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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-4676-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CRISTIAN VASILE,

Defendant-Appellant.

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Submitted January 24, 2018 – Decided May 18, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Indictment No.  
15-03-0499.

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

Robert D. Laurino, Acting Essex County  
Prosecutor, attorney for respondent (Camila  
Garces, Special Deputy Attorney General/Acting  
Assistant Prosecutor, of counsel and on the  
brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Tried by a jury, defendant Cristian Vasile was convicted of third-degree burglary, N.J.S.A. 2C:18-2. On May 16, 2016, he was sentenced to an extended term of nine years imprisonment, subject to parole ineligibility. Defendant was sentenced as a persistent offender. See N.J.S.A. 2C:44-3(a). He appeals, and we affirm.

The trial record establishes the following. On December 3, 2014, the occupant of the third floor apartment at 91 Warwick Street saw a stranger standing in front of 82 Warwick Street. The man appeared to be either ringing the doorbell or talking on his cell phone. The man opened a window next to the door and went inside. The neighbor immediately called police. During the 911 call, the neighbor said he did not know the number of the house the man entered, but guessed it must be "80 something." He later added "[86] or something like that," and described the man as white, wearing a black jacket and carrying a dark backpack.

Shortly after the man entered 82 Warwick, police arrived and were directed to the apartment by the neighbor. Newark Police Officer Carlos Gonzalez and his partner, Officer Joseph Cueto, gained entry through the unlocked back door. Once inside, they went into the ransacked master bedroom and encountered the owner's grandson, who came out of his nearby bedroom. He did not match the description of the intruder. The officers found no one else

on the first floor, but saw an interior staircase to the left of the back door.

When the officers went upstairs, a man who appeared to be disoriented, later identified as defendant, began to go down the stairs as police were going up. Cueto noticed defendant put down a blue bag. He was detained and patted down for weapons; a pry bar was discovered in his back pocket. The officers handcuffed defendant, searched the backpack, and found additional pry bars on his person.

Inside the blue bag, Cueto found a white box containing Vera Wang perfume and a larger white rectangular box containing a gold necklace. The contents of the bag were photographed, and defendant was driven to the station.

The owner of 82 Warwick Street testified that at approximately 2:30 that afternoon, she was crocheting in her basement when she heard noises. When the police walked her through the first floor, she saw that everything was "a mess" in her bedroom. She was missing a closed white box of perfume and a white box containing a gold necklace located in a nightstand in her bedroom, the items police recovered from the blue bag. The owner did not know defendant and was unable to identify him at trial.

Defendant filed a pretrial motion to dismiss the indictment because of the discrepancy in house numbers. At the grand jury

presentation, the police witness testified that he was dispatched to "84 Warwick Street," while the indictment listed "82 Warwick Street" as the burglary location. A police incident report stated law enforcement was dispatched to 86 Warwick Street.

The second count of the indictment charged defendant with third-degree theft, N.J.S.A. 2C:20-3(a), however, the prosecutor did not present any proofs to the grand jury regarding the recovered items. The State later amended that count, count two, to a disorderly persons charge of theft, N.J.S.A. 2C:20-2(b)(4). That charge was eventually dismissed.

The judge denied the motion because the address issue was irrelevant. Defendant was found on the premises in possession of the owner's property without having previously obtained either permission to enter or permission to take anything.

The morning of the second day of trial, defendant moved pro se to excuse his defense attorney and represent himself. He was dissatisfied because trial counsel refused "to ask certain questions . . . make certain remarks, [and] object to the scene that was in the courtroom." The court stated in response to the motion:

If I thought for one moment that an attorney was being ineffective during the course of a trial, I would take some action. I don't see that here. She has raised objections throughout the trial. She has

questioned the witnesses. To me . . . I didn't think she would get out of them what she got out of them, to be quite honest, sitting here watching.

. . . .

I think she cross examined [the witnesses] the way she needed to cross examine them. I don't see what she did wrong . . . . So, and especially being in the middle of a trial. Again, if I saw anything that was out of line, I would have a duty to say something, . . . because my job here is to make sure we have a fair trial, and that your rights are protected. And I see that they are, so far. So I don't see any reason to recuse her or remove her from the case. So I will not.

After the judge denied his motion, defendant continued to insist that he had the right to represent himself and wanted to do so. He and the judge engaged in the following colloquy:

THE COURT: First of all, that should have been raised quite some time ago. . . . Because then the Court has to go into a different line of questioning for that. And now I would then have to decide whether you're capable of representing yourself or not.

Second of all, in the middle of a trial, it's not going to happen for a few reasons. One, I think it would be prejudicial to you, at this point. Two, we never had that discussion as to whether you are able to represent yourself. Okay?

[Defendant]: Yeah, but when the [c]ourt's faced with that decision, they have to decide if I'm making it knowingly and intelligently.

THE COURT: Not in the middle of trial though.

[Defendant]: Well, is there a stipulation where it says in the Constitution that I have to give up my Constitutional Rights to a fair trial --

THE COURT: I . . . have discretion.

[Defendant]: -- or to be presented with adequate counsel?

THE COURT: I have discretion, sir.

[Defendant]: Is there somewhere in the Constitution that says that, Your Honor?

THE COURT: All right, you tell me where it says that you can? I'm not going to get into a Constitutional argument with you, sir because --

[Defendant]: Well it says in . . . State [v.] Kane (phonetic).

THE COURT: Where I . . . sit right now, sir, you're represented by . . . competent counsel. And that's how this trial will continue. Okay?

[Defendant]: So you're going to violate my Constitutional Rights to represent myself?

THE COURT: You can disagree with my decision, sir. But that's where we are right now.

Defendant also alleged during the colloquy that: (1) the prosecution withheld exculpatory evidence; (2) there were inconsistent addresses for the burglarized residence; and (3) defense investigators never provided him with any witness statements. Trial counsel and the judge engaged in the following exchange:

THE COURT: Well, listen, there's a discovery rule; right? And under the [r]ules of [d]iscovery the prosecution has to provide you with all available discovery. If anything was missing, I'm sure there would have been a motion filed . . . . So I can only assume that discovery was turned over.

Sometimes you may think that something is outstanding but it may not be in the possession of the State. I don't know what happened with discovery; I don't know what happened with pretrial motions. I have the trial of this case. The trial is near completion and my intention is to complete it . . . .

[Defense Counsel]: Judge, the only thing I would add with respect to the written statements, it's clear from the record that we've made all requests to the State for any written statements that were created or generated in this case. And they . . . with the exception of these notes that Officer Gonzalez testified were destroyed, the State has assured us that they have handed over all other statements. I have no reason to believe that statements don't exist that we were not provided []. And we will be requesting a failure to preserve notes instruction in this case . . . .

Defendant, represented by a second attorney post-trial, renewed his request to represent himself, and again accused the State of withholding exculpatory evidence. He argued that his new attorney did not have "enough time with the file" and that the Public Defender's Office also concealed exculpatory evidence from his new attorney. Defendant's new attorney acknowledged that he had received some additional paperwork that day and intended to

visit defendant in jail before the next court date. He also anticipated reviewing with defendant the State's application for discretionary extended-term sentencing. Despite the judge's suggestion that defendant allow his new attorney time to meet with him before the sentencing hearing, defendant insisted "I want to move pro se. I want to argue. I want to get sentenced." The judge said he would "consider that next time if there's still an issue between yourself and your attorney."

Thereafter, defendant moved pro se for a new trial on the basis that: (1) the verdict sheet from the jury was not secured; (2) an inconsistency existed between the State's Grand Jury witness, the indictment, and a 911 call as to the house number on Warwick Street where defendant was arrested; and (3) the State did not use a witness to identify defendant. Defendant made these arguments himself at some length on the record, and thanked the court for "letting me represent myself."

The court did "not find sufficient merit in any of the defendant's arguments for a new trial." As to the issue with the verdict sheet, the court explained:

I spoke to my court clerk. Apparently, I'm not sure what happened with the verdict sheet that the jury foreperson had. They may have taken that with them. But we don't have it in the court file. When the file was sent down to . . . the Probation Department for the



pre-sentence interview[,] my clerk,  
inadvertently . . . checked off not guilty.

. . . .

But that was not the . . . jury's copy.  
Apparently, for whatever reason, we did not  
secure the verdict sheet.

The court also noted defendant had not established "the State knowingly used false or perjured testimony that was material to the conviction." Nor did defendant present any new, material evidence not discoverable prior to trial that could have affected the jury's verdict. Accordingly, the court denied defendant's motion.

Immediately thereafter, the court considered the State's motion to sentence defendant as a persistent offender. The court noted that after turning eighteen on September 22, 1995, defendant was convicted on eight separate occasions of thirteen third-degree crimes and one second-degree crime. Based on this record, the court found defendant extended-term eligible as a persistent offender and granted the State's motion. The court then found aggravating factors three, N.J.S.A. 2C:44-1(a)(3), the risk of re-offense, and six, N.J.S.A. 2C:44-1(a)(6), the extent of defendant's prior criminal history, based on defendant's nearly

twenty-five year record, including twenty indictable convictions<sup>1</sup> and ten juvenile adjudications. The court also found aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), the need to deter defendant and others from violating the law. The court found no mitigating factors. Clearly convinced the aggravating factors substantially outweighed any other consideration, the judge imposed the nine-year custodial sentence, subject to four and one-half years of parole ineligibility. Two remaining disorderly persons offenses were dismissed. This appeal followed.

Defendant raises the following points for our consideration:

POINT I

THE TRIAL COURT VIOLATED MR. VASILE'S CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION BY FAILING TO ENGAGE IN THE REQUISITE INQUIRY AFTER HE CLEARLY INDICATED THAT HE WISHED TO REPRESENT HIMSELF.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING MR. VASILE'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT.

POINT III

THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE, AND MR. VASILE'S FAMILY MEMBERS WERE NOT PROVIDED WITH AN OPPORTUNITY TO SPEAK AT THE SENTENCING HEARING.

A. The Sentencing Court Erred in Finding that the Conduct Was Serious When Compared to Other Offenses of Its Kind,

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<sup>1</sup> The judge totaled defendant's aggregate number of convictions, including those stemming from the same incidents.

Thus Resulting in a Manifestly Excessive and Unduly Punitive Sentence.

- B. The Matter Should Be Remanded Because the Court Failed to Permit Mr. Vasile's Family to Speak at the Sentencing Hearing.

By way of pro se brief, defendant raises these alleged errors:

POINT I

THE APPELLANT IS ENTITLED TO A NEW TRIAL BASED ON THE MANNER IN WHICH IT WAS CONVEYED.

POINT II

THE VERDICTS WERE SHARPLY AGAINST THE WEIGHT OF THE EVIDENCE, NECESSITATING REVERSAL.

I.

On appeal, defendant first argues the trial court improperly denied his mid-trial "request to represent himself without conducting the proper inquiry as to whether he was capable of self-representation." The State asserts defendant's request was untimely in that it was not made "until the trial was almost complete, and four out of five of the State's witnesses had testified."

A court's determination on whether to permit a defendant to represent himself is reviewed for abuse of discretion. State v. DuBois, 189 N.J. 454, 475 (2007). "Both the United States Constitution and our New Jersey Constitution grant defendants charged with a criminal offense the right to have the assistance of counsel." State v. King, 210 N.J. 2, 16 (2012) (citations

omitted). The corollary to that right is a "defendant's right to represent himself." Ibid. (citing Faretta v. California, 422 U.S. 806, 814 (1975)). "A defendant's right of self-representation is not absolute, however, and it cannot be used to jeopardize the State's equally strong interest in ensuring the fairness of judicial proceedings and the integrity of trial verdicts." Id. at 18 (citing State v. McNeil, 405 N.J. Super. 39, 51 (App. Div. 2009)). "[B]ecause of the importance of trial counsel to the criminal justice process, the courts must indulge in every reasonable presumption against waiver." State v. Ortisi, 308 N.J. Super. 573, 587 (App. Div. 1998) (citing State v. Gallagher, 274 N.J. Super. 285, 295 (App. Div. 1994)). Therefore, trial courts have "the duty to assure that a defendant's waiver of counsel is made 'knowingly and intelligently.'" King, 210 N.J. at 18 (quoting State v. Crisafi, 128 N.J. 499, 509 (1992)). To fulfill that duty:

a trial court must inform a defendant of the charges to be tried, the statutory defenses to those charges, and the potential sentencing exposure that accompanies those charges. A court should also inform a defendant of the risks he faces and problems he may encounter. In addition, the court should explain that a defendant representing himself remains as obligated to follow the applicable rules of procedure and evidence as would a licensed attorney. Further, a court should stress the difficulties inherent in proceeding without an attorney and specifically advise the

defendants that it would be unwise not to accept the assistance of counsel.

[Ibid. (citations omitted).]

In King, the defendant was represented by counsel up to the day of trial. Id. at 10. On the date of trial, "shortly before the trial was scheduled to begin," the defendant appeared with his lawyer who informed the judge of his client's desire to represent himself. Ibid. "After listening to defendant's responses to the various questions posed to him, the trial court . . . . stated that it was not 'satisfied' that defendant 'fully under[stood] the nature and consequences of this decision.'" Id. at 14 (alteration in original). The trial court in King "pointed to the fact that defendant was unable to state what he had written down while doing research in the law library a few days ago and could not adequately answer the court's questions about the court rules or the evidence rules." Ibid. The "defendant's 'inability to do that' precluded an intelligent waiver of his right to counsel." Ibid. On appeal, our Supreme Court held:

Because we are satisfied that the record created in response to defendant's motion does not support the denial of his right to represent himself, his convictions must be reversed. The right of self-representation is either respected or denied; its deprivation cannot be harmless. Defendant may have been represented by a skilled attorney, the evidence against him may have been substantial, and the verdict may find strong

support in the record; that matters not. The trial court failed to honor defendant's right to make this decision. We have the obligation to recognize and vindicate that constitutional right.

[Id. at 22 (citations omitted).]

We have interpreted King to mean that the Supreme Court "admonished judges to guard against paternalistic tendencies that usurp an adult defendant's right to choose his or her own path, and to honor a defendant's right to make an informed and intelligent decision to waive a constitutional right, even if that decision may be fraught with latent perils and ultimately prove[] to be unwise." State v. Van Ness, 450 N.J. Super. 470, 498 (App. Div. 2017).<sup>2</sup>

This defendant, however, did not seek to represent himself prior to the commencement of trial, as was the case in King and Van Ness. He did so on the second day of trial, after the State had called the victim, the neighbor, Gonzalez, and Barros. The State's only remaining witness was Cueto.

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<sup>2</sup> Van Ness dealt with a defendant who sought to represent himself before trial began. The Appellate Division in Van Ness concluded the trial judge, in believing that King stood for the proposition that he could not "stop somebody from representing themselves even if it's a bad idea for them," misapplied King. Id. at 497. Because the trial judge did not take the requisite measures to protect the defendant's right to counsel, the Appellate Division reversed and remanded the case for a new trial. Id. at 499.

"[L]ike any other request for substitution of an attorney, a defendant's decision to dismiss his lawyer and represent himself must be exercised in a timely fashion. The right of self-representation is not a license to disrupt the criminal calendar, or a trial in progress[.]" State v. Pessolano, 343 N.J. Super. 464, 473 (App. Div. 2001) (quoting State v. Buhl, 269 N.J. Super. 344, 362 (App. Div. 1994)). "In every trial there is more at stake than just the interests of the accused. A defendant cannot be permitted to place the trial judge in the unenviable dilemma where, in managing the business of the court, he appears to be depriving the accused of his right to self-representation." Buhl, 269 N.J. Super. at 363 (citation omitted). Hence, a defendant's right of "self-representation cannot be insisted upon in a manner that will obstruct the orderly disposition of criminal cases. A defendant desiring to exercise the right must do so with reasonable diligence." Ibid.

In Pessolano, the "defendant's application to proceed pro se was made after the jury was selected and immediately before opening statements." 343 N.J. Super. at 473. The trial judge did not abuse his discretion in denying the defendant's request. Ibid. In Buhl, we likewise found untimely a defendant's request to represent himself "immediately before the jury was impaneled." 269 N.J. Super. at 364.

Conversely, in State v. Thomas, 362 N.J. Super. 229 (App. Div. 2003), defendant's self-representation motion was timely and made "about six weeks prior to trial." Id. at 240. Defendant's demeanor did not "in any way suggest he might be disruptive if representing himself." Ibid. Here, the colloquy between defendant and the judge did suggest defendant may well have been disruptive.

Granting defendant's request mid-trial would have disrupted this proceeding, potentially jeopardizing both the fairness of the trial and the orderly disposition of the case. Given his conduct in the courtroom when interacting with the court on the record, defendant would likely have been disruptive. Thus, the trial judge did not abuse his discretion in denying defendant's request to represent himself.

## II.

Defendant asserts that the indictment should have been dismissed as insufficient because of the confusion regarding the burglary address—that the officer said it was 84 Warwick Street instead of 82 during the grand jury presentation. The discrepancy was corrected during the proceedings. The officer testified at trial that defendant was found inside 82 Warwick Street in possession of items that belonged to the owner of the home.

An indictment must provide a defendant with sufficient notice so that he can defend against the charge. See State v. Branch,



155 N.J. 317, 324 (1998). Defendant was found in the house, thus the grand jury was not misled and defendant did not receive inadequate notice of the charges. The confusion does not mean, as defendant suggests, that there was a failure to satisfy the statutory elements of the crime. We consider this argument to be so lacking in merit as to not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

### III.

"Appellate review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). Under that standard, "[a]n appellate court is bound to affirm a sentence, even if it would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record." State v. O'Donnell, 117 N.J. 210, 215 (1989) (citing State v. Jarbath, 114 N.J. 394, 400-01 (1989)). Provided that "the trial court follows the sentencing guidelines, the one exception to that obligation occurs when a sentence shocks the judicial conscience." Id. at 215-16 (citing State v. Roth, 95 N.J. 334, 365 (1984)).

The trial court properly exercised its discretion in finding aggravating factors three, six, and nine based on defendant's

significant prior record. Notably, the present offense represents defendant's ninth indictable conviction for a theft-related offense. On four other occasions, defendant was convicted of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(5), second-degree eluding, N.J.S.A. 2C:29-2(b), third-degree escape, N.J.S.A. 2C:29-5(a), fourth-degree forgery, N.J.S.A. 2C:21-1, and third-degree distribution of a CDS, N.J.S.A. 2C:35-5(b)(3). Defendant also has at least ten juvenile adjudications and at least one conviction in municipal court. He was statutorily eligible for an extended-term sentence as a persistent offender under N.J.S.A. 2C:44-3(a), and the judge did not abuse his discretion in imposing a nine-year prison term with fifty-four months of parole ineligibility.

Defendant also argues the matter should be remanded for resentencing because the trial court failed to allow his family to speak at the sentencing hearing. In Blackmon, our Supreme Court found that "other than defendants, and crime victims or their survivors, there is no absolute right to speak at a sentencing proceeding; instead, permitting others to address the court directly is a matter entrusted to the sentencing court's discretion." 202 N.J. at 305. Nevertheless, "to the extent that the choice about who may speak is an exercise of discretion, it shares the same attributes of all discretionary determinations,

namely, it must be accompanied by some expression of reasons sufficient to permit appellate review." Id. at 307.

After the judge imposed sentence and explained defendant's appeal rights, defendant said, "[y]ou never asked me if I wanted to speak before sentencing.<sup>[3]</sup> You never asked my family if they wanted to speak before sentencing. They are in court. You know, I believe, that it could have went to the mitigating factors."

The following exchange then occurred:

THE COURT: -- I wasn't told that any family member wanted to speak.

[Defendant]: Well, you see them there; both of them.

THE COURT: It doesn't mean that I know that they want to speak,

[Defendant]: Well, you didn't ask.

THE COURT: Well, I would have been told.

[Defendant]: You're supposed to ask. That's what the court rule says.<sup>[4]</sup>

THE COURT: All right. So noted.

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<sup>3</sup> In fact, defendant was permitted to speak at length before the judge imposed sentence.

<sup>4</sup> According to Rule 3:21-4(b), "[b]efore imposing sentence[, ] the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment."

Because defendant did not alert the court of his family's desire to speak until after sentence was imposed, the court committed no error in refusing to let them do so at that juncture. Even if defendant had notified the court prior to the imposition of sentence, the judge had the discretion to refuse them. A remand for resentencing is unnecessary, as no abuse of discretion occurred.

#### IV.

We briefly address defendant's pro se arguments. He contends he is entitled to a new trial because of the discrepancy between the addresses to which we have previously referred. The arresting officer testified that he found defendant in the home in possession of stolen items. The issue does not warrant discussion in a written opinion. R. 2:11-3(e)(2).

Defendant's claim of ineffective assistance of counsel will not be addressed on direct appeal, as such claims typically involve allegations and evidence that lie outside the trial record. State v. Preciose, 129 N.J. 451, 460 (1992). We defer discussion of those contentions to a future petition for post-conviction relief, should defendant choose to file one.

At the pretrial hearing on October 20, 2015, the trial court commented that a Wade hearing was unnecessary since the State did not anticipate eliciting an identification from the neighbor. No

civilian identified defendant at the trial, therefore, defendant's claim that an identification instruction or a Wade hearing was necessary lacks merit. See R. 2:11-3(e)(2). Only the officer identified him. The other arguments defendant includes in that point do not warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Nor do we agree that the verdict was "sharply against the weight of the evidence." The confusion regarding the number of the home defendant burglarized does not undercut the credibility of the officers' testimony or the weight of the proofs. This point also lacks merit. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION