

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
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-4771-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK A. MCDONALD,

Defendant-Appellant.

Submitted May 1, 2018 – Decided May 24, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment
Nos. 13-08-1062 and 15-06-0762.

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

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (David M. Liston,
Assistant Prosecutor, of counsel and on the
briefs).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Mark A. McDonald was charged in two separate indictments related to a May 30, 2013 incident. On the 2013 indictment, defendant was convicted of two counts of third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); two counts of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and one count of fourth-degree prohibited devices, N.J.S.A. 2C:39-3(f). In a bifurcated trial on the 2015 indictment, the same jury convicted defendant of two counts of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b). Defendant's appeal focuses on denial of his motion to suppress evidence of CDS, the State's failure to prove defendant was convicted of a predicate act on the certain persons offenses, and the sentencing judge's imposition of consecutive sentences. We affirm in part and vacate in part.

For the convictions related to the 2013 indictment, defendant was sentenced to a ten-year term with a five-year period of parole ineligibility. For the convictions related to the 2015 indictment, defendant was sentenced to a consecutive ten-year term with a five-year period of parole ineligibility.

On May 30, 2013, three Edison Township Police officers were conducting surveillance of a hotel room where defendant was staying. The officers received a tip from a confidential informant, who told them that a man matching defendant's

description was selling drugs from his hotel room, and would be driving a green GMC Yukon to New York on May 30 to acquire more drugs.

The officers saw defendant leave his room, meet with someone in the hallway of the hotel, and then return to his room. The officers believed defendant was conducting a hand-to-hand drug transaction, although they did not see an exchange of money or drugs.

Around midday, the officers saw defendant leave his room, get into a green GMC Yukon, and drive away. The officers followed the car to the George Washington Bridge. After defendant drove across the bridge, the officers returned to the hotel and continued their surveillance of defendant's room.

Defendant returned to the hotel around 9:00 p.m. and parked the green GMC Yukon in front of his room. An officer in an unmarked car pulled up and blocked the vehicle. The other officers instructed defendant to turn off the car, show his hands, and exit the vehicle. Defendant complied.

Detective Robert Duffy and fellow officers detained defendant. Duffy asked defendant for identification and defendant provided a New Jersey identification card. While the officers were checking defendant's information, defendant asked to use the bathroom. Duffy declined to let defendant use the bathroom based

on his concern that defendant might destroy drug evidence. After checking defendant's identification card, the officers discovered defendant's license was suspended and he had an open warrant.

Defendant was then arrested. Duffy asked if there was anything in the vehicle and defendant acknowledged there was marijuana in the car. The detective also asked if defendant would consent to a search of the car and defendant consented. While Duffy was preparing the consent paperwork for defendant's review and signature, the detective learned the car was registered to defendant's wife.¹ Duffy then sought to obtain consent to search the car from defendant's wife.

While Duffy continued speaking with defendant, Detective Sergeant Jeff Abrams knocked on the door to defendant's room. Defendant's wife answered and Abrams explained the police were conducting an investigation, and that the officers wanted to speak with her. Defendant's wife told Abrams that both the car and hotel room were registered in her name.

Duffy told defendant's wife that defendant was under arrest, and asked her for consent to search the car and the room. The

¹ The record is unclear whether the female who owned the car was defendant's wife or girlfriend. We refer to her as defendant's wife.

wife agreed and signed the consent-to-search forms for the car and the hotel room.

In the search of the car, the police found marijuana, a handgun, and a loaded magazine containing hollow-point bullets. In the search of the hotel room, the police found another handgun, ammunition, digital scales, plastic bags, heroin, marijuana, crack cocaine, and \$5000 in cash.

Defendant was taken to the police station, where he was given his Miranda² rights. Defendant agreed to waive his rights, and gave a recorded statement, taking responsibility for the items found in the car and hotel room. Defendant was indicted in 2013 and 2015 for charges in connection with the events of May 30, 2013.

Defendant moved to suppress all evidence, arguing he was arrested without probable cause when he entered the hotel parking lot and was surrounded by an unmarked police car and police officers. Defendant further argued that even if there was probable cause for arrest, the officer's inquiry whether there was anything in the car was a violation of his Miranda rights.

The officers involved in the events of May 30, 2013 testified during the suppression hearing. They testified that defendant

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

consented to the searches. The State also provided defendant's recorded statement as part of the evidentiary hearing on defendant's motion. In the recorded statement, defendant expressly stated he consented to the search of the vehicle and the hotel room.

After considering the evidence and testimony, the motion judge denied defendant's suppression motion. The judge concluded that the tip from the confidential informant was corroborated by the officers' observations of defendant's activities on May 30, 2013. The judge found the officers properly conducted an investigative stop of the defendant upon his return to the hotel.

With regard to the consent issue, the judge found:

In the course of the encounter with [defendant] he was asked to provide consent. He provided consent. He provided consent. . . . He was asked about anything being in the car that they should know about. He admitted to there being some marijuana in the car. It then turns out that the person he was staying with may have had a proprietary interest in the property and the police then proceeded thereafter to address that situation.

The [c]ourt does not find that the stop here was pretextual, that the law enforcement testimony was evidence of fabrication. The [c]ourt finds the officer[s] credible under these circumstances, having had a chance view their demeanor. . . . The motion to suppress will be denied at this time.

A bifurcated trial was held on the 2013 indictment and the 2015 indictment. Defendant does not raise any appeal arguments related to the convictions on the 2013 indictment except the denial of his motion to suppress evidence of CDS. Thus, we focus on defendant's convictions on the 2015 indictment on the certain persons not to have weapons charges. At trial, Suzanne Kowalski, a detective assigned to the Middlesex County Prosecutor's Office, testified on behalf of the State. Kowalski stated she located two certified judgments of conviction in New York, indicating prior convictions of defendant in 1986 and 1991 for crimes of the third degree under New York law. While she testified that the New York offenses were "substantially similar or comparable to crimes of the third degree in New Jersey," on cross-examination, Kowalski acknowledged that she had "no particular expertise in the New York statutes."

During summation, defense counsel argued the State failed to prove the New York convictions bore any relation to the predicate offenses identified in the certain persons not to have weapons statute. The judge sustained an objection by the prosecutor, advising defense counsel: "[I]f you persist in this I'm going to instruct [the jury] that the crime, without getting into the specifics of what the crime was, is the equivalent of a crime of third degree." Although defense counsel argued such an instruction

would be improper, the judge maintained his position and defense counsel abandoned the argument.

The judge instructed the jury regarding the certain persons charges as follows:

[T]he State must prove beyond a reasonable doubt . . . that the defendant is a person who previously has been convicted of a crime of the third degree. The term convicted of a crime of [sic] means a judgment of conviction entered by a [c]ourt of competent jurisdiction in this state, New Jersey, or elsewhere. If the defendant has been convicted in another state, territory, commonwealth or other jurisdiction of the United States, or any country in the world in a court of competent jurisdiction, of a crime which in said other jurisdiction is comparable to a crime of the third degree.

On appeal, in his counseled brief, defendant argues:

POINT I

THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE, INSTEAD OF SEEKING THE CONSENT OF A THIRD-PARTY UNCONNECTED TO THE INVESTIGATION, THE POLICE SHOULD HAVE SOUGHT CONSENT FROM MCDONALD WHO WAS THE TARGET OF THEIR INVESTIGATION AND WAS PRESENT ON THE SCENE.

POINT II

THE CERTAIN PERSONS CONVICTIONS MUST BE REVERSED BECAUSE THE STATE FAILED TO PROVE THAT MCDONALD HAD BEEN CONVICTED OF AN ENUMERATED OFFENSE AND THE MODEL JURY INSTRUCTION PERMITS A CONVICTION WITHOUT PROOF OF THAT ESSENTIAL ELEMENT (NOT RAISED BELOW).

POINT III

BECAUSE THE SENTENCING COURT FAILED TO COMPLY WITH THE YARBOUGH GUIDELINES, A REMAND FOR RESENTENCING IS REQUIRED.

In his supplemental pro se brief, defendant argues:

POINT I

THE STATE'S PRESENTATION OF HEARSAY, TO THE EFFECT THAT THE [REASON] DETECTIVES SET UP SURVEILLANCE AT THE RED ROOF INN, WAS BECAUSE DEFENDANT HAD BEEN IMPLICATED IN HAND TO HAND DRUG SALES BY A CONFIDENTIAL INFORMANT, VIOLATED DEFENDANT'S RIGHT TO CONFRONT WITNESSES AND HIS RIGHT TO DUE PROCESS OF LAW, AND A FAIR TRIAL. [U.S.] CONST. AMENDS. VI, XIV; N.J. CONST. (1947) ART. 1, PAR[A]S. 1, 9, AND 10.

POINT II

THE PROSECUTOR'S SUMMATION CONSTITUTED AN INAPPROPRIATE COMMENT ON DEFENDANT'S FAILURE TO TESTIFY.

POINT III

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. 1[] PAR[A]. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT IT SHOULD CONSIDER WHETHER INCRIMINATING STATEMENTS PURPORTEDLY MADE BY THE DEFENDANT WERE TRUE, AND IF NOT, TO DISREGARD THEM (NOT RAISED BELOW).

POINT IV

DEFENDANT'S CONVICTION SHOULD BE REVERSED
BECAUSE OF THE CUMULATIVE EFFECTS OF THE
ERRORS WHICH OCCURRED DURING HIS TRIAL.

I.

We first consider defendant's arguments related to denial of his motion to suppress evidence. We afford "considerable latitude . . . [to] a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion." State v. Kuropchak, 221 N.J. 368, 385 (2015) (quoting State v. Feaster, 156 N.J. 1, 82 (1998)). In reviewing a motion to suppress, we "uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007) (citation omitted). This is true especially when the findings of the trial court are "substantially influenced by [its] opportunity to hear and see the witnesses and to have the 'feel' of the case." Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). The trial court's legal conclusions are entitled to no special deference, and are reviewed de novo. State v. Gandhi, 201 N.J. 161, 176 (2010).

Defendant argues the motion judge erroneously denied his motion to suppress, because the police improperly sought consent

to search from his wife. Defendant concedes this argument was not raised before the motion judge.

"Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). "'[T]he points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review.' Parties must make known their positions at the suppression hearing so that the trial court can rule on the issues before it." State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 19 (2009)). "For sound jurisprudential reasons, with few exceptions, our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available." Ibid. (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

Arguments not raised in the trial court are reviewed under plain error. R. 2:10-2. Such an error must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Chavies, 345 N.J. Super. 254, 265 (App. Div. 2001) (quoting State v. Macon, 57 N.J. 325, 336 (1971)). "Appellate courts ordinarily decline to consider issues not presented to the trial court unless they 'go to the jurisdiction of the trial court or concern matters of

great public interest.'" Kvaerner Process, Inc. v. Barham-McBride Joint Venture, 368 N.J. Super. 190, 196 (App. Div. 2004) (quoting Nieder, 62 N.J. at 234); see also U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 483 (2012) (declining to consider argument raised for the first time on appeal).

We reject defendant's arguments related to the denial of his motion to suppress for two reasons. First, defendant ignores the record reflecting his explicit consent to search the car and the hotel room. Second, defendant never raised the third-party consent issue to the motion judge. As our Supreme Court has held, the State is not required to "disprove issues not raised by the defense at a suppression hearing." Witt, 223 N.J. at 418 (declining to address lawfulness of vehicle stop where defendant initially only contested the vehicle search).

II.

We next examine defendant's appeal from the certain persons convictions on the 2015 indictment. When a defendant does not object to a jury charge at trial, we review the matter under the plain error doctrine. State v. Noble, 398 N.J. Super. 574, 593-94 (App. Div. 2008); see also R. 1:7-2; R. 2:10-2. A plain error is one that is "clearly capable of producing an unjust result." R. 2:10-2. In the context of a jury charge, plain error is "[l]egal impropriety in the charge prejudicially affecting the

substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." Noble, 398 N.J. Super. at 593 (alteration in original) (quoting State v. Brown, 190 N.J. 144, 160 (2007)).

"[T]rial courts must instruct juries in a manner consistent with the intent of the Legislature." State v. Afanador, 151 N.J. 41, 48 (1997). "[E]rroneous [jury] instructions are almost invariably regarded as prejudicial. Such errors are 'poor candidates for rehabilitation under the harmless error philosophy.'" State v. Vick, 117 N.J. 288, 289 (1989) (quoting State v. Crisantos (Arriagas), 102 N.J. 265, 273 (1986)). "[T]he tenets of due process and the right to a jury trial mandate that . . . [each] element of the offense . . . must be found beyond a reasonable doubt by the jury." State v. Anderson, 127 N.J. 191, 201 (1992). If the jury is told "that it need not concern itself" with an element of the offense, "the defendant is, in effect, deprived of that trial by jury to which he is entitled, namely, one in which the jury must find that the State has proved each and every material element of the crime beyond a reasonable doubt." State v. Raqland, 105 N.J. 189, 193–94 (1986).

Defendant argues the trial court erroneously instructed the jury regarding the predicate offenses related to the certain

persons charges, and therefore, these convictions must be vacated. The State counters that any error in the jury charge was invited by defense counsel based on counsel's failure to object to the charge during the trial.

N.J.S.A. 2C:39-7(b) precludes persons previously convicted of certain enumerated offenses (known as predicate offenses) from possessing firearms. In this case, defendant did not stipulate to a prior conviction within the enumerated predicate offenses that prohibited him from possessing a firearm. As such, the State was required to prove this element of the charge beyond a reasonable doubt. See N.J.S.A. 2C:39-7(b); U.S. Const. amend. XIV, N.J. Const. art. I, ¶ 9; see also Vick, 117 N.J. at 291.

Here, the State produced evidence that defendant was previously convicted of crimes of the third degree under New York law, without specifying the nature of the offenses or offering any testimony that defendant's prior convictions in New York were for offenses enumerated in N.J.S.A. 2C:39-7(b) as predicate offenses. The judge instructed the jury that they only needed to find defendant was previously "convicted of a crime of the third degree." The certain persons offense does not include every third degree offense, only the specifically listed predicate offenses. See N.J.S.A. 2C:39-7(b).

In State v. Bailey, 231 N.J. 474 (2017), decided after defendant's convictions on the certain persons charges in this case, the defendant was charged pursuant to N.J.S.A. 2C:39-7 and refused to stipulate that his previous convictions were predicate offenses. Id. at 477. At trial in that case, the State presented sanitized judgments of conviction showing only the date of the prior conviction and degree of the offense. Ibid. The jury was instructed in accordance with the model jury charge that they must find defendant "previously has been convicted of third-degree crimes," thus the jury found defendant guilty of the certain persons offense. Id. at 479. We affirmed, holding any error was invited, but noted the jury charge was "disquieting." Id. at 480.

The Supreme Court reversed, finding that "[t]he over-sanitization called for in the model charge injects a constitutional defect into any trial on a certain persons offense where a defendant declines to stipulate." Id. at 488. The sanitization of the convictions treats the essential element of the certain persons charge as proven, denying the defendant a fair trial. Id. at 481. The Court rejected the State's claim that defense counsel in Bailey invited the error because he asked the judge to give the model jury charge despite any constitutional infirmity in the jury instruction. Id. at 490. The Court held even invited errors should be reviewed when they "cut mortally

into the defendant's substantive rights." Id. at 481 (citing State v. Corsaro, 107 N.J. 339, 345–46 (1987)).

The Bailey decision was not a new rule of law. Rather, the decision enforced a fundamental constitutional principle that "in a criminal prosecution in which the accused has a constitutional right to a trial by jury, each element of the crime must be decided by the jury and none of those elements may be withheld from the jury and decided by the judge as a matter of law." Bailey 231 N.J. at 483–84 (quoting Anderson, 127 N.J. at 208–09).

Here, the State had the burden of proving defendant committed a predicate offense to obtain a conviction on the certain persons charges. The State failed to demonstrate defendant's prior convictions in New York were the equivalent of predicate offenses under the New Jersey statute sufficient to allow the jury to convict defendant of the certain persons charges. Thus, defendant's convictions on the certain persons offenses must be vacated. The error in this case "cut mortally into the defendant's substantive right[]" to be found guilty beyond a reasonable doubt of all elements of the offense. Id. at 481.

III.

Because defendant's convictions on the certain persons charges must be vacated, the sentence imposed must be vacated as well. We need not remand for resentencing, because the sentence

and judgment of conviction for the CDS and weapons charges were independent from the sentence and judgment of conviction imposed for the certain persons charges. See State v. Rodriguez, 97 N.J. 263, 273 (1984) ("[The] trial court cannot increase [a] valid sentence on [a] conviction of one count of an indictment to compensate for the reversal on appeal of another conviction with a separate sentence[.]" (citing State v. Vaccaro, 150 N.J. Super. 410 (App. Div. 1977))).

We have considered defendant's pro se appellate arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed as to denial of defendant's motion to suppress.
Vacated as to defendant's convictions on the certain persons offenses and the resultant sentence imposed.

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


CLERK OF THE APPELLATE DIVISION