

**NOT FOR PUBLICATION WITHOUT THE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-0003-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANGEL CONSEPCION a/k/a
ANGEL CONCEPCION,

Defendant-Appellant.

Argued May 21, 2024 – Decided May 29, 2024

Before Judges Gooden Brown and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 21-01-0063.

Daniel S. Rockoff, Assistant Deputy Public Defender, argued the cause for appellant (Jennifer Nicole Selitti, Public Defender, attorney; Daniel S. Rockoff, of counsel and on the brief).

Linda A. Shashoua, Designated Counsel, argued the cause for respondent (William Reynolds, Atlantic County Prosecutor, attorney; Linda A. Shashoua, on the brief).

PER CURIAM

Defendant Angel Consepcion appeals from his conviction and sentence for first-degree unlawful possession of a weapon by a person with a prior conviction of an offense enumerated in the No Early Release Act, N.J.S.A. 2C:43-7.2. See N.J.S.A. 2C:39-5(j). Defendant moved to suppress the AK-47 and AR-15 firearms which formed the evidential basis for the charge after the police found the weapons during a protective sweep of the residence¹ in which they arrested defendant. When the trial court denied his suppression motion, defendant entered a negotiated guilty plea and was sentenced to ten years in prison with a five-year period of parole ineligibility.

On appeal, defendant challenges the denial of his suppression motion as permitted by Rule 3:5-7(d) and he also argues that the court failed to set forth its reasons for imposing a period of parole ineligibility. Specifically, defendant raises the following contentions:

POINT I

BECAUSE OFFICERS ILLEGALLY ENTERED
DEFENDANT'S HOME AND SEARCHED
UPSTAIRS WITHOUT A SEARCH WARRANT
AFTER ARRESTING HIM WITHOUT INCIDENT
AT THE FRONT DOOR, THIS COURT MUST

¹ The residence was described as a "very small" two-bedroom apartment or two-story rowhome.

REVERSE THE DENIAL OF . . . DEFENDANT'S
MOTION TO SUPPRESS.
POINT II

THIS COURT MUST REMAND FOR
RESENTENCING BECAUSE THE TRIAL COURT
DID NOT ARTICULATE REASONS FOR
IMPOSING ANY DISCRETIONARY PAROLE
DISQUALIFIER, LET ALONE THE MAXIMUM.

Having considered defendant's arguments and the applicable law, we affirm the trial court's denial of his suppression motion, but we remand for resentencing on the parole ineligibility issue.

I.

The protective sweep in this case was made immediately following the execution of an arrest warrant by detectives from the United States Marshal's Service Fugitive Task Force (Task Force), New Jersey State Troopers, and local police. The trial court conducted a two-day suppression hearing and five of the approximately twelve law enforcement officers involved in the operation testified.

Following the hearing, the court rendered a thorough sixteen-page written decision setting forth its findings of fact and conclusions of law. The Task Force was responsible for serving defendant with an active National Crime Information Center (NCIC) warrant for two counts of first-degree murder out of

Cook County, Illinois, and for aggravated sexual assault in Milwaukee, Wisconsin. Illinois police advised the officers that defendant was hiding in an apartment in Pleasantville. These officers described defendant as a "hitman for the Cartel," who had a violent criminal history. The officers also located a social media photograph of defendant where he was seen holding an AK-47.

The officers formed a perimeter around the apartment and several announced they had observed an individual "peep" through the bedroom window of the second floor. The officers were not sure whether the individual was defendant or someone else. Accordingly, the officers began to "cover" or point their rifles at the upstairs window "in the event they would encounter somebody engaging them with deadly force" as they moved toward the door.

The officers knocked on the door and announced their presence. Detective Legatie testified that "the door opened and while [defendant] was inside the residence, he put his hands up" The police arrested defendant inside the apartment.

Detective Provenzano asked defendant if anyone else was in the apartment. Defendant did not answer. Provenzano testified he was concerned by defendant's non-response given defendant's violent history and the fact that he had otherwise followed the officers' commands. In order to protect the

safety of the officers inside and outside the apartment, Provenzano directed officers to conduct a protective sweep of the residence for other individuals who might be present.

The sweep lasted less than five minutes from beginning to end. Legatie described the layout of the apartment, stating there was a living room to the left "as soon as you enter the residence" with stairs leading to the second floor. Legatie stated that because of the layout, the officers had someone "hold the top, the stairs going upstairs in terms of like keeping eyes, make sure no one was going to come down to hurt us"

After clearing the first floor, the officers went upstairs to look for individuals and found two bedrooms that were separated by a bathroom. In the back bedroom, they found an AK-47 lying in "plain view" on an inflatable bed. They saw an AR-15 leaning against the wall in an open closet² in the other bedroom. The officers photographed, but did not touch, the weapons.

The officers then secured the apartment until a search warrant could be obtained for the rest of the apartment. The subsequent search resulted in the discovery of controlled dangerous substances.

Defendant did not testify at the hearing and presented no witnesses.

² The closet did not have doors.

Following the hearing, the trial court rendered a written decision denying defendant's motion to suppress the firearms found during the protective sweep. Defendant argued the police should have secured a warrant before moving beyond the place inside the apartment where they arrested defendant. The court rejected this argument after finding that the officers' actions in conducting the protective sweep were in accord with the governing legal precedents in this area.³

The court provided the following explanation for its determination:

In the present case, [defendant] was known to be very violent. He was wanted for a homicide in two separate jurisdictions, posed with an assault weapon on social media, and arrest warrants were already issued and perfected out of Illinois. While he was arrested at the entrance door without incident, that act does not quell the need for officer safety. An officer could easily be shot by another occupant of the home, through the floor or closet, from another room or from a second story window. There were indeed a variety of communications asserting someone was peeking out the windows and it was unknown if it was [defendant] or others occupying the home. Against this backdrop[,] a protective sweep was valid because it was reasonable, necessary, and essential to the safety of the officers.

The court continued:

³ See Maryland v. Buie, 494 U.S. 325 (1990); State v. Cope, 224 N.J. 530 (2016); State v. Davila, 203 N.J. 97 (2010).

Six or seven officers performed a tactical or protective sweep of the first and second floor in a stack formation. The sweep was quick and lasted only a few minutes. They found the weapons on the second floor, one in a bedroom on a blow-up mattress and one in the second bedroom in a closet without doors, all in plain view. The officers only swept the areas [where] they thought individuals could be hiding. They had reason to believe other individuals could be in the house because . . . defendant was a known gang member who was wanted for murder in another State. Moreover, there was a good-faith-belief other people could be occupying the home.

In summing up its decision, the court stated:

The witnesses who testified for the [S]tate were very credible. They all reliably conveyed to the [c]ourt a legitimate concern for their safety, that the sweep was done quickly[,] and was limited to area[s] where someone could surprise or attack the officers.

II.

In Point I, defendant argues that the trial court erred by denying his motion to suppress the weapons the officers found during the protective sweep of the apartment. We disagree.

We review a trial court's factual findings in a suppression hearing with great deference. State v. Gonzalez, 227 N.J. 77, 101 (2016). In our review of a "grant or denial of a motion to suppress[,] [we] 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. Gamble, 218 N.J. 412, 424 (2014). We defer "to those findings of the trial [court] which are substantially influenced by [its] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). We owe no deference, however, to the trial court's legal conclusions or interpretation of the legal consequences that flow from established facts. Our review in that regard is de novo. State v. Watts, 223 N.J. 503, 516 (2015).

Applying that standard of review, we discern substantial credible evidence in the record to support the trial court's findings of fact and we agree with the court's interpretation of the legal consequences that flow from those facts. We conclude that the State's proofs established by a preponderance of the evidence, State v. Mann, 203 N.J. 328, 337-38 (2010), that the warrantless discovery of the AK-47 and the AR-15 was justified by the plain view doctrine in conjunction with a permissible protective sweep.

"[A] 'protective sweep' is a quick and limited search of premises, incident to an arrest[,] and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a

person might be hiding." Davila, 203 N.J. at 113 (quoting Buie, 494 U.S. at 336). As our Supreme Court has made clear:

[A] protective sweep incident to an in-home arrest is permissible under the following circumstances. First, the police may sweep the "spaces immediately adjoining the place of arrest from which an attack" might be launched even in the absence of probable cause or reasonable suspicion. [Buie, 494 U.S. at 334]. Any wider sweep must be justified by "specific facts that would cause a reasonable officer to believe there is an individual within the premises who poses a danger" to the arresting officers. [Davila, 203 N.J. at 115]. Second, the sweep must be "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." [Buie, 494 U.S. at 327]. Although the sweep "is not a search for weapons or contraband," such items may be seized if observed "in plain view" during the sweep. [Davila, 203 N.J. at 115]. Last, the sweep should last "no longer than is necessary to dispel the reasonable suspicion of danger" or "to complete the arrest and depart the premises." Ibid. (quoting Buie, 494 U.S. at 335-36).

[Cope, 224 N.J. at 548.]

Here, there was substantial credible evidence in the record to establish that the protective sweep satisfied the conditions set forth in Buie, Davila, and Cope. The trial court found that the sweep was "reasonable, necessary, and essential to the safety of the officers." The officers knew that defendant was a "very violent" gang member who was wanted for murder. He had posed on social media holding an AK-47.

Although the officers arrested defendant immediately after he opened the door to the apartment, that did "not quell the need for officer safety." Multiple officers had seen someone peeking out of the apartment windows, and the officers could not be sure whether that person was defendant or another individual. Thus, the officers were already "covering" the upstairs window with their rifles in case someone began shooting from inside the residence. In addition, defendant refused to tell the officers whether someone else was in the home, which heightened their safety concerns. The court also credited the officers' account that they only swept areas where they knew individuals could be hiding, that the sweep lasted "only a few minutes." and that the weapons were "all in plain view"⁴ in the bedrooms.

Under the totality of these circumstances, we are satisfied that the officers properly conducted a protective sweep of the apartment leading to the discovery of the AK-47 and the AR-15. Therefore, we affirm the trial court's denial of defendant's motion to suppress this evidence.

⁴ Under the plain view doctrine, the State must prove by a preponderance of the evidence not only that the officers were lawfully present when they observed the incriminating item but also that it was "immediately apparent that the seized item is evidence of a crime." Gonzalez, 227 N.J. at 101. The State plainly met both of these requirements in this case.

III.

In Point II, defendant complains the trial court erred when it imposed the maximum parole bar of five years "without any articulated explanation." We agree.

The court sentenced defendant under N.J.S.A. 2C:39-5(j) to ten years in prison, which was the minimum custodial sentence for a first-degree offense. However, it is not clear from the record how the court reached its decision to impose a five-year parole bar. The court did discuss defendant's past record and found three aggravating factors, three, six, and nine, which it gave "substantial weight," and no mitigating factors. After that brief discussion, however, the court merely stated:

Given the balance of nature, not just the quality of nature, not just the number of aggravating factors [sic] do outweigh the mitigating factors, [defendant] will be sentenced as follows.

[On his conviction for violating N.J.S.A. 2C:39-5(j)], ten years New Jersey State Prison, parole ineligibility five years.


Obviously, more explanation was needed to justify the parole bar and its length. This is so because it is well established that if a sentencing court orders a period of parole ineligibility, the court "shall state on the record the reasons for imposing the sentence[.]" State v. Bessix, 309 N.J. Super. 126, 130 (App.

Div. 1998) (quoting State v. Kruse, 105 N.J. 354, 359 (1987)). In the absence of any explanation for the basis of a court's determination, which hinders appellate review, we must vacate and remand for resentencing the issue of parole ineligibility for the unlawful possession of a weapon under N.J.S.A. 2C:39-5(j). Ibid. On remand, the trial court shall also consider the applicability of our recent decision in State v. Cromedy, 478 N.J. Super. 157, 168 (App. Div. 2024), which held that a defendant convicted of a first-degree offense under N.J.S.A. 2C:39-5(j) "must serve a mandatory period of parole ineligibility pursuant to N.J.S.A. 2C:43-6(c)."

In summary, we affirm the denial of defendant's suppression motion, but remand for resentencing on the period of parole ineligibility for his conviction.

Affirmed in part and remanded in part in accordance with this opinion.
We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION