SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4289-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DOMINIC SUMLER,
a/k/a CORY BELL, DOMINIC J.
SUMLER, and DOMINIC SUMMER,

Defendant-Appellant.

Submitted May 16, 2022 – Decided June 14, 2022

Before Judges Rose and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 18-10-0609.

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

William A. Daniel, Union County Prosecutor, attorney for respondent (Michele C. Buckley, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following denial of his motion to suppress a handgun and drugs seized pursuant to a warrantless search of his vehicle, defendant Dominic Sumler pled guilty to first-degree unlawful possession of a handgun by an individual with a prior conviction for a crime enumerated in N.J.S.A. 2C:43-7.2(d),[1] N.J.S.A. 2C:39-5(j) (count one), and third-degree possession with intent to distribute a controlled dangerous substance (CDS) within 1000 feet of school property, N.J.S.A. 2C:35-7(a) (count six), charged in a seven-count Union County indictment. Defendant thereafter moved for reconsideration of the judge's order denying his suppression motion. After affording defendant the opportunity to testify and call a police witness on his behalf, the judge denied defendant's motion.

Defendant was sentenced pursuant to the negotiated plea agreement to a ten-year prison term, with a five-year period of parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6(c), on the weapons conviction, and a concurrent

[1] N.J.S.A. 2C:43-7.2 is the No Early Release Act, commonly referred to as NERA.

four-year prison sentence on the drug conviction. Those terms were imposed consecutively to the sentence defendant was serving for a violation of parole.[2]

Before the motion judge, defendant challenged the validity of the motor vehicle stop, primarily arguing his alleged traffic violation was a pretextual basis for the stop, police lacked probable cause to conduct the search, and the officers unreasonably extended the stop's duration by requesting a canine drug detection sniff test of the car. On appeal, defendant repackages his argument, asserting the automobile exception did not apply because police testified they had probable cause to search the car before the K-9 unit alerted to the presence of drugs. Defendant contends the circumstances giving rise to probable cause therefore were not unforeseeable and spontaneous to otherwise justify the automobile exception to the warrant requirement under State v. Witt, 223 N.J. 409 (2015). Alternatively, defendant argues his sentence was excessive.

[2] The remaining counts of the indictment were dismissed pursuant to the plea agreement: fourth-degree possession of a large capacity ammunition magazine, N.J.S.A. 2C:39-3(j) (count two); fourth-degree possession of hollow-nosed bullets, N.J.S.A. 2C:39-3(f) (count three); third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1) (count four); third-degree possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a) (count five); and second-degree possession of a firearm while committing a CDS offense, N.J.S.A. 2C:39-4.1(a) (count seven).

More particularly, defendant raises the following points for our consideration:

POINT I

> THE POLICE IMPROPERLY EVADED THE WARRANT REQUIREMENT BY SITTING ON PROBABLE CAUSE RATHER THAN SEARCHING DEFENDANT'S CAR IMMEDIATELY. THE EVIDENCE FOUND DURING THIS ILLEGAL WARRANTLESS SEARCH MUST BE SUPPRESSED.

POINT II

> THE COURT'S IMPROPER FAILURES TO ADDRESS MITIGATING FACTORS AND CONDUCT A YARBOUGH[3] ANALYSIS RENDER DEFENDANT'S SENTENCE EXCESSIVE AND REQUIRE A REMAND FOR RESENTENCING.

We reject these contentions and affirm.

I.

During the initial suppression hearing on June 3, 2019, the State presented the testimony of Elizabeth Police Officer (EPO) Billy Ly, who conducted the motor vehicle stop. Defendant did not testify or call any witnesses on his behalf.

Around 9:00 p.m. on June 18, 2018, Ly and his partner, EPO Kevin Arias, were responding to a service call in Elizabeth when a silver Nissan Sentra rolled

[3] State v. Yarbough, 100 N.J. 627 (1985).

through a stop sign at the intersection of Union Avenue and Parker Road. Ly applied the brakes to his police car to avoid hitting defendant's vehicle. The officers initiated a traffic stop based on the motor vehicle violation. Defendant was the sole occupant of the car.

Ly approached the driver's side; Arias approached the passenger's side. The officers observed what Ly described as a "vague" or "faint" odor of marijuana when defendant rolled down the window. Ly also noticed defendant was attempting to conceal cash between his legs, tobacco on defendant's jeans, and cigar shavings in the car. Ly explained hollowed-out cigars signified potential marijuana use. The officer also saw currency in low denominations scattered along the car's back seat.

Defendant produced his driver's license but was unable to locate the car's registration and insurance documentation among other papers in the glove compartment. Defendant told the officers he was on his way home to Newark from his managerial job at a Sonic restaurant in Bayonne. The officers found defendant's account "[il]logical and unusual" because "major highways" connected Bayonne and Newark and did not require "diverting to Elizabeth through the projects" where the stop occurred.

Defendant complied with the officers' request to exit the vehicle, raised the windows, and locked the car behind him. Defendant told the officers there was no contraband in the car and he denied their request for consent to search it. A pat-down revealed no weapons or other contraband. During the course of the stop, Ly conducted a license plate check and determined defendant was on parole for first-degree robbery.

At 9:28 p.m., the officers requested a K-9 unit, which arrived at approximately 9:45 p.m. The canine alerted to the presence of narcotics on the front passenger side of the vehicle, leading to a warrantless search of the car's interior. Officers found a loaded handgun under the passenger's seat, and heroin and crack cocaine in the center console. Defendant was placed under arrest.

When the prosecutor asked why Ly did not search the vehicle after he detected the odor of marijuana emanating from the car, the officer stated: "I just believed that a narcotics K-9 would reassure me and be better." In response to the court's inquiry, Ly acknowledged the law permitted him to search the car based on his olfactory perception of marijuana. Noting "it wasn't a strong smell," and he "[di]dn't want to violate [defendant's] rights," the officer explained:

> I was trying to investigate further, speak to him; realized that his behavior was suspicious, his

> inconsistent stories, the way that he got out of the car was unusual. I never seen [sic] it before where somebody rolls up the windows, takes the keys out of the ignition and . . . immediately closes the door and . . . locks it. . . . Along with that, the high crime area where it's known for narcotics; the fact that he was on parole for first-degree robbery.

After Ly testified, defense counsel challenged Ly's veracity, arguing the stop, which Ly attempted to justify by claiming he vaguely smelled marijuana, was merely pretextual. Counsel also contended the traffic stop was unreasonably delayed by calling in the K-9 unit after the officers failed to find marijuana in plain view.

Following argument, the motion judge reserved decision and shortly thereafter issued a well-reasoned written opinion, accompanying a June 6, 2019 order. The judge squarely addressed the issues raised in view of the governing law. Finding "Ly testified candidly and in a straightforward manner," the judge rejected defendant's challenges to the validity of the stop and subsequent search of the vehicle. The judge's detailed analysis credited Ly's observations following the stop.

Pertinent to the contentions now specifically raised on appeal, the motion judge was

> satisfied that Officer Ly had the requisite probable cause, obtained organically through the spontaneous

> and unforeseeable stop of the defendant's vehicle for a motor vehicle infraction, to initiate a search of the defendant's vehicle under the automobile exception to the warrant requirement, as articulated in Witt. It therefore follows that Officer Ly had the reasonable suspicion necessary to justify prolonging the defendant's seizure until the canine unit arrived and the exterior sniff of the defendant's vehicle was conducted. That the dog gave a positive indication that the vehicle contained narcotics only further bolstered the probable cause Officer Ly had based on his previously articulated observations.
>
> . . . .
>
> Further, the [fifteen- to twenty-] minute delay in the stop owing to Officer Ly's decision to call the narcotics canine was not an unreasonable delay and was nevertheless supported by probable cause much less the reasonable suspicion required to justify prolonging the motor vehicle stop.

The judge therefore concluded "the scope and duration of the search was reasonable under these circumstances."

Defendant moved for reconsideration, seeking to call Arias as a witness and introduce in evidence the officer's body-worn camera recording. Defense counsel argued the recording established police did not announce they smelled marijuana during the motor vehicle stop. Counsel suggested Ly had fabricated his testimony, asserting had the officers "smelled marijuana, they didn't need to bring the K-9" because "[t]hat's probable cause in and of itself." Noting defense

counsel was unable to review the recording with defendant prior to the initial hearing, the judge permitted defendant to call Arias and introduce the recording in evidence. On the second day of the two-day reconsideration hearing, defendant testified on his own behalf.

Arias echoed Ly's testimony, confirming the officers detected the odor of marijuana when they stopped defendant's vehicle, but because the scent was "vague," the officers called the K-9 unit "to assure [them] the smell was there." Defendant acknowledged the body camera footage accurately captured the incident but claimed "the camera actually shut off" during an unspecified time period. The judge reviewed the body camera recording in camera.

Following supplemental briefing, on March 23, 2020, the motion judge issued a cogent written decision, denying defendant's reconsideration motion. The judge amplified the findings set forth in her June 6, 2019 decision, reiterated the applicable legal principles, and credited the testimony of both officers. Acknowledging the body camera footage confirmed Ly "d[id] not mention marijuana," the judge was unpersuaded the footage contradicted Ly's testimony. Instead, the judge determined the footage "actually corroborate[d] much of [the officers'] testimony." Largely tracking her initial decision, the judge again

found the stop and search were lawful, based on the credible testimony of both arresting officers.

II.

Our review of a trial court's decision on a suppression motion is circumscribed. We defer to the court's factual and credibility findings provided they are supported by sufficient credible evidence in the record. State v. Dunbar, 229 N.J. 521, 538 (2017). Our deference includes the trial court's findings based on video recording or documentary evidence. See State v. S.S., 229 N.J. 360, 374-81 (2017) (clarifying the deferential and limited scope of appellate review of factual findings based on video evidence); see also State v. Tillery, 238 N.J. 293, 314 (2019); State v. McNeil-Thomas, 238 N.J. 256, 271-72 (2019). Deference is afforded because the court's findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). We disregard a trial court's findings only if they "are clearly mistaken." State v. Hubbard, 222 N.J. 249, 262 (2015). Legal conclusions are reviewed de novo. Dunbar, 229 N.J. at 538.

Well-established principles guide our review. "Warrantless seizures and searches are presumptively invalid as contrary to the United States and the New

Jersey Constitutions." State v. Pineiro, 181 N.J. 13, 19 (2004). To overcome this presumption, the State must show by a preponderance of evidence that the search falls within one of the well-recognized exceptions to the warrant requirement. State v. Manning, 240 N.J. 308, 329 (2020). "One such exception is the automobile exception to the warrant requirement." Witt, 223 N.J. at 422.

In Witt, the Court abandoned the "pure exigent-circumstances requirement" it had added to the constitutional standard to justify an automobile search in State v. Cooke, 163 N.J. 657, 671 (2000), as reiterated in State v. Pena-Flores, 198 N.J. 6, 11 (2009), and returned to the standard set forth in State v. Alston, 88 N.J. 211. Witt, 223 N.J. at 447. The Court in Witt held "the automobile exception authorize[s] the warrantless search of an automobile only when the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous." Ibid. (citing Alston, 88 N.J. at 233).

Referencing the following excerpt from Witt, defendant now claims the officers impermissibly "sat" on probable cause by failing to conduct the search of his vehicle when police detected the odor of marijuana emanating from the vehicle and calling the K-9 unit to develop probable cause:

> The language in Alston ensured that police officers who possessed probable cause well in advance of an automobile search sought a warrant. Police officers could not sit on probable cause and later conduct a warrantless search, for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant.
>
> [Id. at 431-32.]

Defendant thus claims the officers "failed to satisfy the unforeseeable and spontaneous requirement of our automobile exception." The State counters defendant did not raise this argument before the motion judge and, as such, this court should decline to consider it. See id. at 418 (holding issues not raised before the trial court are not preserved for appellate review).[4] Alternatively, the State argues the K-9 unit "confirmed the officers' suspicions, . . . clearly [establishing] probable cause to conduct a warrantless roadside search of the vehicle."

As stated, prior to the motion for reconsideration hearing, defense counsel sought to cast doubt on Ly's credibility, contending the officers did not need to call for the K-9 unit if they smelled marijuana at the stop. The prosecutor

[4] In view of the State's contentions, we requested the trial briefs. See R. 2:6-1(a)(2) (permitting appellate review of briefs filed in the trial court when the issues raised before the trial court are "germane to the appeal"). The issue was not specifically raised in the briefs supplied.

countered it was "absurd" to suggest the officer was not credible by taking "the more cautious, safer route" of confirming his suspicion via the K-9 unit. Although the issue defendant now raises before us was not precisely couched in terms of police having "sat" on probable cause before the trial court, we are convinced the issue was sufficiently argued and addressed by the motion judge to permit our review.

Having considered defendant's contentions in view of the applicable legal principles, we conclude they lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). We affirm the motion judge's orders, upholding the validity of the search, substantially for the reasons stated in her well-reasoned written decisions. Because we conclude the judge's factual and credibility findings "are supported by sufficient credible evidence in the record," those findings are entitled to our deference. Dunbar, 229 N.J. at 538. We add only the following brief remarks.

Defendant's reliance on Witt is misplaced. The officers did not "sit" on probable cause prior to conducting the warrantless search in this case; they called for the K-9 unit to confirm what they characterized as a "faint" or "vague" odor of marijuana. Defendant cites no authority to support his assertion that police may not confirm their olfactory suspicions by requesting a canine drug

detection sniff test. Nor are we aware of any authority prohibiting police from doing so. The officers' cautious approach in calling for the K-9 unit to confirm their suspicions, which arose spontaneously after defendant's traffic violation, was reasonable. There was no need for a warrant under the circumstances presented here.

III.

Defendant argues his sentence is excessive. He contends the judge "improperly ignored mitigating factors," and impermissibly imposed consecutive sentences without conducting a Yarbough analysis or providing an explicit statement explaining the overall fairness of the sentence pursuant to State v. Torres, 246 N.J. 246, 268 (2021). Defendant's contentions are unavailing.

We apply a deferential standard in reviewing a trial court's sentencing determination. See e.g., State v. Trinidad, 241 N.J. 425, 453 (2020). We do not "substitute [our] judgment" for that of the sentencing court. State v. Case, 220 N.J. 49, 65 (2014). Ordinarily, we will not disturb a sentence that is not manifestly excessive or unduly punitive, does not constitute an abuse of discretion, and does not shock the judicial conscience. State v. Blackmon, 202 N.J. 283, 297 (2010). However, our deference "applies only if the trial judge

follows the Code [of Criminal Justice] and the basic precepts that channel sentencing discretion." Case, 220 N.J. at 65.

In weighing the aggravating and mitigating factors, a sentencing court must conduct a qualitative, not quantitative analysis. See State v. Kruse, 105 N.J. 354, 363 (1987); State v. Boyer, 221 N.J. Super. 387, 404 (App. Div. 1987) (explaining a sentencing court must go beyond enumerating factors). The court must also state the reason for the sentence, including its findings on the aggravating and mitigating factors. N.J.S.A. 2C:43-2(e); R. 3:21-4(h). However, the court's explanation of the aggravating and mitigating factors need not "be a discourse." State v. Dunbar, 108 N.J. 80, 97 (1987), overruled in part, State v. Pierce, 188 N.J. 155 (2006). We may uphold a sentence when the "transcript makes it possible to 'readily deduce' the judge's reasoning." State v. Miller, 205 N.J. 109, 129-30 (2011) (quoting State v. Bieniek, 200 N.J. 601, 609 (2010)).

At sentencing, defense counsel argued defendant's intelligence, potential for employment upon release from prison, and his child support obligations, supported application of mitigating factors eight, N.J.S.A. 2C:44-1(b)(8) (defendant's conduct stemmed from circumstances unlikely to recur); and nine, N.J.S.A. 2C:44-1(b)(9) (defendant's character and attitude indicate defendant is

unlikely to commit another offense). On appeal, defendant now contends the record supported mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11) (imprisonment would entail excessive hardship to defendant or his dependents).

The judge found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will re-offend); six, N.J.S.A. 2C:44-1(a)(6) (extent and seriousness of defendant's prior record); and nine, N.J.S.A. 2C:44-1(a)(9) (general and specific deterrence), none of which defendant challenges on appeal. Although the judge did not expressly consider the mitigating factors raised at sentencing, her citation to defendant's prior convictions, including drugs and a violation of parole for robbery, permit us to "readily deduce from the sentencing transcript" she "was mindful of and did consider the mitigating factors urged for defendant." Bieniek, 200 N.J. at 609. Indeed, mitigating factors eight and eleven are not supported by the record evidence.

Nor are we persuaded by defendant's belated contention that the judge sua sponte should have found mitigating factor eleven. The mere fact that a defendant has children does not require a trial court to find mitigating factor eleven. See State v. Dalziel, 182 N.J. 494, 505 (2005). Instead, a defendant must demonstrate the children are dependents, who will suffer an excessive hardship, i.e., adverse circumstances "different in nature than the suffering

unfortunately inflicted upon all young children whose parents are incarcerated." State v. Locane, 454 N.J. Super. 98, 129 (App. Div. 2018). Defendant failed to make that showing.

Defendant cites no authority to support his belated contention that the judge failed to conduct a Yarbough analysis and issue a fairness statement under Torres in imposing the aggregate sentence consecutively to defendant's parole violation. Nor are we aware of any authority so requiring. Rather, the Code provides, in pertinent part: "When a defendant is sentenced to imprisonment for an offense while on parole in this State, such term of imprisonment . . . shall run consecutively unless the court orders these sentences to run concurrently." N.J.S.A. 2C:44-5(c). The plea agreement in this matter expressly stated the aggregate term would run consecutively to defendant's "parole hit"; defendant did not argue otherwise.

We also discern no reason to remand this matter for an "explanation of [the] overall fairness," under Torres, which is required when imposing consecutive sentences under Yarbough. Torres, 246 N.J. at 268. In any event, the judge expressly noted imposition of the consecutive term resulted in "a long sentence," but "under all of the circumstances" presented in this matter, she deemed it "appropriate." The judge also considered defendant's argument for an

imposition of a forty-two-month parole disqualifier on the first-degree weapons conviction. However, as the judge correctly determined, in sentencing defendant to a ten-year prison term – the lowest end of the first-degree range under N.J.S.A. 2C:43-6(a)(1) – the minimum parole ineligibility term is five years. See N.J.S.A. 2C:43-6(c).

Affirmed.