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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2147-06T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PETER JOHN PRICE,

Defendant-Appellant.

Submitted October 23, 2007 - Decided November 8, 2007

Before Judges Coburn and Fuentes.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment
Number 06-01-0055.

Yvonne Smith Segars, Public Defender,
attorney for appellant (M. Virginia
Barta, Assistant Deputy Public Defender,
of counsel and on the brief).

Anne Milgram, Attorney General, attorney
for respondent (Mary E. McAnally, Deputy
Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant Peter John Price was tried before a jury and convicted of one count of second-degree eluding, N.J.S.A. 2C:29-2b. The trial court, sitting as the trier of fact, also found defendant guilty of related motor vehicle offenses, including

speeding, N.J.S.A. 39:4-98, careless driving, N.J.S.A. 39:4-97, driving while suspended, N.J.S.A. 39:3-40, failure to observe a traffic control device, N.J.S.A. 39:4-81, following too closely, N.J.S.A. 39:4-89, and failure to observe marked lanes, N.J.S.A. 39:4-88A.

After merging the Title 39 offenses with the conviction for eluding, the court sentenced defendant to a term of seven years, and imposed the mandatory fines and penalties. We gather the following facts from the evidence presented at trial.

While on patrol at around midnight in a marked police car, Hazlet Police Officer William Agar noticed a small four-door car, later identified as a black Volkswagen Jetta, traveling southbound turn into the eastbound lane of Highway 36. Agar characterized the manner in which the car switched lanes as "erratic." Immediately thereafter, the Jetta began tailgating a car in the right lane, and then swerved quickly around the car and continued at a high rate of speed.

Agar proceeded to follow the Jetta, catching up to it at the intersection of Highway 36 and Laurel Avenue. At this point, Agar decided to stop the Jetta; he radioed his intention to police headquarters and provided a description of the vehicle including the license plate number. Agar activated his overhead lights as the Jetta approached the intersection of Highway 36

and Palmer Avenue. At this time, Agar described the car's only occupant, the driver, as "a subject with dark hair and either a dark jacket or shirt on."

After initially slowing down as it approached a traffic jughandle, the Jetta made a "quick right [turn] and he accelerated south on Palmer Avenue." Agar then activated his siren (in addition to the overhead lights) and radioed headquarters that he was in pursuit. The Jetta increased speed to an estimated forty-five to fifty miles per hour¹, and began to pull away from the pursuing police car. Agar continued his pursuit until he reached Highway 35, where he lost sight of the Jetta. Agar searched the area unsuccessfully, and eventually reached the area where the Town and Country Diner is located on Highway 35 in Keyport; he then returned to Hazlet.

In response to Agar's radio transmissions, which included a description of the Jetta, Officer Kevin Geoghan positioned his police car at the intersection of Highway 35 and Fleetwood Drive, facing the direction where the Jetta was last seen. Geoghan activated the police vehicle's ally light. According to Geoghan, this enable him "to see inside the vehicles as they go

¹ The posted speed limit for that area ranged from thirty-five to forty-five miles per hour.

by." He testified that he saw the Jetta drive by with the driver as its sole occupant. He did not pursue.

Officer Scott Randolph was positioned south of Geoghan's location, at the intersection of Highway 35 and Poole Avenue. He testified that he saw the Jetta drive through a red light. He pursued the Jetta until it drove through a second red light. He last saw the Jetta traveling north on Highway 35 through the intersection of Homdel Road.

At the same time these events were unfolding, Keyport Police Officers Sorber and Dixon were searching the side streets around Highway 35 in response to the Hazlet police's radio transmissions. As they reached the Town and Country Diner, they noticed a Jetta matching the description of the wanted vehicle parked in the restaurant's parking lot. After Agar and Geoghan arrived, the four officers "secured" the scene and began to investigate.

When Agar reached the Jetta, he immediately noticed that the hood of the car was "warm to the touch," and "the front seat was pushed all the way back and leaning back, reclined a little." This was significant, because, by this time, Agar was aware that the Jetta's registered owner was a man named Gerard Perez, described as five feet, four inches tall. Thus, the

angle and position of the seat were inconsistent with Perez' height.

Agar then went inside the dinner. Based on information received from a waitress, Agar returned to the Jetta and seized a pack of "Camel Turkish Silver" cigarettes from the floor of the car, and a phone charger from the center dashboard. According to Agar, these items were significant, "[b]ecause another officer was on [the] scene and he was speaking to a subject who had similar items on his person."

The officer referenced by Agar was Sorber, who had noticed defendant, described as a tall man with dark hair wearing a dark leather jacket, talking on a cell phone in the area where the Jetta had been found. Based on his familiarity with the area, defendant seemed "out of place" to Sorber, because "normally people don't generally congregate on this side of the diner."

Defendant said he was waiting for his girlfriend, who was driving a Nissan XTerra. Hazlet Police Officer Randolph advised defendant of the pursuit; but defendant denied any involvement in the matter. When Randolph asked defendant about the whereabouts of his girlfriend, defendant seemed to change his initial statement, claiming that he was with another woman in a blue Ford Escort. Randolph patted defendant down and asked him

to sit in the rear of the police car. Defendant had a pack of "Camel Turkish Silver" cigarettes and a Cingular cell phone.

The police found the keys to the Jetta in a planter near the front door of the diner. The phone charger seized from the Jetta matched the cell phone taken from defendant. Defendant was arrested and processed at police headquarters. He was determined to be six feet, five inches tall. The parties stipulated that, at the time of the incident, defendant had a suspended driver's license.

Later on that same evening, Jetta owner Gerard Perez, a resident of Hazlet, reported his car missing to the local police department. Perez, who testified at trial, told the police that "he lent [defendant] his vehicle to go to the ATM at approximately 12 AM." He also told the police at the time that he did not know defendant's last name. Perez decided to report the missing car to the police after he woke up to find that defendant had not returned.

Defendant did not testify at trial. James Hay, a friend of defendant, testified for the defense. According to Hay, at around 11:50 p.m. on the night in question, defendant was in the parking lot of a strip club named "Pumps." Finally, the defense re-called Gerard Perez to the stand. He testified that he

smokes "Camel Turkish Silver" cigarettes; thus, any cigarettes found in the Jetta would have been his.

Against these facts, defendant now appeals raising the following arguments.

POINT I

THE DEFENDANT'S CONVICTION FOR SECOND DEGREE ELUDING MUST BE SET ASIDE BECAUSE IT STANDS AGAINST THE WEIGHT OF THE EVIDENCE. (Not Raised Below)

POINT II

UNDER ALL RELEVANT CIRCUMSTANCES. THE COURT ABUSED ITS DISCRETION IN FIRST REFUSING TO SENTENCE DEFENDANT AS A THIRD-DEGREE OFFENDER, AND THEN SENTENCING HIM TO A TERM GREATER THAN THE MINIMUM FOR A SECOND-DEGREE OFFENSE.

We reject these arguments and affirm. As to Point I, we note that defendant did not move before the trial court for a new trial based on the insufficiency of the evidence. Thus, under Rule 2:10-1, that argument is not cognizable on appeal. State v. Froland, 378 N.J. Super. 20, 37 (App. Div. 2005), certif. granted, 187 N.J. 82 (2006). Despite this procedural bar, we have carefully examined the record to insure that the jury's verdict does not offend the interest of justice. We are satisfied that the evidence presented by the State, including all reasonable inferences that may be drawn from circumstantial evidence, supports the jury's verdict. State v. Reyes, 50 N.J.

454, 458-59 (1967); State v. Smith, 262 N.J. Super. 487, 512 (App. Div.), certif. denied, 134 N.J. 476 (1993).

The sentence imposed by the court for the crime of second-degree eluding was well within its statutory authority. We discern no legal basis to interfere with it. State v. Dalziel, 182 N.J. 494, 501-02 (2005). The section of the judgment of conviction (JOC) merging all of the Title 39 offenses with the second-degree eluding conviction under Title 2C must be vacated.²

Under our holding in State v. Wallace, 313 N.J. Super. 435, 439 (App. Div. 1998), aff'd on other grounds 158 N.J. 552 (1999), the convictions under Title 39 for speeding, N.J.S.A. 39:4-98, careless driving, N.J.S.A. 39:4-97, failure to observe a traffic control device, N.J.S.A. 39:4-81, following too closely, N.J.S.A. 39:4-89, and failure to observe marked lanes, N.J.S.A. 39:4-88A, must merge with the conviction for second-degree eluding. This is so, because "every significant element of [these offenses] is embodied in second-degree eluding." Wallace supra, 313 N.J. Super. at 439.³

² Although this issue was not raised by either party, a reviewing court has an affirmative duty to correct an illegal sentence. State v. Crawford, 379 N.J. Super. 250, 257 (App. Div. 2005).

³ Under N.J.S.A. 2C:29-2(b), evidence showing a violation of Title 39, Chapter 4 offenses permit the jury to draw a "permissive inference" that the eluding escalated to a second-degree crime.

This merger, however, does not obviate the imposition of mandatory penalties under Title 39. State v. Baumann, 340 N.J. Super. 553, 556-57 (App. Div. 2001). "Those penalties . . . must survive the merger, particularly since they represent not only punishment for the offender but also protection for the driving public." Id. at 557. Our reasoning and ultimate holding in Baumann was upheld by the Supreme Court in State v. Wade, 169 N.J. 302, 303 (2001). Here, although none of the merged Title 39, Chapter 4 offenses carry specific mandatory statutory penalties, the court is nevertheless required to assess motor vehicle points. N.J.S.A. 39:5-30.6; and N.J.S.A. 39:5-30.5a.

We therefore remand this matter for the trial court to amend the JOC to reflect the imposition of the mandatory motor vehicles points. Because the conviction for driving while suspended, N.J.S.A. 39:3-40, is unrelated to the eluding charge under N.J.S.A. 2C:29-2(b), it does not merge with it. On remand, the trial court shall therefore impose an appropriate fine and penalty for the conviction of driving while suspended.

Defendant's conviction is affirmed. The matter is remanded for re-sentencing in accordance with this opinion.

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


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