SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4712-16T3

STATE OF NEW JERSEY,

Plaintiff-Appellant/
Cross-Respondent,

v.

MARK A. GLENN,

Defendant-Respondent/
Cross-Appellant.

Submitted January 25, 2018 – Decided April 6, 2018

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 16-11-3245.

Mary Eva Colalillo, Camden County Prosecutor, attorney for appellant/cross-respondent (Jason Magid, Assistant Prosecutor, of counsel and on the brief).

Jacobs & Barbone, PA, attorneys for respondent/ cross-appellant (Louis M. Barbone, of counsel and on the briefs).

PER CURIAM

By leave granted, the State appeals, and defendant Mark A. Glenn cross-appeals, from the April 27, 2017 Law Division order, which granted in part defendant's motion to suppress his video-recorded statement admitting to possessing and manufacturing child pornography. The parties also appeal from the June 1, 2017 order, which denied their respective motions for reconsideration. We conclude the motion judge erred in not suppressing the entire video-recorded statement and reverse.

At approximately 6:00 a.m. on November 5, 2015, detectives from the Camden County Prosecutor's Office went to a home to execute a search warrant in connection with an investigation involving the possession and manufacturing of child pornography. When they arrived, they spoke to defendant's father, who denied knowledge of child pornography being downloaded on computers in the home. The detectives "zip-tied" defendant's parents for officer safety, and then went to the den, where they encountered defendant and his twin brother, who they also "zip-tied."

A detective explained to defendant and his brother that they were at the home to execute a search warrant regarding child pornography being downloaded at that location utilizing a file-sharing program called "eMule." Without prompting from the detective, defendant said he used a file-sharing program to download "some stuff." When the detective asked what he meant by

"some stuff" and what he used to download it, defendant said "some videos, other stuff involving children" and he downloaded it on a Toshiba laptop that only he utilized (hereinafter, the first statement). Defendant also stated the laptop was in his bedroom Defendant was not arrested at that point because the detectives had not yet verified he was referring to child pornography or the possession of child pornography.

The detectives then searched defendant's bedroom and found several laptops, including the Toshiba laptop, numerous magazines involving prepubescent and pubescent children, as well as VCR tapes, some with pictures of prepubescent children laminated and affixed to the cover, and numerous CDs and DVDs. The detectives also found numerous pictures of clothed and nude prepubescent males and females, which appeared to be cut out of magazine circulars, and other types of visual media, laminated pictures of prepubescent females, and drawings of an unknown prepubescent female. Based on defendant's prior statements and on what they found in his room, the detectives believed he was the individual that was downloading child pornography.

The detectives conducted a forensic examination of the Toshiba laptop and found numerous videos and/or images of prepubescent and/or pubescent children involved in sexual acts with adult males and nude images of prepubescent and pubescent

children. The detectives also examined an SD card, and found a photograph of a prepubescent female that showed an adult male's hand moving her garments aside and taking pictures of her exposed genitalia and buttocks. The detectives asked defendant's father if he recognized the female in the photograph, and he identified her as his cousin's juvenile daughter, K.C. The detectives then asked defendant if it was his hand in the photograph. Defendant admitted it was his hand and he had taken the pictures of K.C.'s exposed genitalia and buttocks (hereinafter, the second statement).

Defendant was arrested for possession and manufacturing of child pornography and transported to the Gloucester Township Police Department. At approximately 10:00 a.m., the detectives advised defendant of his Miranda[1] rights. Defendant initially invoked his right to an attorney, but later said, without prompting from the detectives, that he would answer questions and give a statement without counsel present. The detectives then began the questioning by reminding defendant about his admissions in the first statement. Defendant admitted he used an "eMule" file-sharing program to download videos containing child pornography on his Toshiba laptop, it was his hand depicted in the photograph

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

of K.C., and he took the pictures of her exposed genitalia and buttocks (hereinafter, the third statement).

The detectives also asked defendant whether he had videotaped anyone other than K.C. When defendant responded he could not recall, the detectives said "the penalties that you're looking at aren't going to increase at all" and "being forthcoming to us . . . we even tell that to the judge. This guy cooperated." Defendant responded, "I just already know that I'm going to jail forever for the rest of my lifetime."

A grand jury indicted defendant on fourteen counts of third-degree endangering the welfare of a child (possession of child pornography), N.J.S.A. 2C:24-4(b)(5) and (6); four counts of first-degree endangering the welfare of a child (manufacturing child pornography), N.J.S.A. 2C:24-4(b)(3); and four counts of second-degree endangering the welfare of a child (filming child pornography), N.J.S.A. 2C:24-4(b)(4).

Defendant filed a motion to suppress his three statements. The motion judge declined to suppress the first statement, ruling that although "zip-tied," defendant was not in custody and subject to interrogation at the time he made the statement and the statement was not made in response to any questioning. The judge suppressed the second statement, ruling that defendant was in custody and subject to interrogation at the time he made the

statement and had not received his Miranda rights. The parties do not challenge either of these rulings.

This appeal concerns the partial grant of defendant's motion to suppress the third statement. The judge found defendant knowingly and voluntarily waived his Miranda rights before giving the statement. However, citing State v. O'Neill, 193 N.J. 148 (2007), the judge found the second and third statements were made in close proximity, the same detectives were involved in the questioning, and they never advised defendant that his second statement could not be used against him. Thus, the judge suppressed those portions of the third statement relating to the photograph of K.C. The judge determined that those specific statements were a contextual continuation of the unwarned second questioning and were tainted.

Defendant filed a motion for reconsideration, arguing that under O'Neill, he did not knowingly and voluntarily waive his Miranda rights with respect to the entire third statement because he was not advised the second statement could not be used against him. The judge disagreed, noting he found no error with respect to the first statement, which concerned downloading and possessing child pornography, and the policies behind suppression of evidence did not apply to follow-up questions during the third statement on those identical issues. The judge reasoned that "[w]hether or

not [defendant] believed information relating to K.C. was also admissible or not simply would not impact a knowing and voluntary waiver with respect to questioning involving possession and downloading of those images." The State also filed a motion for reconsideration, which the judge denied substantially for the reason he previously expressed.

On appeal, the State argues that because defendant waived his Miranda rights before giving the third statement, the motion judge erred in partially suppressing the statement. Defendant argues judge should have suppressed the entire statement. We agree with defendant.

Our Supreme Court has established the standard of review applicable to consideration of a trial judge's ruling on a motion to suppress:

> Appellate review of a motion judge's factual findings in a suppression hearing is highly deferential. We are obliged to uphold the motion judge's factual findings so long as sufficient credible evidence in the record supports those findings. Those factual findings are entitled to deference because the motion judge, unlike an appellate court, has the 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'
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> [State v. Gonzales, 227 N.J. 77, 101 (2016). (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).]

As for the denial of a motion for reconsideration, we have determined,

> Reconsideration itself is a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice[.] It is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion, but should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.
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> [Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (citations omitted).]

We will not disturb a trial court's reconsideration decision unless it represents a clear abuse of discretion. Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015) (citation omitted). We conclude the motion judge's factual findings are not supported by sufficient credible evidence in the record, and the judge mistakenly exercised his discretion in denying defendant's motion for reconsideration.

Our courts afford defendants greater protections under the Fifth Amendment than federal courts. O'Neill, 193 N.J. at 177. As our Supreme Court stated, "[i]ndeed, in applying Miranda's rationale to the jurisprudence of our state law privileges, we have reached different results from the United States Supreme

Court's interpretations of Miranda's reach." Id. at 178. The Court made clear that the principles established in our caselaw prohibit police officers conducting a custodial interrogation from withholding essential information necessary for the exercise of the privilege. Id. at 179 (citing State v. A.G.D., 178 N.J. 56 (2003); State v. Reed, 133 N.J. 237 (1993)).

O'Neill involved the murder of a cab driver. 193 N.J. at 156. During a custodial interrogation, the defendant only admitted to participating in a plan to rob the cab driver. 193 N.J. at 156. After the admission, detectives advised the defendant of his Miranda rights and resumed the interrogation without any significant break and without advising him that his admission during the prior interrogation could not be used against him. Ibid.

The defendant agreed to give a taped statement. At the outset, the detectives "began the questioning by cueing [the defendant] to his earlier unwarned interrogation[.]" Id. at 157. The defendant then repeated many of the same details he had provided prior to receiving his Miranda warnings, and added information indicating he may have possessed a pistol at the time of the shooting. Id. at 157-58. In a second taped-statement, the defendant covered the same ground as his unwarned statement, and

added information directly implicating himself in the cab driver's shooting death. Id. at 159-60.

The trial court denied defendant's motion to suppress the statements made after the Miranda warning, and we affirmed. State v. O'Neill, 388 N.J. Super. 135 (App. Div. 2006). The Court reversed and remanded for a new trial, holding as follows:

> when Miranda warnings are given after a custodial interrogation has already produced incriminating statements, the admissibility of post-warning statements will turn on whether the warnings functioned effectively in providing the defendant the ability to exercise his state law privilege against self-incrimination. In making that determination, courts should consider all relevant factors, including: (1) the extent of questioning and the nature of any admissions made by defendant before being informed of his Miranda rights; (2) the proximity in time and place between the pre- and post-warning questioning; (3) whether the same law enforcement officers conducted both the unwarned and warned interrogations; (4) whether the officers informed defendant that his pre-warning statements could not be used against him; and (5) the degree to which the post-warning questioning is a continuation of the pre-warning questioning. The factual circumstances in each case will determine the appropriate weight to be accorded to any factor or group of factors.
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> Under that formula, however, great weight should be given if the police informed a suspect that his admissions made prior to being given the Miranda warnings could not be used against him. Providing that information would strongly suggest that the defendant made

> any post-warning incriminating statements knowingly, voluntarily, and intelligently.
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> [Id. at 180-81 (citation omitted).]

The Court cautioned, however, that "the failure to give that instruction will not automatically render the defendant's post-Miranda statements inadmissible." Id. at 181. Rather, "courts must view the totality of the circumstances in light of the relevant factors and then determine whether the unwarned questioning and admissions rendered the Miranda warnings ineffective in providing a defendant the opportunity to exercise the privilege." Id. at 181-82.

Applying these principles to the facts, the Court found that by the time defendant received his Miranda rights, he had already admitted to his role in planning to rob the cab driver, but was not advised his admission could not be used against him. Id. at 182-83. The Court emphasized that "[w]ithout such an assurance, defendant might fairly have concluded that it would have been futile to keep silent after having made a damning admission." Id. at 183. The Court concluded that "[b]ecause the detectives gave Miranda warnings midstream and did not mention the inadmissibility of his prior incriminating statements, defendant lacked sufficient information needed to make a knowing, voluntary, and intelligent waiver of the privilege." Ibid. The Court specifically rejected

our view that, because the responses were substantially different and the statements were taken at different times and locations, the contents of defendant's unwarned statements could not be objectively viewed as a mere continuation of earlier questions. Ibid. The Court concluded that "[d]efendant's second account, in which he admitted accidentally shooting the cab driver, albeit different from his first account, was part of an unbroken interrogation." Ibid. In other words, while the illegally obtained first statement was factually distinct from the contextual continuation of the second statement, the entirety of the second statement had to be suppressed.

Such is the case here. Possession and manufacturing of child pornography was the focus of the investigation. Defendant confessed to those crimes in the second statement, not the first statement. The third interrogation occurred in close proximity to the second statement, the same detectives were involved, and they never advised defendant his pre-warning second statement could not be used against him. In addition, while part of the third statement is factually distinct from the illegally-obtained second statement, the entire third statement was a continuation of the second statement. Under the facts of this case, the third statement was the fruit of the unconstitutionally obtained second statement. We are satisfied that once defendant "let the cat out

of the bag by confessing [to possessing and manufacturing child pornography], no matter what the inducement, he [was] never thereafter free of the psychological and practical disadvantages of having confessed. He [could] never get the cat back in the bag." O'Neill, 193 N.J. at 171, n13 (citation omitted). Accordingly, the entire third statement must be suppressed.

Reversed.