitutional rights; and entered his plea knowingly, intelligently, voluntarily, and free from threat or outside promise. The judge further found the plea was supported by a sufficient factual basis. "A trial judge's finding that a plea was voluntarily and knowingly entered is entitled to appellate deference so long as that determination is supported by sufficient credible evidence in the record." State v. Lipa, 219 N.J. 323, 332 (2014) (citing State v. McCoy, 222 N.J. Super. 626, 629 (App.

Div. 1988), aff'd, 116 N.J. 293 (1989)). The trial judge's findings are amply supported by the record.

The record before us does not reveal the information necessary to address the ineffective assistance of counsel claims. See State v. Morton, 155 N.J. 383, 432-33 (1998) (refusing to decide ineffective assistance claim on direct appeal where record did not reveal why counsel did not call certain witnesses during penalty-phase of capital trial); State v. Dixon, 125 N.J. 223, 261-62 (1991) (refusing to decide ineffective assistance claim on direct appeal where record was "inadequate to disclose what reasons of tactics and strategy motivated counsel"). Defendant's claims involve alleged conduct that lies outside the trial record. See State v. Preciose, 129 N.J. 451, 460 (1992) ("Our courts have expressed a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." (citations omitted)). We decline to address defendant's argument that his trial counsel provided ineffective assistance.

We affirm defendant's conviction. Our decision, however, does not bar defendant from reasserting his ineffective assistance of counsel claim in a timely filed PCR petition. See Morton, 155 N.J. at 433 (permitting defendant to revisit his ineffective assistance of counsel claims on PCR "despite rejection of these

claims at direct appeal"); State v. Marshall, 148 N.J. 89, 147-54 (1997) (permitting defendant to raise ineffective assistance claims in PCR proceeding despite rejection of these claims on direct appeal); Preciose, 129 N.J. at 460 ("Ineffective-assistance-of-counsel claims are particularly suited for post-conviction review because they often cannot reasonably be raised in a prior proceeding.").

III.

Defendant argues the money laundering charge should have been merged into the theft by deception charge for purposes of sentencing. We disagree.

"Merger is based on the principle that 'an accused [who] has committed only one offense . . . cannot be punished as if for two.'" State v. Miller, 108 N.J. 112, 116 (1987) (alteration in original) (quoting State v. Davis, 68 N.J. 69, 77 (1975)). "The analysis is similar to a double jeopardy analysis." Ibid. (citing State v. Mirault, 92 N.J. 492, 501 (1983)). "The first step is to compare the statutes defining the offenses at issue . . . focus[ing] on the elements of the crimes and the Legislature's intent in creating them." Ibid. It also requires "focusing on the specific facts of each case." Id. at 117. However, "merger may be improper even where a single course of conduct constitutes a violation of two different criminal statutes." Ibid.

In order to be convicted of theft by deception, the State must prove: (1) the defendant obtained the property of another; (2) the defendant purposely obtained the property by deception; and (3) the victim relied upon the deception in parting with the property. Model Jury Charges (Criminal), "Theft by Deception (N.J.S.A. 2C:20-4)" (rev. Apr. 15, 2013). A person deceives if he purposely "[c]reates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind." N.J.S.A. 2C:20-4(a). In contrast, in order to be convicted of money laundering, the State must prove defendant

> engage[d] in a transaction involving property known or which a reasonable person would believe to be derived from criminal activity . . . knowing that the transaction is designed in whole or in part . . . to avoid a transaction reporting requirement under the laws of this State or any other state or of the United States.
>
> [N.J.S.A. 2C:21-25(b).]

Thus, theft by deception and money laundering involve entirely different elements and address distinctly different criminal behavior. Moreover, "different interests [are] protected by the statutes violated." Miller, 108 N.J. at 118. Therefore, the offenses do not merge for sentencing purposes.

Defendant further argues the trial court erred in sentencing him to a consecutive three-year term on the money laundering charge, citing State v. Yarbough, 100 N.J. 627 (1985).

"Appellate review of the length of a sentence is limited. An appellate court should assess the aggravating and mitigating factors to determine whether they were based upon credible evidence in the record." State v. Miller, 205 N.J. 109, 127 (2011) (citations omitted). The trial court explained its basis for finding and weighing the four aggravating factors and four mitigating factors. Those findings are supported by competent credible evidence in the record. At issue is whether the consecutive sentences are appropriate.

"[T]rial judges have discretion to decide if sentences should run concurrently or consecutively." Miller, 205 N.J. at 128 (citing N.J.S.A. 2C:44-5(a)). In Yarbough, the Court adopted "criteria as general sentencing guidelines for concurrent or consecutive-sentencing decisions." 100 N.J. at 644. The criteria include:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> . . . .
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous; [and]
>
> (4) there should be no double counting of aggravating factors[.]
>
> [Miller, 205 N.J. at 128 (quoting Yarbough, 100 N.J. at 643-44).]

"[T]he reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision." Yarbough, 100 N.J. at 643.

> When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal. However, if the court does not explain why consecutive sentences are warranted, a remand is ordinarily needed for the judge to place reasons on the record."
>
> [Miller, 205 N.J. at 129 (citations omitted).]

Because the trial court did not provide a statement of reasons for its decision to impose consecutive sentences, we are compelled to remand this case for resentencing. "A statement of reasons is

a necessary prerequisite for adequate appellate review of sentencing decisions." Miller, 108 N.J. at 122. Without a statement of reasons we cannot determine whether the trial court's imposition of consecutive sentences was a valid exercise of discretion.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.