SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3827-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRENT A. PETTIT,
a/k/a BRENT PETTIT,
KRIS N. CISROWE, and BRENT
PETITE,

Defendant-Appellant.

Argued December 11, 2017 – Decided March 22, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 14-10-0764.

Rebecca Gindi, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Rebecca Gindi, of counsel and on the briefs).

Lila B. Leonard, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Lila B. Leonard, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Brent A. Pettit of third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1).[1] The judge granted the State's motion for an extended term of imprisonment, N.J.S.A. 2C:44-3(a), and imposed a seven-year term with a three-and-one-half years of parole ineligibility. Before us, defendant raises the following arguments:

> POINT I
>
> THE HEROIN AND STATEMENT MUST BE SUPPRESSED BECAUSE THEY WERE A COMPELLED RESPONSE TO UNWARNED CUSTODIAL INTERROGATION.
>
> > A. THE TRIAL COURT CORRECTLY FOUND THAT A REASONABLE PERSON IN PETTIT'S SITUATION WOULD NOT HAVE FELT FREE TO LEAVE AFTER POLICE REQUIRED THAT HE EXIT SOMEONE ELSE'S CAR, AND MULTIPLE OFFICERS IMMEDIATELY ACCUSED HIM OF ENGAGING IN CRIMINAL ACTIVITY.
> >
> > B. THE TRIAL COURT'S FINDING THAT THE OFFICERS' QUESTIONING WAS NOT AN INTERROGATION WAS ERRONEOUS BECAUSE THE OFFICERS TOLD PETTIT THEY BELIEVED HE WAS SELLING DRUGS AND ASKED HIM A QUESTION THAT WAS LIKELY TO ELICIT AN INCRIMINATING RESPONSE.
> >
> > C. THE HEROIN AND STATEMENT "YEAH, I DO" WERE COMPELLED RESPONSES TO THE OFFICERS' CUSTODIAL INTERROGATION AND MUST BE SUPPRESSED.

[1] Before trial, the State dismissed the second count of the indictment charging defendant with possession with intent to distribute.

POINT II

BECAUSE THE TRIAL COURT FAILED TO VOIR DIRE THE JURY AFTER LEARNING THAT AT LEAST ONE JUROR WAS HAVING TROUBLE HEARING DEFENSE COUNSEL DURING HER OPENING AND THE EXAMINATION OF THE STATE'S KEY WITNESS — A CRITICAL PORTION OF THE TRIAL — PETTIT WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (NOT RAISED BELOW).

POINT III

IMPOSITION OF A DISCRETIONARY EXTENDED TERM, A SENTENCE WITHIN THE SECOND-DEGREE RANGE, AND A DISCRETIONARY PAROLE DISQUALIFIER FOR THIRD-DEGREE POSSESSION OF LESS THAN HALF AN OUNCE OF CDS BASED ONLY ON DEFENDANT'S PRIOR RECORD WAS INAPPROPRIATE AND RESULTED IN AN EXCESSIVE SENTENCE.

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

I.

Defendant moved pre-trial to suppress physical evidence seized from his person without a search warrant, as well as statements he made to police officers at the scene of a motor vehicle stop. At the evidentiary hearing, Vineland Police Officers Jose Torres and Christopher Ortiz testified, after which the judge determined both officers were credible and made the following factual findings. We defer to those findings because "the trial court . . . had the opportunity to hear and see the . . . witness[es] at the suppression hearing and to evaluate the

credibility of [their] testimony." State v. Scriven, 226 N.J. 20, 32 (2016) (citing State v. Elders, 192 N.J. 224, 244 (2007)). We uphold those factual findings because they are supported by sufficient credible evidence in the record. Elders, 192 N.J. at 243.

The judge found that Officer Torres witnessed a motor vehicle violation and lawfully stopped a car driven by Christopher Constante. Torres knew Constante and the front-seat passenger, Jessica Dakin, as "drug users," and defendant, seated in the rear, as "a drug dealer." Torres called for backup and Ortiz arrived shortly thereafter with two other officers.

Ortiz was also familiar with Constante and Dakin from prior contacts, but he did not know defendant. The officers ordered Constante, who appeared nervous and reluctant to talk while in the car with the other passengers, out of the vehicle and to the rear of the car. At that point, another officer located a piece of suspected crack cocaine on the driver's seat. Ortiz issued Miranda[2] warnings to Constante, who provided further information regarding defendant and Dakin.[3] The officers asked defendant to

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

[3] Although the judge did not provide the details of this additional information in his findings, Ortiz testified that he asked Constante, "what was going on" and Constante said he was driving Dakin around so she could "possibly buy narcotics" from defendant.

exit the car, and, when he did, without issuing Miranda warnings, asked defendant "if there was anything on him that [they] should be aware of." Defendant said, "'Yeah, I do,'" and removed twenty packets of heroin from his waistband.

Although the judge did not specifically reference the testimony in his factual findings, the record reflects that in response to questions posed by the judge, Ortiz acknowledged that from the moment crack cocaine was found on the front seat, he had probable cause to arrest all three occupants of the vehicle. He also said police would routinely "frisk" a defendant as part of the arrest.

Following the testimony, defense counsel argued there was no reason to order defendant out of the car and no authority for police to question defendant without Miranda warnings. The prosecutor countered by arguing defendant was not subject to custodial interrogation but only "roadside questioning." The prosecutor also contended police had probable cause to search everyone in the car after finding crack cocaine on the front seat, alluding to the inevitable discovery of the heroin on defendant.

The judge concluded Torres had reason to stop the car for a motor vehicle violation, and the officers properly ordered Constante out of the car. The judge determined that when police discovered crack cocaine, "at that moment, . . . there was probable

cause to arrest all of the individuals within the vehicle for the possession of that controlled substance." Based upon Constante's statements, the judge concluded police had "sufficient cause to remove" both passengers from the car. The judge reasoned once the crack cocaine was found, "this turned from a traffic stop into an investigative stop[] into an arrest."

The judge concluded that the question posed to defendant — "Do you have anything on you I should know about?" — "was not asked to elicit any inculpatory evidence, or response." The judge reasoned police ask such questions to prevent injury, because "there may be injectables, or something like that involved." Police also ask such questions "because, sometimes it's just easier than frisking [the person], for them to produce anything they have on them, and it's less intrusive on the side of the roadway." In sum, the judge concluded "there was probable cause to arrest. . . . [T]here was the intent to search, incident to arrest, at the time. And, . . . the question . . . was a predicate to the search, incident to arrest. It was not for the purposes of interrogation." He denied the motion to suppress both the physical evidence and defendant's response to the officers' question.

Defendant argues that his answer to the officers' question and his surrender of the heroin from his waistband were compelled

responses to custodial interrogation without prior Miranda warnings, and the judge should have suppressed both his statement and the heroin. The State contends defendant was neither in custody nor being interrogated when Officer Ortiz asked, "Do you have anything on you I should know about?"

We do not defer to the judge's legal conclusions drawn from established facts, because we review all legal issues de novo. State v. Vargas, 213 N.J. 301, 327 (2013) (citing State v. Gandhi, 201 N.J. 161, 176 (2010)). The State's argument ignores the judge's finding that not only was there probable cause to arrest defendant before Ortiz asked the question, but also that Ortiz "was intending to place [defendant] under arrest" when he asked the question. Defendant correctly asserts, and the judge essentially concluded, that defendant was not free to leave at that point. See State v. P.Z., 152 N.J. 86, 103 (1997) (holding that "[t]he critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action based on the objective circumstances").

As a result, the State's reliance upon cases like Berkemer v. McCarty, 468 U.S. 420 (1984), and State v. Hickman, 335 N.J. Super. 623 (App. Div. 2000), is misplaced. Those cases deal with limited investigative detentions, not arrests, and permit police, for example, to "ask the detainee a moderate number of questions

to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions," without providing Miranda protections. Berkemer, 468 U.S. at 439.

This case is most similar to the facts presented by State v. O'Neal, 190 N.J. 601 (2007), upon which defendant relies. There, after police observed the defendant engage in two drug transactions and saw him stash the drugs in his sock, they approached and asked "'what's going on?'" Id. at 607. Although the defendant denied any wrongdoing, police patted down a bulge in his sock and asked what it was. Ibid. Defendant admitted it was cocaine, and police seized a bag containing vials of cocaine from his ankle area. Ibid.

The defendant moved to suppress the incriminating statement he made to police, arguing it was elicited without Miranda warnings. Id. at 608. The trial court denied the motion, concluding the defendant was not in custody, and we affirmed, concluding Miranda warnings were unnecessary because the detention was a valid investigatory stop. Id. at 609-10. Defendant was convicted after trial, at which time his incriminatory statement and the seized drugs were admitted into evidence. Id. at 610.

Viewing the facts objectively, the Court concluded the officers "had probable cause to search and arrest [the] defendant." Id. at 614. Furthermore, it did not matter whether the search

preceded the arrest because "[i]t is the 'right to arrest,' rather than the actual arrest that 'must pre-exist the search.'" Ibid. (quoting State v. Doyle, 42 N.J. 334, 342 (1964)). The Court "conclude[d] that the police had probable cause to arrest defendant for a drug offense, and the seizure of the drugs during the search that preceded the arrest was lawful." Id. at 615. The Court, however, also concluded that defendant was in custody when police asked what was in his sock. Id. at 616. We agree, therefore, that defendant was in custody when Ortiz asked, "Do you have anything on you I should know about?"

In O'Neal, because police had not issued Miranda warnings to the defendant prior to posing the question, the Court held the trial judge should have suppressed defendant's incriminatory statement. Ibid. Defendant argues, therefore, the judge here should have suppressed both his verbal response to the question and his nonverbal response, i.e., producing the heroin from his waistband. He relies in particular on our decision in State v. Mason, 164 N.J. Super. 1 (App. Div. 1979).

There, police detained the defendant in an unmarked police car, and, without giving her Miranda warnings, asked if she had any drugs. Id. at 3. The defendant gave a noncommittal verbal response but then produced drugs from her sweater. Ibid. We held that her surrender of the drugs was a nonverbal response to

interrogation that violated Miranda, and the trial court properly suppressed the evidence. Id. at 4.

However, in Mason, we specifically rejected the State's argument that the police conduct was "justified as incident to a valid arrest[,]" because "the police did not arrest defendant but chose to interrogate her." Ibid. As already noted, the motion judge here concluded that police not only had probable cause to arrest defendant but also intended to arrest him for the crack cocaine found in the car before ever posing a question.[4]

That factual finding makes this case more similar to State v. Barnes, 54 N.J. 1 (1969). There, police stopped a car driven by the defendant, the subject of an arrest warrant because she had escaped from prison. Id. at 4. After ordering everyone out of the car, and arresting and handcuffing the defendant, police transported the car a few blocks away to avoid a gathering crowd, and, while conducting the initial cursory search of the car, found stolen checks on its floor. Id. at 4-5. Without providing Miranda warnings, police asked the defendant, "Whose stuff is this?" Id. at 5. She answered the checks were hers. Ibid.

[4] Defendant contends in his reply brief that "facts in the record indicate that the officers would not have arrested [defendant]" based solely on the crack cocaine found on the driver's seat because they chose not to arrest Dakin, who was in closer proximity to the drugs. The judge found otherwise, and we defer to those factual findings.

The Court specifically rejected the defendant's argument that the officers' question violated Miranda, requiring suppression of her answer. The Court said, "[W]e cannot believe that the officer's single inquiry was the kind of custodial interrogation which the Supreme Court in Miranda held to be barred in the absence of prior warnings." Id. at 6-7; see also State v. Cunningham, 153 N.J. Super. 350, 351-54 (App. Div. 1977) (citing Barnes and finding that even after Miranda warnings were issued and the defendant invoked his right to remain silent, detective's question regarding the defendant's address and with whom he lived did not violate Miranda or require suppression of physical evidence found at the address given).

The circumstances surrounding the question posed in this case were qualitatively different from those presented in O'Neal. There, police had witnessed defendant make two drug sales and hide the drugs in his sock. They had physically frisked him and felt the bulge in the same sock before asking what it was. The question was clearly intended to elicit an incriminatory response. See State v. Stott, 171 N.J. 343, 365 (2002) (citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). Here, as the judge found, the circumstances were more ambiguous. Thus, we agree that the officers' question in this case was not custodial interrogation that violated Miranda.

Even if our evaluation of the legal consequences flowing from the particular facts of this case is incorrect, we still affirm the denial of defendant's motion to suppress for other reasons, only alluded to by the State and the judge. See State v. Scott, 229 N.J. 469, 479 (2017) ("It is a long-standing principle underlying appellate review that 'appeals are taken from orders and judgments and not from opinions . . . or reasons given for the ultimate conclusion.'") (quoting Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001)).

In O'Neal, although concluding police violated Miranda, the Court concluded the failure to suppress the statement was harmless beyond a reasonable doubt.

> The police had probable cause to search and arrest defendant prior to asking the offending question and would have discovered the cocaine when they searched the sock. The fact that defendant told the police what they were about to discover had no bearing on the legality of the seizure of the cocaine.
>
> [O'Neal, 190 N.J. at 616 (emphasis added).]

We conclude the Court's reasoning applies with equal force to this case.[5]

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[5] It is unnecessary to address whether the officers' question in this case — "Do you have anything on you I should know about?" — is the kind of "narrowly tailored" inquiry that falls within the "safety exception to Miranda." O'Neal, 190 N.J. at 618 (citing New York v. Quarles, 467 U.S. 649, 659 n.8 (1984)).

Under the inevitable discovery doctrine, "[e]vidence is admissible even though it was the product of an illegal[ity], 'when . . . the evidence in question would inevitably have been discovered without reference to the police error or misconduct[.]'" State v. Sugar, 108 N.J. 151, 156 (1987) (quoting Nix v. Williams, 467 U.S. 431, 448 (1984)). The State must show by clear and convincing evidence

> (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.
>
> [State v. Johnson, 120 N.J. 263, 289 (1990) (citation omitted).]

Defendant correctly points out that the State's argument before the motion judge, and its appellate brief before us, pays little more than lip service to an assertion that inevitable discovery justifies the warrantless seizure of heroin from defendant. We recognize that the Court has cautioned against review of issues not fully addressed by the parties in the trial court, particularly when those proceedings "create[] a 'record . . . barren of facts that would shed light on [the] issue.'"

Scott, 229 N.J. at 479 (quoting State v. Witt, 223 N.J. 409, 418 (2015)). But, this is not such a case, because the record is fully developed, and, contrary to defendant's argument in his reply brief, the judge's factual findings support application of the inevitable discovery doctrine.

The judge specifically found that police were in the process of arresting defendant before Ortiz asked the offending question and before defendant produced the heroin from his waistband. Ortiz stated, when asked by the judge, that police routine would have required him to "frisk" defendant at the time of arrest. Police would have discovered the heroin even if Ortiz never asked defendant a single question.

We affirm the denial of defendant's motion to suppress.

II.

We provide some factual context for the argument raised in Point II. At trial, all the witnesses for the State and defense testified in one day. After the first two witnesses testified, the judge received a note from the jury attendant that a certain juror wished to speak with him, and counsel agreed the judge and counsel should speak to the juror outside the presence of the

other jurors.[6] Before that happened, the following exchange occurred:

> Judge: All right? The other one is — is that another juror, I do not know which juror it is — indicates that defense counsel needs to speak up.
>
> Defense counsel: Okay.
>
> Judge: They're having trouble hearing you. So you need to project a little bit more, [counsel]; okay?
>
> Defense counsel: Gotcha.

Defendant now argues it was plain error for the judge not to conduct further inquiry of the unidentified juror who expressed difficulty in hearing defense counsel. Defendant likens the situation here to that where a juror is inattentive or asleep. In State v. Mohammed, 226 N.J. 71, 75 (2016), the Court provided guidance for trial judges when faced with such circumstances:

> When it is alleged that a juror was inattentive during a consequential part of the trial, if the trial court concludes, based upon personal observations explained adequately on the record, that the juror was alert, the inquiry ends. If the judge did not observe the juror's attentiveness, the judge must conduct individual voir dire of the juror; if that voir dire leads to any conclusion other than that the juror was attentive and alert, the judge must take appropriate corrective action.

[6] At sidebar, the judge dealt with issues regarding that juror and another which are irrelevant to defendant's argument.

Here, there was no indication that the juror was inattentive or asleep, or, for that matter, that he or she had not heard any testimony. In his opening instructions, the judge told the jurors to let him know if they had a problem hearing the witnesses, but no one raised that issue with the judge. The argument requires no further discussion. R. 2:11-3(e)(2).

III.

Lastly, defendant argues his sentence was excessive. He contends the judge engaged in improper "double counting of his criminal record," "overweigh[ed] . . . aggravating factors three, six and nine," and "fail[ed] to find mitigating factors one and two which were clearly supported by the record." We disagree and affirm defendant's sentence.

The State moved to sentence defendant as a persistent offender. N.J.S.A. 2C:44-3(a). There is no dispute that he was eligible, having had six prior indictable convictions. Once a defendant is found to be a persistent offender, "the permissible sentencing range expands; the maximum sentence of the higher-degree range becomes the top of the extended-term range, while the bottom remains the minimum sentence of the ordinary-term sentencing range." State v. Hudson, 209 N.J. 513, 527 (2012) (citations omitted). Thus, the range of possible sentences for

defendant's third-degree conviction was three to ten years. As noted, the judge imposed a seven-year term.

Defendant argues the judge used his prior criminal record to both impose an extended term and set the actual term, which, he contends, is a variation of impermissible double counting.[7] However, in State v. Pierce, 188 N.J. 155, 170 (2006), the Court made clear that in setting the appropriate term within the extended range,

> courts . . . will perform their sentencing function by using the traditional approach of finding and weighing aggravating and mitigating factors and imposing a sentence within the available range of sentences. That determination will be reviewed for reasonableness.
>
> The court may consider the protection of the public when assessing the appropriate length of a defendant's base term as part of the court's finding and weighing of aggravating factors and mitigating factors.

The mechanics which must be followed by a sentencing court in imposing a period of parole ineligibility are set forth in State v. Kruse, 105 N.J. 354 (1987). "When determining parole ineligibility . . . the court must be clearly convinced that the

[7] The case cited by defendant in support of this proposition, State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005), is inapposite since there we dealt with the use of the same aggravating factors to impose an extended term above the then permissible "presumptive" extended term sentence.

aggravating factors substantially outweigh the mitigating factors. The different standard reflects the fact that [p]eriods of parole ineligibility are the exception and not the rule. They are not to be treated as routine or commonplace." Id. at 359 (citation omitted) (emphasis added).

"Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). We assess whether the aggravating and mitigating factors "were based upon competent credible evidence in the record." State v. Miller, 205 N.J. 109, 127 (2011) (quoting State v. Bieniek, 200 N.J. 601, 608 (2010)). We do not "'substitute [our] assessment of aggravating and mitigating factors' for the trial court's judgment." Ibid. (quoting Bienek, 200 N.J. at 608). When the judge has followed the sentencing guidelines, and his findings of aggravating and mitigating factors are supported by the record, we will only reverse if the sentence "shocks the judicial conscience" in light of the particular facts of the case. State v. Roth, 95 N.J. 334, 364 (1984); accord State v. Cassady, 198 N.J. 165, 183-84 (2009).

In this case, the judge carefully explained his findings as to aggravating factors three, six and nine and explained why he rejected certain mitigating factors. The judge made the necessary

additional findings justifying imposition of a period of parole ineligibility. We find no basis to disturb the judge's exercise of his broad discretion.

Affirmed.