RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5131-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.A.F.,

Defendant-Appellant.

Submitted December 19, 2017 – Decided January 12, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 14-05-0441.

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

Sean F. Dalton, Gloucester County Prosecutor, attorney for respondent (Douglas B. Pagenkopf, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant M.A.F.[1] appeals from a December 10, 2015 order denying a motion to suppress his confession, and also appeals from his sentence entered on June 17, 2016. We affirm.

Defendant was charged with: one count of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); two counts of second-degree sexual assault, N.J.S.A 2C:14-2(b); one count of second-degree sexual assault, N.J.S.A 2C:14-2 (c)(1); one count of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); and one count of second-degree endangering the welfare of a child, N.J.S.A 2C:24-4(b)(3). Defendant pled guilty to second-degree assault, N.J.S.A 2C:14-2(b), in accordance with a negotiated plea agreement. He was sentenced to eight years in prison subject to an eighty-five percent parole disqualifier under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

The following facts are taken from the record. In May 2013, Detective Staci Lick of the Gloucester County Prosecutor's Office received a telephone call from the victim's mother, claiming the victim stated defendant had been sexually abusing her. The victim is the defendant's nine-year old, biological daughter.

Detective Lick interviewed the child who described incidents of sexual abuse that occurred over several years. As a result, a

[1] We use initials to protect the identity of the minor.

search warrant was obtained for defendant's home. Defendant was not home when the search was conducted. When police arrived at the home, defendant's wife stated she had asked him to leave since "he was acting very disoriented[,] [a]nd [she] didn't find it appropriate around [their] son . . . ." She also stated she believed he was drunk because she "smelled alcohol on his breath[,]" "[h]is eyes appeared to be a little blood . . . shot[,]" and "he was talking a little slow . . . [and] slurring his words."

At the request of the police, defendant's wife called and asked him to return to the home because detectives wished to speak with him about the investigation. Defendant returned and was asked by detectives to accompany them to the station for questioning. Defendant agreed.

Defendant filed a motion to suppress his statement. At the suppression hearing, Detective Lick testified defendant was not handcuffed or placed under arrest at that time, but his pockets were searched for the safety of the officers. Detective Lick testified defendant was not under arrest because he was transported to the police station in the front passenger seat of the police cruiser. Once at the station, Detective Lick testified defendant was placed in an interview room, and she and Detective Brandon Cohen conducted a fifty-three minute videotaped interview.

The following discussion occurred at the outset of the interview:

> DET. LICK: Okay. Are you under the influence of drugs or alcohol or anything?
>
> [DEFENDANT]: No.
>
> DET. LICK: No? Okay. Do you take any medication?
>
> [DEFENDANT]: Ibuprofen, headache medicine, stuff like that, all the time.
>
> DET. LICK: Okay. Are you on anything right now?
>
> [DEFENDANT]: I took like two ibup[r]ofens. [sic]
>
> DET. LICK: Okay. So you understand and know what you're doing today?
>
> [DEFENDANT]: Yeah.

Detective Lick then stated, "[n]ow, like I said, we do want to talk to you about something but we do have to read your rights before that, and it protects us and it protects you." Detective Lick instructed defendant to read the Miranda[2] form aloud and initial where indicated to confirm he understood it.

Then the following exchange continued:

> [DEFENDANT]: I really don't want to sign that if I don't know, you see what I'm saying, what's going on.

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

> DET. LICK: You don't want to sign it because you don't know what's going on?
>
> [DEFENDANT]: Yeah. I definitely want to know what's going on (inaudible) talk about it.
>
> DET. LICK: Well, this says it right here. This says your waiver of these rights is not final. You may withdraw your waiver at any time, either before or during questioning, meaning if we talk— —
>
> [DEFENDANT]: No, I (inaudible). I'm just saying.
>
> DET. LICK: See, understand, we can talk and anytime you can say, I don't want to talk anymore; okay?
>
> [DEFENDANT]: Yeah.
>
> DET. LICK: So what you need to do is read these out loud, initial on each line and then we — read that out loud to us, as well.
>
> [DEFENDANT]: Yeah.

Defendant then read the Miranda rights form aloud, signed the form and waiver, and indicated he understood both.

During the ensuing interview, Detective Lick questioned defendant about the victim, and informed defendant she had spoken to the victim who "indicated that things were happening at [home] when she's been with [defendant], that made her uncomfortable." Defendant initially denied knowing what made the victim uncomfortable and stated it could be related to them play-wrestling. Eventually, however, defendant admitted to: touching

the victim's vagina; watching pornography with her; having her hold his penis; rubbing his penis in front of and against her body; and ejaculating into his hand in front of her.

Defendant also told detectives he had taken inappropriate pictures of the victim in suggestive poses, but deleted them at her request. Defendant stated his cousin and his brother had abused him, and he believed this abuse contributed to him "ma[king] a mistake" with his daughter. Defendant was subsequently indicted.

The motion judge denied the motion, finding defendant had knowingly and voluntarily waived his Miranda rights. Defendant subsequently entered into a plea agreement, and was sentenced by the same judge. This appeal followed.

Defendant raises the following points on appeal:

> I. DEFENDANT'S INTERROGATION SHOULD HAVE BEEN SUPPRESSED BECAUSE THE POLICE REFUSED HIS DEMANDS THAT THEY TELL HIM WHY THEY WANTED TO QUESTION HIM BEFORE HE DECIDED WHETHER TO WAIVE HIS RIGHTS AND SAID THEY COULD NOT GIVE HIM THAT INFORMATION UNLESS HE SIGNED THE MIRANDA FORM, WHICH INCLUDED A WAIVER OF HIS RIGHTS, THUS IMPROPERLY COMPELLING HIM TO GIVE UP HIS RIGHTS.
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> II. REGARDLESS OF WHETHER DEFENDANT WAS IN CUSTODY WHEN HE WAS INTERROGATED, HIS CONFESSION SHOULD HAVE BEEN SUPPRESSED BECAUSE, FOR THE REASONS DISCUSSED IN POINT I, THE POLICE COMPELLED HIM TO GIVE UP HIS RIGHT TO REMAIN SILENT.
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> III. THE SENTENCE OF EIGHT YEARS WITH A PAROLE TERM OF MORE THAN SIX YEARS AND NINE MONTHS

AND WITH LIFETIME REGISTRATION AS A SEX OFFENDER AND LIFETIME PAROLE SUPERVISION IS EXCESSIVE.

I.

"[A]n appellate court reviewing a motion to suppress must 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. Rockford, 213 N.J. 424, 440 (2013) (alteration in original) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). "Those findings warrant particular deference when they are '"substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy."'" Ibid. (alteration in original) (quoting Robinson, 200 N.J. at 15); see also State v. Elders, 192 N.J. 224, 243-44 (2007). "Thus, appellate courts should reverse only when the trial court's determination is 'so clearly mistaken "that the interests of justice demand intervention and correction."'" State v. Gamble, 218 N.J. 412, 425 (2014) (quoting Elders, 192 N.J. at 244).

Defendant argues the motion to suppress should have been granted because defendant was in police custody during the interrogation. Defendant also argues the statement he gave police was invalid because police refused to tell him the purpose of

their interview when he asked, and conditioned providing this information on the waiver of his right to remain silent.

"In determining the voluntariness of a defendant's confession, we traditionally look to the totality of the circumstances to assess whether the waiver of rights was the product of a free will or police coercion." State v. Nyhammer, 197 N.J. 383, 402 (2009). We must "consider such factors as the defendant's 'age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved.'" Ibid. (quoting State v. Presha, 163 N.J. 304, 313 (2000)).

The Supreme Court has stated:

> [W]e are not aware of any case in any jurisdiction that commands that a person be informed of his suspect status in addition to his Miranda warnings or that requires automatic suppression of a statement in the absence of a suspect warning. The essential purpose of Miranda is to empower a person — subject to custodial interrogation within a police-dominated atmosphere — with knowledge of his basic constitutional rights so that he can exercise, according to his free will, the right against self-incrimination or waive that right and answer questions. The defining event triggering the need to give Miranda warnings is custody, not police suspicions concerning an individual's possible role in a crime.
>
> [Id. at 406 (citations omitted).]

"[A] knowing, voluntary and intelligent waiver of Miranda rights is not dependent on a person being told that he is a suspect in a particular criminal investigation." Ibid.; see also Colorado v. Spring, 479 U.S. 564, 575 (1987). "Although 'evidence that the accused was threatened, tricked, or cajoled into a waiver' of his privilege will render the waiver involuntary . . . '[o]nce Miranda warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right.'" Nyhammer, 197 N.J. at 407 (citations omitted) (quoting Miranda, 384 U.S. at 476; Spring, 479 U.S. at 576).

The Supreme Court also stated:

> In the typical case, explicit knowledge of one's status as a suspect will not be important for Miranda purposes. . . . [T]he failure to be told of one's suspect status still would be only one of many factors to be considered in the totality of the circumstances. We must acknowledge the reality that in many, if not most, cases the person being questioned knows he is in custody on a criminal charge. We also are mindful that the Miranda warnings themselves strongly suggest, if not scream out, that a person is a suspect[.]
>
> [Ibid.]

The Court expounded that Miranda "warnings should be a sobering wake-up call to a person under interrogation." Id. at 407-08. "Whether defendant was in custody at that moment is not

significant; at worst, he was read his rights before it was necessary to do so." Id. at 408. "Miranda does not require that 'the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights' [which] . . . 'could affect only the wisdom of a Miranda waiver, not its essentially voluntary and knowing nature.'" Id. at 407 (quoting Spring, 479 U.S. at 376-77).

Defendant's argument that the motion judge was required to determine whether he was in custody ignores that we must consider the totality of the circumstances. In addition to the fact that he executed a valid waiver of his rights, defendant was informed police wished to speak with him regarding an investigation. He complied with the police request he meet them at his home. He was informed by Detective Lick that police had a search warrant for his residence. Once home, defendant voluntarily agreed to accompany police to the station for an interview.

Before the interview began in the police station, defendant was given his Miranda warnings. He expressly acknowledged them by reading them aloud and affixing his signature to the form. At the outset of his interview, defendant acknowledged that no substantive discussions had taken place before he had been given his Miranda rights. When defendant showed hesitancy in responding

to questions, he was reminded of his right to terminate the interview and remain silent.

Moreover, the interview took less than one hour. Reviewing the video of defendant's interview, the motion judge noted defendant appeared alert and attentive during questioning, never asked for the interview to stop, appeared to understand all of the detectives' questions, and did not appear to be under the influence of drugs or alcohol. Therefore, considering the totality of the circumstances, defendant's waiver and confession were voluntary, knowing, and intelligent.

We also reject defendant's reliance on State v. A.G.D., 178 N.J. 56 (2003), that his waiver and confession were invalid because police were required to apprise him of the purpose underlying the search warrant for his home. In A.G.D., the Supreme Court suppressed a statement made by the defendant where police had obtained an arrest warrant for A.G.D., but withheld the existence of the warrant from him. Id. at 68. Instead, police told A.G.D. they sought to interview him about allegations of sexual abuse against him without specifying the charges. Id. at 59. Without knowledge police had an arrest warrant, A.G.D. "insisted that he had done nothing wrong and wanted to put an end to the matter" and gave the police a statement. Ibid.

The Court stated:

> [t]he government's failure to inform a suspect that a criminal complaint or arrest warrant has been filed or issued deprives that person of information indispensable to a knowing and intelligent waiver of rights. . . . Without advising the suspect of his true status when he does not otherwise know it, the State cannot sustain its burden to the Court's satisfaction that the suspect has exercised an informed waiver of rights, regardless of other factors that might support his confession's admission.
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> [Id. at 68 (emphasis added).]

Here, there was no doubt defendant understood he was a suspect. When he was asked to return to his home to be interviewed, he was advised a search warrant was being executed in his home. Moreover, defendant accompanied detectives in a police vehicle for the express purpose of being interviewed by them. Once at the station, defendant was truthfully advised police had no warrant for his arrest and he was not under arrest. Therefore, defendant was aware of his status before waiving his rights and agreeing to be questioned. These facts differ materially from those in A.G.D. and do not invalidate his confession.

Defendant's statement was knowingly, voluntarily, and intelligently provided. Therefore, the motion judge properly denied defendant's motion to suppress.

II.

Defendant argues his sentence was excessive. He claims the sentencing judge erred in finding four aggravating factors, but no mitigating factors. Defendant also argues the court should have considered that he would be subject to parole supervision in assessing aggravating factors three and nine, which require the court to address the likelihood the defendant would reoffend and the need to deter defendant in the calculation of the sentence.

"It is well established that [an] appellate court[] review[s] the trial court's 'sentencing determination under a deferential standard of review.'" State v. Grate, 220 N.J. 317, 337 (2015) (quoting State v. Lawless, 214 N.J. 594, 606 (2013)). We review sentences imposed by the trial court for an abuse of discretion. State v. Megargel, 143 N.J. 484, 493-94 (1996).

Thus, an appellate court must affirm the trial sentence unless:

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
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> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

To provide for adequate review, "the trial court should identify the aggravating and mitigating factors, describe the balance of those factors, and explain how it determined defendant's sentence." State v. Kruse, 105 N.J. 354, 360 (1987). Our role is then to "review findings of fact by the sentencing court in support of its findings of aggravating and mitigating circumstances and to modify the defendant's sentence upon his application where such findings are not fairly supported on the record before the trial court." Roth, 95 N.J. at 362 (quoting N.J.S.A. 2C:44-7).

Here, the record demonstrates no abuse of discretion by the sentencing judge. The judge weighed the aggravating and mitigating factors, applied them to the facts, and ultimately determined to order the sentence suggested by the plea agreement. Specifically, the sentencing judge found the aggravating factors under N.J.S.A. 2C:44-1(a)(2), (3), (6) and (7) applicable. The judge found no mitigating factors.

Defendant argues the judge should have considered mitigating factor six, namely, that "[t]he defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained, or will participate in a program of community service[.]" N.J.S.A 2C:44-1(b)(6). Defendant claims he agreed to compensate the victim in the amount she requested. Defendant

also claims the court should have considered mitigating factor four, N.J.S.A. 2C:44-1(b)(4), because he was a victim of child abuse.

Neither of these mitigating factors were argued at the sentencing hearing. Regardless, the sentencing judge did not abuse her discretion by rejecting the application of mitigating factor six because the record demonstrates defendant offered to pay the Victims of Crime Compensation Office a total of $98. Such a payment would not reimburse the victim for the sexual assault she endured from defendant.

Mitigating factor four does not apply because it requires the court to consider whether "[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense[.]" N.J.S.A. 2C:44-1(b)(4). Here, there is no evidence supporting the theory defendant's history of sexual abuse contributed to his inability to understand the nature of his offense. Other than defendant's mention of having been molested in his youth, he did not claim his history of sexual abuse kept him from understanding the wrongfulness of his conduct. Instead, he characterized the abuse he experienced as a reason why he "made a mistake" and abused his daughter. As the sentencing judge noted, this demonstrated defendant was aware of the

wrongfulness of his actions and chose to "not accept personal responsibility," but blame his shortcomings on others.

Defendant further claims pursuant to N.J.S.A. 2C:44-1(c)(2), the sentencing judge should have considered the parole consequences. Specifically, defendant argues the judge should have considered the lifetime of parole supervision as a Megan's Law offender and a required three-year parole supervision in the findings of aggravating factors three, N.J.S.A. 2C:44-1(a)(3), and nine, N.J.S.A. 2C:44-1(a)(9). We disagree.

There is no requirement N.J.S.A. 2C:44-1(c)(2) should be considered in determining these aggravating factors. Rather, as the State argues, the statute "requires the sentencing court determine the sentence imposed with reference to the real length of time which will be served." The sentencing judge made such a consideration by noting defendant would be required to serve eighty-five percent of the sentence, and that the three years of parole supervision "will begin as soon as [defendant] completed the sentence of incarceration." Thus, the sentencing judge did not err in her consideration of N.J.S.A. 2C:44-1(c)(2).

Lastly, we note the sentencing judge imposed the recommended sentence pursuant to the negotiated plea agreement.

Affirmed.