SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1063-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALBERTO MARTINEZ,
a/k/a ALBERTO MILLER, and
ALBERTO MARTINEZ, JR.,

Defendant-Appellant.

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Argued September 18, 2023 — Decided October 4, 2023

Before Judges Sabatino and Mawla.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 19-09-1452.

Colin Sheehan, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Colin Sheehan, of counsel and on the briefs).

Erin M. Campbell, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex

County Prosecutor; Erin M. Campbell, of counsel and on the briefs).

PER CURIAM

Defendant Alberto Martinez appeals from a December 21, 2020 order denying his motion to suppress evidence from a warrantless vehicle search and challenges fact witness testimony, which led a jury to convict him of controlled dangerous substance (CDS) offenses. He also challenges his sentence. We reverse and remand for the reasons expressed in this opinion.

A Middlesex County grand jury indicted defendant on: second-degree conspiracy to possess heroin and/or fentanyl with intent to distribute, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(2) (count one); third-degree possession of heroin and/or fentanyl, N.J.S.A. 2C:35-10(a)(1) (count two); second-degree possession with intent to distribute heroin and/or fentanyl, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2) (count three); third-degree distribution of heroin and/or fentanyl, N.J.S.A. 2C:35-5(b)(3) (count four); third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count nine); second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2) (count ten); and third-degree financial facilitation of criminal activity, N.J.S.A. 2C:21-25(a) (count eleven).

The trial judge conducted an evidentiary hearing on the suppression motion. The State's witness was Sergeant Christopher Sorber, a fourteen-year veteran of the Edison Police Department. Sergeant Sorber testified he was trained for "[h]igh level investigations for narcotics, trafficking[,] and distribution." During his career, he made approximately thirty-to-fifty arrests involving drug interdiction, primarily of heroin and cocaine. He was also a part of the Edison Narcotics Bureau Task Force and engaged in more than one hundred arrests.

On or about June 19, 2019, Sergeant Sorber received an anonymous tip from a concerned citizen, alleging defendant distributed heroin from a Dunkin' Donuts parking lot on Woodbridge Avenue in Edison. The tipster stated defendant worked at an adjacent Mavis Discount Tire and would frequently "walk over or drive . . . into the lot of the Dunkin' Donuts throughout the day . . . in a silver Chevy Impala." Sergeant Sorber performed a motor vehicle records search and confirmed the vehicle belonged to defendant.

On July 3, 2019, at approximately 4:30 p.m., the sergeant and two officers conducted surveillance in separate, unmarked vehicles near the Dunkin' Donuts and Mavis parking lots. An hour later, Sergeant Sorber saw defendant leave Mavis, enter the Impala, and pull into a spot near the Dunkin' Donuts parking

lot. Codefendant Joseph Benko approached and entered defendant's vehicle. Sergeant Sorber was not able to "physically see their bodies in the car" because defendant's vehicle had tinted windows; however, he was advised defendant and Benko were in the vehicle, which was confirmed by the other officers via radio. Less than a minute later, Benko exited the Impala and "walked over two spots in the same parking lot" and approached the driver side door of a white GMC van. Benko "handed the individual in [the GMC] something through the window."

Almost immediately, defendant reversed his vehicle from the Dunkin' Donuts lot. Sergeant Sorber blocked defendant's vehicle with his police vehicle, preventing it from exiting the lot. He ordered defendant to exit the vehicle and arrested him.

At the same time, another officer held the GMC driver at gunpoint and saw that Benko tossed an item under an adjacent vehicle. The officer arrested Benko and Michael Iacobacci, who was the driver of the GMC, and recovered two bundles of heroin stamped "Mike Tyson." Subsequently, Sergeant Sorber searched defendant's vehicle and found a bookbag containing a digital scale, $1,800 cash, plastic "baggies," heroin, cocaine, and defendant's Mavis pay stub.

The trial judge credited Sergeant Sorber's testimony, and made the following findings:

> Based on the officer's training and experience and based on the totality of the circumstances, including the concerned citizen's tip, [Sergeant Sorber] believed that what he observed was a drug transaction. . . .
>
> The search of the vehicle did not occur at that point in time, but rather it occurred after the police then found on the ground in the area where they observed . . . Benko . . . throw . . . [t]wo bricks of heroin.
>
> So, it was at that point in time that [Sergeant Sorber] testified that he believed he had probable cause to search the vehicle and that he was then permitted to do so. And the legal justification provided by the State is . . . , one, there was clearly probable cause, but . . . secondly[,] there was no need for a warrant under the guidelines of State v. Witt[, 223 N.J. 409 (2015)].

The judge made supplemental written findings stating: "The encounter between police and . . . [d]efendant as an investigatory stop [was] justified by reasonable suspicion." He noted Sergeant Sorber "observed Benko exit [d]efendant's vehicle, walk over to codefendant Iacobacci's vehicle, and hand Iacobacci an item."

> Based on this observation, [Sergeant] Sorber testified that he believed, based on his considerable training and experience, that a drug transaction had just occurred. As a result, in this case, the State presented evidence that not only corroborated the innocent details of the tip (the type of car and location) but also the illegality

> asserted in the tip (drug trafficking). Based on the totality of these circumstances[,] it was proper for an investigatory stop to occur.

The judge also found "[p]olice had probable cause to search [d]efendant's vehicle without a warrant pursuant to the [a]utomobile [e]xception to the [w]arrant [r]equirement." Also, "[p]olice lawfully seized [two bundles of heroin] because by throwing it on the ground, Benko voluntarily abandoned it, thereby giving up his privacy interest in it."

Further, the judge found warrantless search of defendant's vehicle was justified because "the circumstances giving rise to probable cause were spontaneous and unforeseeable for four different reasons." The judge noted the tip was two weeks old, and police did not have any expectations that day because the tipster did not provide a specific timeframe when defendant engaged in drug transactions. The events in the parking lot quickly unfolded and "the incident occurred in less than a minute's time . . . . [T]wo of [the] three [d]efendants were in a mobile vehicle and could presumably leave the scene at any point." The "incident did not occur in a quiet area away from the general public" but instead during rush hour in a parking lot near a highly travelled corridor and "the urgency of protecting officer and citizen safety was present at the scene . . . ."

Defendant's trial lasted for five days. The State's witnesses were Sergeant Sorber, Iacobacci, Benko, and Sergeant Joseph Celentano from the Middlesex County Prosecutor's Office (MCPO), Special Prosecutions Division. Defendant testified on his own behalf.

Sergeant Sorber described his qualifications and the underlying facts of the case consistently with his testimony at the suppression motion hearing. Relevant to this appeal, the following exchange took place when the State inquired about his observations after Benko entered defendant's vehicle:

> [SGT. SORBER:] After a very short amount of time, the front seat passenger exited the vehicle, and then, he walked two cars over to a white GMC work van.
>
> [STATE:] Now, you say a short period of time. . . . [C]an you estimate how long that other individual was inside the Chevy Impala?
>
> [SGT. SORBER:] Thirty seconds.
>
> [STATE:] At that point, did that give you suspicion?
>
> [SGT. SORBER:] Yes.
>
> [STATE:] Why?
>
> [SGT. SORBER:] As a narcotics detective, short meetings in public places . . . sets off bells for me, because it screams some type of criminality, because you don't want to meet for long period of times if you're doing anything illegal. You want to make it as brief and as short as possible.

The sergeant then described the search of defendant's vehicle and the discovery of a digital scale located inside a backpack. He explained the relevance of the scale as follows: "[T]hrough my training and experience as a narcotics detective, typically, an individual that is carrying around a digital scale and has drugs on them . . . in my eyes, it's a form of distribution. They're packaging, and they're weighing it out to distribute." Sergeant Sorber also made the following remarks at trial, which are subject to this appeal: (1) "[T]he totality of everything I observed was a money for drug transaction[;]" (2) "[O]nce the drug would be weighed out on the scale, it needs to be packaged, and it would be put into the plastic bag for sale[;]" (3) "[T]ypically, cell phones are used to communicate . . . between a drug dealer and the user to set up a deal[;]" (4) "[C]ash is at least the preferred method of transacting[;]" and (5)

> [W]ax folds are . . . typically cut with . . . another substance that could make it more potent, such as fentanyl, or a derivative of. So, because of that . . . type of substance, the most minute amount of it that either seeps into your skin or goes airborne by just picking up a bag can kill you.

Iacobacci recounted the events leading up to his arrest. He testified he was a recovering opioid addict and Benko had texted him to purchase heroin and meet at the Dunkin' Donuts. He drove to the Dunkin' Donuts and waited

approximately ten minutes for Benko to arrive. Once Benko arrived, he entered Iacobacci's vehicle, and discussed purchasing two bundles of heroin for $100. After Iacobacci gave Benko the money, Benko left the white GMC and entered defendant's vehicle, which was parked near the Dunkin' Donuts lot. Benko remained in defendant's vehicle for approximately a minute and a half, then returned to the GMC, and both were apprehended. Iacobacci also saw defendant being arrested near the Impala.

Benko testified he was also a recovering opioid addict and planned to meet with Iacobacci to purchase four bundles of heroin. Benko also agreed to meet defendant at the Dunkin' Donuts parking lot. He described the drug transaction and arrest in the same manner as Iacobacci.

Sergeant Celentano testified he served twenty-two years as a law enforcement officer. He explained his background and experience with the Middlesex County Sheriff's Department, involvement with the narcotics task force, and employment with the MCPO. The court qualified him as an expert in the field of illegal drug use and distribution. He described the process for cocaine and heroin distribution, primarily packaging and branding stamps, and the amount of drugs generally contained in glassine envelopes, "balls[,]" and

bundles of heroin. He also explained the surveillance process and how narcotics are commonly sold.

Defendant claimed the items seized from his car belonged to Benko and denied he was involved in any drug sale. He could not explain why his pay stub was found in the bag, but suggested police planted it during their search.

The jury convicted defendant on all non-dismissed counts.[1] At sentencing, the State moved for a mandatory extended term based on defendant's prior convictions. N.J.S.A. 2C:43-6(f). Defense counsel acknowledged defendant was mandatory extended-term eligible. The trial judge granted the State's application.

The judge gave considerable weight to aggravating factors three, six, and nine, and found no mitigating factors. On counts three, four, and ten, defendant was sentenced to a concurrent sixteen-year term, with an eight-year period of parole ineligibility. Regarding count eleven, defendant was sentenced to a four-year prison term, which ran consecutive to counts three, four, and ten. Defendant's aggregate sentence totaled twenty years, subject to eight years of parole ineligibility.

[1] The court dismissed count one on defendant's motion, following the close of the State's case.

Defendant raises the following points on appeal:

> POINT I
>
> THE EVIDENCE SEIZED IN THE WARRANTLESS SEARCH OF [DEFENDANT]'S CAR MUST BE SUPPRESSED BECAUSE THE PROBABLE CAUSE DID NOT ARISE FROM UNFORESEEABLE AND SPONTANEOUS CIRCUMSTANCES AS REQUIRED BY STATE V. WITT.
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> POINT II
>
> THE ADMISSION OF [SERGEANT] SORBER'S UNQUALIFIED AND PREJUDICIAL "EXPERT" TESTIMONY ON THE ULTIMATE ISSUE OF [DEFENDANT]'S GUILT WAS REVERSIBLE ERROR. (Not raised below).
>
> > A. [Sergeant] Sorber's lay opinion was unqualified expert testimony, was unhelpful to the jury, and intruded on the jury's function.
> >
> > B. Allowing [Sergeant] Sorber, as the arresting officer, to opine on [Defendant]'s guilt was particularly prejudicial.
>
> POINT III
>
> THE ADMISSION OF [SERGEANT] SORBER'S IRRELEVANT, PREJUDICIAL, AND REPUDIATED OPINION THAT INCIDENTAL FENTANYL EXPOSURE IS FATAL WAS REVERSIBLE ERROR. (Not Raised Below).
>
> POINT IV

THE TRIAL COURT IMPROPERLY USED [DEFENDANT]'S DEFENSE OF HIS INNOCENCE AT TRIAL AGAINST HIM TO IMPOSE A HARSHER SENTENCE. (Not Raised Below).

While this appeal was pending, we directed the parties to file supplemental briefs to address the Supreme Court's recent opinion in State v. Smart, 253 N.J. 156 (2023). Defendant's supplemental brief asserts Smart supports the arguments raised in Point I above and requires reversal of the suppression motion order. The State's brief argues Smart is distinguishable.

I.

"Generally, on appellate review, a trial court's factual findings in support of granting or denying a motion to suppress must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). Factual findings will not be disturbed on appeal unless they are "so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Gamble, 218 N.J. 412, 425 (2014) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). However, legal conclusions drawn from those facts are reviewed de novo. State v. Radel, 249 N.J. 469, 493 (2022); see also S.S., 229 N.J. at 380.

Defendant argues any evidence obtained by police should be suppressed because they should have obtained a warrant to search his vehicle. He asserts

the warrantless search was invalid because police were surveilling his activities for two weeks to obtain evidence of him dealing drugs in the Dunkin' Donuts parking lot, rendering the circumstances of the search "foreseeable and far from spontaneous circumstances . . . ."

Defendant concedes "police developed probable cause for a search after recovering the tossed bundles of heroin[,]" but lacked probable cause based on a traffic violation or the plain view exception. He asserts the trial judge's "reliance on the 'urgency of protecting officer and citizen safety' is . . . misplaced." He argues a warrant was required to search his vehicle because it was "parked in the Dunkin' [Donuts] parking lot, [and] did not pose the same safety concerns of a car stopped on the side of a highway or even a road."

The Fourth Amendment of the United States Constitution, as well as Article I, Paragraph 7 of the New Jersey Constitution, guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. A warrantless search is presumed to be unreasonable and therefore invalid. State v. Valencia, 93 N.J. 126, 133 (1983). "Warrantless searches are 'permissible only if "justified by one of the few specifically established and well-delineated exceptions to the warrant

requirement.'"' State v. Robinson, 228 N.J. 529, 544 (2017) (quoting Witt, 223 N.J. at 422).

Where evidence is seized during a vehicle stop without a warrant, "[t]he State has the burden of proof to demonstrate by a preponderance of the evidence that the warrantless seizure was valid." State v. Atwood, 232 N.J. 433, 437-38 (2018) (alteration in original) (quoting State v. O'Neal, 190 N.J. 601, 611 (2007)). Where the State fails to show the search falls within one of the exceptions to the warrant requirement, the exclusionary rule requires suppression of the evidence. Id. at 449.

When a motor vehicle is subject to an investigatory stop "a police officer must have a reasonable and articulable suspicion that the driver of a vehicle, or its occupants, is committing a motor-vehicle violation or a criminal or disorderly persons offense to justify a stop." State v. Scriven, 226 N.J. 20, 33-34 (2016) (citing State v. Locurto, 157 N.J. 463, 470 (1999)); see also State v. Rosario, 229 N.J. 263, 276 (2017). A suspicion of criminal activity is reasonable only if it is based on "some objective manifestation that the person [detained] is, or is about to be engaged in criminal activity." State v. Pineiro, 181 N.J. 13, 22 (2004) (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)).

In reviewing the facts of an investigatory stop, the court considers the "totality of the circumstances." Ibid. This includes a police officer's "background and training," and their ability to "make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" State v. Nelson, 237 N.J. 540, 555 (2019) (quoting United States v. Arvizu, 534 U.S. 266, 273 (2002)). "[P]olice may rely on behavior that is consistent with innocence as well as guilt in finding reasonable and articulable suspicion to conduct an investigatory stop." Pineiro, 181 N.J. at 25.

Under the automobile exception to the warrant requirement, a vehicle may be searched without a warrant where: (1) "the police have probable cause to believe that the vehicle contains contraband or evidence of an offense," and (2) "the circumstances giving rise to probable cause are unforeseeable and spontaneous." Witt, 223 N.J. at 447; see also State v. Rodriguez, 459 N.J. Super. 13, 22 (App. Div. 2019). Recently, our Supreme Court in Smart and State v. Cohen upheld the longstanding principle that the State must prove the ripening of probable cause was both "unforeseeable and spontaneous." See Smart, 253 N.J. at 480; Cohen, 254 N.J. 308, 319-20 (2023).

"Probable cause exists if at the time of the police action there is 'a well-grounded' suspicion that a crime has been or is being committed." State v. Sullivan, 169 N.J. 204, 211 (2001) (quoting State v. Waltz, 61 N.J. 83, 87 (1972)). A court must consider whether the totality of the facts presented to the arresting officer would support "a [person] of reasonable caution in the belief that an offense has been or is being committed." State v. Sims, 75 N.J. 337, 354 (1978) (quoting Draper v. United States, 358 U.S. 307, 313 (1959)).

"Probable cause requires 'a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" State v. Demeter, 124 N.J. 374, 380-81 (1991) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). An officer's actions must be considered in conjunction with "the specific reasonable inferences which [they are] entitled to draw from the facts in light of [their] experience." Terry v. Ohio, 392 U.S. 1, 27 (1968).

Sergeant Sorber received the tip two weeks prior to defendant's arrest. The tipster provided defendant's name, place of employment, and the type of automobile he operated, allowing the sergeant to search motor vehicle records and confirm defendant's ownership. The tipster also described how defendant traveled to the Dunkin' Donuts and the type of drugs defendant sold.

Police surveilled defendant's vehicle, and although they could not see into it, they observed Benko exit defendant's car just thirty seconds after he entered and give Iacobacci "something" prior to entering the GMC van. Based on these facts and circumstances as well as Sergeant Sorber's experience, background, and training, there was sufficient reasonable suspicion for him to believe a drug transaction occurred and he could conduct an investigatory stop.

However, we part ways with the trial judge that the circumstances allowed police to conduct a warrantless search of defendant's vehicle. The judge relied on the fact Benko tossed a bundle of heroin underneath an adjacent vehicle, but this arguably unpredictable discrete act did not validate the warrantless search of defendant's vehicle.

The weeks-old tip, the subsequent surveillance of defendant at work, and the surveillance of the drug transaction at the Dunkin' Donuts parking lot, demonstrate the circumstances that gave rise to probable cause were foreseeable. The facts also do not convince us of spontaneity, but rather show police reasonably anticipated finding drugs in defendant's vehicle. The police should have impounded the vehicle and secured a warrant. Smart, 253 N.J. at 173-74; see also Rodriguez, 459 N.J. Super. at 23 (stating Witt "afford[s] police officers at the scene the discretion to choose between searching the vehicle immediately

if they spontaneously have probable cause to do so, or to have the vehicle removed and impounded and seek a search warrant later"). For these reasons, the order denying the suppression motion is reversed. Accordingly, defendant's conviction, which was in part founded upon the seized evidence admitted at trial, must be reversed.

II.

Next, although it is not essential to do so, we address the problematic aspects of the testimony the State elicited from Sergeant Sorber to avoid their repetition in the future. Defendant claims the sergeant's testimony prejudiced the outcome of the case and that he provided expert testimony even though the State offered him solely as a fact witness.

Lay witnesses may offer opinions if "rationally based on the witness' perception" and helpful to "understanding the witness' testimony or determining a fact in issue." N.J.R.E. 701. The opinion "must be the product of reasoning processes familiar to the average person in everyday life." State v. Brockington, 439 N.J. Super. 311, 322 (App. Div. 2015) (quoting United States v. Garcia, 413 F.3d 201, 215 (2d Cir. 2005)). Police officers testifying as lay witnesses may not opine that they witnessed a narcotics sale, as this would create "an opportunity for police officers to offer opinions on defendants' guilt." Id. at 323

(quoting State v. McLean, 205 N.J. 438, 461 (2011)). However, "[c]ourts in New Jersey have permitted police officers to testify as lay witnesses, based on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary." State v. LaBrutto, 114 N.J. 187, 198 (1989).

In McLean, an officer testified he observed the defendant engage in two drug transactions. Id. at 443-44. Over defense counsel's objection, the prosecutor asked the officer: "So based on your own experience sir, and your own training, what did you believe happened at that time?" Id. at 446. The trial court permitted the officer, as a lay witness, to testify that he believed he had observed a drug transaction. Ibid. On appeal, the Court held the police officer's statement was inadmissible because it was an expression of a belief in the defendant's guilt, and offered an opinion on matters that were not beyond the understanding of the jury. Id. at 463; see also N.J.R.E. 701. The Court further noted that admissible fact testimony by a police officer cannot express what the officer "'believed,' 'thought,' or 'suspected.'" Id. at 460.

Sergeant Sorber's testimony the events in the parking lot "scream[ed] some type of criminality[,]" and that he "observed . . . a money for drug transaction" contravened McLean. His testimony also exceeded the parameters

of lay opinion testimony under N.J.R.E. 701 because he discussed methods of packaging, distribution, and paraphernalia use; testimony commonly reserved for a qualified narcotics expert. Because this testimony was prejudicial and encroached on the jury's factfinding function, defendant's convictions must be reversed.

Likewise, Sergeant Sorber's testimony about: the digital scale found in defendant's vehicle being a form of paraphernalia commonly used by drug dealers to divide certain drugs; the manner of drug packaging; how dealers use cell phones to make a deal; and how cash is "the preferred method" of payment in drug transactions, exceeded the proper scope of his role as a fact witness. Even though the sergeant's vocational experience was the basis for his testimony, he was not qualified as an expert. Nor was his testimony accompanied by an instruction advising the jury they were free to accept or reject his opinion testimony, as occurred with Sergeant Celentano who was qualified as a law enforcement drug expert. For these reasons, it was error to permit this testimony.

We reach a different conclusion regarding Sergeant Sorber's testimony related to his department's protocol for handling fentanyl. While explaining his handling of the materials taken from defendant's vehicle, the sergeant testified

"we have an order that we're supposed to handle [fentanyl] as hazardous material" because "the most minute amount of [fentanyl] that seeps into your skin or goes airborne by just picking up a bag can kill you."

Taken in context, Sergeant Sorber's testimony regarding fentanyl was not probative of defendant's guilt. It is evident he was explaining his department's protocol for handling a certain type of evidence. The admission of this testimony did not constitute reversible error.

III.

Finally, although we have reversed defendant's convictions, we address his sentencing arguments for sake of completeness. Defendant challenges his sentence, arguing the trial judge improperly assumed he lied when defending himself at trial and used it to give considerable weight to aggravating factor three. He points to the following passage from the sentencing:

> [W]hen you factor in [defendant's] . . . willingness to clearly lie after taking an oath in a courtroom, it . . . collectively and . . . in the totality of the circumstances demonstrates a meaningful and substantive disregard for the rule of the law and the importance of the rule of law, which in this [c]ourt's opinion exacerbates the risk to reoffend.

Our review of a sentencing court's decision is for an abuse of discretion. State v. Fuentes, 217 N.J. 57, 70 (2014). We consider whether:

> (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."
>
> (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

"An 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); Roth, 95 N.J. at 364-65).

Our Supreme Court has expressed its disapproval of "a practice of calling routinely upon defendants at sentencing to disavow their stance of innocence." State v. Poteet, 61 N.J. 493, 497-98 (1972); see also State v. Marks, 201 N.J. Super. 514, 539-40 (App. Div. 1985); N.J.S.A. 2C:44-1(c)(1) ("A plea of guilty by a defendant or failure to so plead shall not be considered in withholding or imposing a sentence for imprisonment.").

As to aggravating factor three, the risk a defendant will reoffend, N.J.S.A. 2C:44-1(a)(3), a defendant does have the option to continue to deny his guilt and show no remorse for an offense he denies committing. See Poteet, 61 N.J.

at 493. A sentencing judge's reference to a defendant's failure to admit his guilt does not warrant reversal unless there is evidence suggesting the failure to admit guilt enhanced the defendant's sentence. See id. at 499 ("[T]he trial court did not ask [the defendant] to concede his guilt, and nothing in the transcript suggests that his sentence was enlarged because he did not confess."); see also Marks, 201 N.J. Super. at 540 ("[T]he trial judge's brief allusion to defendant's failure to candidly admit his guilt does not require a reversal . . . .").

We discern no error in the trial judge's consideration of the aggravating and mitigating factors. In his analysis of aggravating factor three, the judge neither made a passing reference to defendant's failure to admit guilt, nor requested him to admit guilt. There is also no indication he amplified the sentence because defendant maintained his innocence. Rather, the judge considered defendant's prior criminal history and the nature of his current convictions. He concluded defendant's conduct was "much more involved and more complex than one prior drug conviction . . . which rendered him eligible for an extended term[,]" and "demonstrate[d] a meaningful and substantive disregard for the rule of law and the importance of the rule of law" by lying on the stand given the weight of the evidence.

The judge acknowledged,

> lying itself on the witness stand is not necessarily an aggravating factor, but in the context of this case, his version of events, that it was . . . Benko's drugs and money, in this [c]ourt's opinion, based on the ability of this [c]ourt to observe the credibility and demeanor of . . . [d]efendant as well as . . . [Benko], that version of events was to this [c]ourt preposterous.

The sentencing analysis was more nuanced than defendant suggests. He was not punished for defending his innocence, but rather due to his lack of credibility, which pointed to a propensity to reoffend. The judge did not abuse his discretion.

Finally, defendant asserts the judge mistakenly imposed a mandatory extended term for a non-violent drug offense. Citing Attorney General Law Enforcement Directive No. 2021-4, Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12 (Apr. 19, 2021),[2] which revised statewide guidelines and provided waivers for non-violent drug offenses, he claims the State ignored the directive and erroneously moved for a mandatory extended term. Ibid. He claims when appellate counsel applied for the waiver pursuant

[2] https://www.nj.gov/oag/newsreleases21/AG-Directive-2021-4_Mandatory-Minimum-Drug-Sentences.pdf.

to the directive, the State rejected the application because defendant's sentence included an extended term as a persistent offender.

Following its receipt of defendant's reply brief, which raised the waiver issue, the State advised us it consents to a remand for resentencing pursuant to the directive. For these reasons, but for our reversal of the suppression ruling and defendant's convictions, the sentence would be remanded for reconsideration,

Reversed and remanded for further proceedings. We do not retain jurisdiction.