SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0601-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NICHOLAS GOMEZ-ZUNIGA,
a/k/a JOSE LIUS-GOMEZ,

Defendant-Appellant.

Argued April 25, 2023 – Decided May 22, 2023

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 18-06-1146.

Michael T. Denny, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, attorney; Michael T. Denny, of counsel and on the brief).

Lila B. Leonard, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Lila B. Leonard, of counsel and on the brief).

PER CURIAM

Following the denial of his motion to suppress his Mirandized[1] statement to police, defendant Nicholas Gomez-Zuniga pled guilty to second-degree sexual assault against a child, who was less than thirteen years old and defendant was at least four years older, N.J.S.A. 2C:14-2(b). Pursuant to the terms of the negotiated plea agreement, the court sentenced defendant to a ten-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, Megan's Law, N.J.S.A. 2C:7-2, Parole Supervision for Life, N.J.S.A. 2C:43-6.4, and Nicole's Law, N.J.S.A. 2C:44-8, and dismissed the remaining two counts of the indictment, first-degree aggravated sexual assault by sexual penetration against a child under the age of thirteen, N.J.S.A. 2C:14-2(a)(1), and second-degree endangering the welfare of a child by sexual conduct, N.J.S.A. 2C:24-4(a)(1).

On appeal, defendant raises a single point for our consideration.

> IT WAS ERROR FOR THE TRIAL COURT TO ADMIT . . . DEFENDANT'S STATEMENT BECAUSE HIS SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHED AT HIS FIRST APPEARANCE AT [CENTRAL JUDICIAL PROCESSING (CJP)], AND POLICE SHOULD HAVE BEEN PROHIBITED FROM INTERROGATI[NG] HIM WITHOUT HIS LAWYER BEING PRESENT.

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

More particularly, defendant maintains under the Criminal Justice Reform Act (CJRA), N.J.S.A. 2A:162-15 to -26, his initial appearance in CJP court was an "adversarial" criminal proceeding and, as such, the right to counsel attached before he made his statement to police. In essence, defendant seeks extension of well-established precedent that formal adversarial proceedings triggering Sixth Amendment protections commence upon the return of an indictment. The State counters that defendant waived his right to appeal from the denial of his suppression motion and his substantive arguments are unavailing. We affirm because defendant failed to properly preserve his right to appeal, and his contentions otherwise lack merit.

We limit our summary of the procedural history to the issues implicated on appeal; the underlying facts are not disputed. In May 2017, defendant was charged by complaint-warrant with the charges in the ensuing indictment. Thereafter, he was arrested in another state and extradited to New Jersey.

On July 14, 2017, the State moved for pretrial detention. That same day, defendant appeared in CJP court for his initial appearance. The court simultaneously addressed all defendants appearing on the conference call and collectively advised them of their rights, including "the right to remain silent"

and "the right to counsel." The court explained, "You'll be represented by a public defender [today]."

Defendant's matter was called first. The public defender stated, "Judge, based on the language barrier, I didn't have a chance to speak with [defendant]." The court then advised defendant, with the assistance of a court-appointed interpreter, that the State had moved for detention and the hearing would occur the following Wednesday. Later that day, detectives assigned to the Ocean County Prosecutor's Office and Lakewood Police Department interviewed defendant at the jail. After waiving his Miranda rights, defendant made an incriminating statement to police.

Following defendant's indictment, the trial court granted the State's motion to admit defendant's statement into evidence at the time of trial. Defendant was represented at the suppression hearing by a different assigned attorney.

Thereafter, defendant retained counsel and moved to suppress his statement, contending the State violated his right to counsel by conducting the interview after his initial appearance. Defendant acknowledged long-established precedent holding a defendant's Sixth Amendment right to counsel attaches at indictment. He nonetheless argued that because the State had moved

to detain him, "adversarial proceedings had commenced at the point of the CJP hearing," requiring counsel. To support his argument, defendant asserted after the CJRA was enacted, the Office of the Public Defender voluntarily assumed representation of all defendants "detained at th[e] initial CJP hearing" from the initial appearance "through the detention hearing phase," regardless of their eligibility. Cf. N.J.S.A. 2A:162-19 (affording defendants the right to appointed counsel "at the pretrial detention hearing").

Immediately following oral argument, the motion judge issued a decision from the bench, denying defendant's motion. Describing the State's application to detain defendant under the CJRA as seemingly constituting "a consequence of magnitude," the judge found no authority supported defendant's argument. Noting defendant did not request the assistance of counsel before or during the interview, the judge generally referenced "authority that waiving [the] Fifth Amendment also constitutes waiver of the Sixth Amendment right to counsel." See State v. Wessells, 209 N.J. 395, 406 n.2 (2012) (quoting Montejo v. Louisiana, 556 U.S. 778, 795 (2009)).

"Ordinarily, our review of a trial court's decision on a suppression motion is circumscribed." State v. Smart, 473 N.J. Super. 87, 94 (App. Div. 2022), aff'd 253 N.J. 156 (2023); see also State v. Dunbar, 229 N.J. 521, 538 (2017).

"Deference is not due where, as in the present matter, the trial court has not conducted a testimonial hearing and the facts are undisputed." Smart, 473 N.J. Super. at 94.

"Generally, a defendant who pleads guilty is prohibited from raising, on appeal, the contention that the State violated his constitutional rights prior to the plea." State v. Knight, 183 N.J. 449, 470 (2005) (quoting State v. Crawley, 149 N.J. 310, 316 (1997)). Thus, "[a] plea of guilty amounts to a waiver of all issues, including constitutional claims, that were or could have been raised in prior proceedings." State v. Marolda, 394 N.J. Super. 430, 435 (App. Div. 2007); see also State v. Davila, 443 N.J. Super. 577, 585 (App. Div. 2016).

Our Rules of Court recognize three exceptions to the waiver rule: (1) "the denial of a Fourth-Amendment based motion to suppress evidence" under Rule 3:5-7(d) and Rule 7:5-2(c)(2); (2) "the denial of admission into a pretrial intervention program" under then Rule 3:28(g);[2] and (3) a conditional guilty plea under Rule 3:9-3(f). Knight, 183 N.J. at 471.

Pertinent to this appeal, Rule 3:9-3(f) provides:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any

[2] Effective July 1, 2018, Rule 3:28-6, replaced Rule 3:28(g).

> specified pretrial motion. If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea. Nothing in this rule shall be construed as limiting the right of appeal provided for in R. 3:5-7(d).
>
> [(Emphasis added).]

"[F]ailure to enter a conditional plea under Rule 3:9–3(f) generally bars appellate review of non-Fourth Amendment constitutional issues." State v. J.M., 182 N.J. 402, 410 (2005). Nonetheless, we have declined to enforce the rule "in limited situations where it would result in an injustice to strictly adhere to the requirements of the rule." Ibid. (citing State v. Gonzalez, 254 N.J. Super. 300, 304 (App. Div. 1992)).

Defendant appeals from the denial of his motion to suppress his statement to police but the record contains no indication he preserved his right to appeal. Defendant did not list the denial of his suppression motion on the plea form. Nor did he seek to preserve his right to appeal during the plea hearing. Thus, the prosecutor did not consent, and the court did not approve, any application to reserve his right to appeal the denial of defendant's motion to suppress his statement.

We recognize on his plea form defendant circled, "No," to question 4(e): "Do you further understand that by pleading guilty you are waiving your right

to appeal the denial of all other pretrial motions except the following[?]" Notably, however, no motions were listed in the space provided under this question. Moreover, in Davila, we rejected the defendant's attempt to appeal from his conviction following his guilty plea because he "did not articulate with specificity that he wished to preserve the right to appeal his motion to dismiss [a count due to insufficient evidence], nor did the judge approve that particular condition of his guilty plea." 443 N.J. Super. at 587.

We therefore conclude defendant failed to preserve his right to appeal under Rule 3:9-3(f). Accordingly, defendant is barred from raising on appeal issues relating to his post-Miranda statement to police.

Even were we to conclude there was no procedural bar, we agree with the motion judge that defendant's constitutional challenge to the admission of his statement fails in view of controlling precedent. Based on our review of the record in view of that precedent, we conclude defendant's substantive arguments are without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2), beyond the comments that follow.

The Sixth Amendment right to counsel attaches "once the adversary judicial process has been initiated." Montejo, 556 U.S. at 786. In State v. Sanchez, 129 N.J. 261, 276 (1992), our Supreme Court held formal adversarial

proceedings triggering the Sixth Amendment right to counsel commence upon the return of an indictment. As the Court later explained, the adversarial process commences "upon the return of an indictment or like process because, prior to that point in time, 'the State's investigative effort . . . is at a preliminary stage, . . . the police may still be attempting . . . to solve the crime[,] . . . [and] the State's decision to prosecute has not solidified.'" State v. A.O., 198 N.J. 69, 82 (2009) (alterations in original) (quoting State v. P.Z., 152 N.J. 86, 110 (1997)); see also State v. Tucker, 137 N.J. 259, 290 (1994).

In Tucker, the Court declined to extend its holding in Sanchez to police-initiated custodial interrogation conducted pre-indictment after the defendant's first court appearance. 137 N.J. at 291. In State v. A.G.D., the Court deemed invalid "the suspect's waiver of his right against self-incrimination" where "police fail[ed] to inform him that a criminal complaint or arrest warrant had been filed or issued against him." 178 N.J. 56, 58 (2003). However, the Court reaffirmed police otherwise "may interrogate a suspect without the consent of defense counsel before an indictment has been obtained but after the State has filed or issued a criminal complaint or arrest warrant against that suspect." Ibid.

Although, as defendant argues, Tucker and A.G.D. were decided prior to the CJRA's January 1, 2017 effective date, our Supreme Court again reaffirmed,

albeit in dictum that "[i]ndictment triggers the onset of the formal adversarial judicial process, which in turn entitles a defendant to the assistance of counsel under the Sixth Amendment." State v. Wint, 236 N.J. 174, 204 (2018) (quoting Kirby v. Illinois, 406 U.S. 682, 688-89 (1972)). We will adhere to the Court's dictum on this "carefully considered" issue. See State v. Breitweiser, 373 N.J. Super. 271, 282-83 (App. Div. 2004).

Affirmed.