NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5636-12T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VAMBAH SHERIFF, a/k/a
SEKOU M. SHERIFF,

Defendant-Appellant.

Submitted November 18, 2014 – Decided December 16, 2014

Before Judges Nugent and Accurso.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Indictment No. 11-06-00693.

Joseph E. Krakora, Public Defender, attorney for appellant (Stephen P. Hunter, Assistant Deputy Public Defender, on the brief).

Fredric M. Knapp, Morris County Prosecutor, attorney for respondent (Erin Smith Wisloff, Assistant Prosecutor, on the brief).

PER CURIAM

A jury convicted defendant Vambah Sheriff of one count of second-degree eluding, N.J.S.A. 2C:29-2b. The judge granted the State's motion for an extended term and sentenced defendant to a fourteen-year term of imprisonment subject to a five-year period

of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant appeals his conviction and sentence. We affirm both and remand solely for correction of an error in the judgment of conviction.

The pertinent facts are easily summarized. While running random license plate checks from his patrol car on passing cars, a Florham Park police officer learned that the registered owner of a tan Mazda Protégé traveling on Route 24 had a suspended license.[1] Pulling up the owner's picture on the mobile data terminal in his patrol car, the officer compared the picture to the driver of the Mazda. The officer testified that he made his comparison by pulling alongside the Mazda and glancing back and forth between his terminal and the driver while traveling about sixty-five miles an hour. While conceding that he only looked at the driver for about four seconds, the officer testified that he made eye contact and confirmed that the driver was the "exact person" as in the photograph on his terminal.

The officer activated his overhead lights and followed the Mazda as it pulled off the road and stopped on the shoulder. Before the officer could get out of his patrol car, however, the Mazda sped away. The officer gave chase. He followed the Mazda

[1] See State v. Donis, 157 N.J. 44 (1998) (allowing law enforcement to conduct random checks of a car's license plate number using a mobile data terminal).

for about two miles, breaking off the pursuit only after the speeds of both vehicles topped ninety miles per hour. Defendant was arrested later that day, in the Mazda, and identified by the officer as the man he saw driving it earlier. Defendant concedes that he was the registered owner of the Mazda, but claims he was not driving the car when it was stopped by the officer.

The officer testified at trial to the facts related here. Over defendant's objection, the judge provided the jury with the model jury charge on eluding. Specifically, in accordance with the model charge, the judge instructed the jury that

> [i]f you find that [defendant] was the owner of the vehicle, you may infer that he was operating the vehicle at the time of the offense, however, you are not required or compelled to draw this inference. It is your exclusive province to determine whether the facts and circumstances, shown by the evidence, support any inference and you are always free to accept them or reject them as you wish.

Having heard the evidence and the charge, the jury convicted defendant of eluding while creating a risk of death or injury. Defendant raises the following points on appeal.

> POINT I
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> THE INSTRUCTION THAT THE JURY COULD INFER THAT DEFENDANT WAS DRIVING THE CAR INVOLVED IN THE ELUDING SIMPLY BASED ON THE FACT THAT HE WAS THE OWNER OF THE CAR DENIED DEFENDANT A FAIR TRIAL. U.S. Const. Amend. XIV; N.J. Const. Art. I ¶ 1.

POINT II

A SENTENCING REMAND IS REQUIRED UNDER STATE V. PIERCE, 188 N.J. 155 (2006); THE SENTENCE WAS EXCESSIVE. U.S. Const. Amend. VIII, XIV; N.J. Const. Art. I ¶¶ 1, 12.

The sole issue in dispute at this trial was whether the officer accurately identified defendant as the driver of the Mazda. Defendant contended that the officer did not get a good enough look at the driver to allow him to make a definitive identification and instead merely assumed defendant was the driver because he was registered as the car's owner. He claims that his defense was undermined by the judge's instruction to the jurors that they could convict defendant by "essentially do[ing] the same thing," that is, "the jury could assume defendant was the driver based on the undisputed fact that he was the owner of the car." Defendant contends that we should reverse his conviction by rejecting the inference of the model jury charge that it is more likely than not that the owner of a car was its driver at the time of the offense.

Defendant ignores entirely that the inference he complains of is embedded in the offense of which he was charged. N.J.S.A. 2C:29-2b specifically provides that "[f]or the purposes of this subsection, it shall be a rebuttable presumption that the owner of a vehicle or vessel was the operator of the vehicle or vessel at the time of the offense." The Supreme Court has held that

> the validity of a statutory presumption with respect to a criminal offense rests upon two basic criteria: "[t]he first is simply that there must be a rational connection in terms of logical probability between the proved fact and the presumed fact. The second is that the presumption may not be accorded mandatory effect."
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> [State v. Ingram, 98 N.J. 489, 497-98 (1985) (quoting State v. McCandless, 190 N.J. Super. 75, 79 (App. Div.), certif. den., 95 N.J. 210 (1983)).]

As it is clear the model charge provided to the jury did not compel the jurors to infer that defendant was the driver of the Mazda based on his ownership of the car, our focus is on the rational connection between ownership and operation. We owe considerable deference to the Legislature's determination that the inference permitted by the statutory presumption is a rational one. Id. at 499. We are bound to sustain a presumption when "as a matter of common experience, it is more likely than not that the fact to be presumed follows from the facts giving rise to the presumption." McCandless, supra, 190 N.J. Super. at 79.

Applying that standard, we cannot find anything illogical in linking, subject to rebuttal, the owner of a car to its operation. See State v. Kay, 151 N.J. Super. 255, 260-61 (Cty. Ct. 1977). Even assuming that there are more licensed drivers than there are registered vehicles and that drivers may own or have access to more than one vehicle, there remains "a rational

connection in terms of logical probability" that the owner of a car is usually the driver. Ingram, supra, 98 N.J. at 498.

Moreover, we note that the State did not rely exclusively, or even predominantly, upon the statutory presumption in this case. The State instead presented the testimony of the officer who claimed he visually confirmed that defendant was indeed the driver of the Mazda at the time of the offense, and proof that defendant was arrested later that day in the same car. Given the evidence in the record, we cannot conclude that use of the model charge deprived defendant of a fair trial.

We also reject defendant's arguments that the judge failed to apply the correct range of defendant's extended term sentence and that the sentence imposed is excessive. Defendant is correct that the judge stated at one point during the sentencing that the extended term range for this second-degree crime was ten to twenty years, instead of five to twenty years. A review of the entire transcript, however, makes clear that the judge merely misspoke, she did not misapprehend the correct sentencing range. The judge began her statement imposing sentence by acknowledging the requirements of State v. Pierce, 188 N.J. 155, 168, 170 (2006), and noting defendant's concession that he was extended term eligible. She then explained that the court "has the discretion to use the full range of sentences available as a function of the court['s] assessment of the aggravating and

mitigating factors, including consideration of deterrent . . . need to protect the public."

Reviewing defendant's criminal history, the judge found that the twenty-seven year old had engaged in "a pattern of anti-social and criminal behavior." She specifically identified defendant's two prior convictions for aggravated assault, as well as his convictions for unlawful possession of a weapon and identity theft. The judge further acknowledged defendant's extended criminal record in finding aggravating factors three, the risk that defendant would commit another offense, six, the extent of defendant's prior criminal record and the seriousness of the offenses of which he has been convicted and nine, the need to deter, N.J.S.A. 2C:44-1a(3), (6) and (9). The judge found no mitigating factors. She specifically rejected factor one, that the conduct did not cause or threaten serious harm, as precluded by the jury's finding to the contrary; two, that defendant did not contemplate that his conduct would cause serious harm, as unreasonable under the circumstances; eight, that defendant's conduct was the result of circumstances unlikely to recur, and nine, that his character and attitude make further offense unlikely as without support in the record. N.J.S.A. 2C:44-1b(1), (2), (8) and (9).

Finding that the aggravating factors substantially outweighed the non-existing mitigating ones and that there was a

need to protect the public from the risk of harm of a high speed auto accident caused by defendant's conduct, the judge imposed a fourteen-year term of imprisonment with a five-year period of parole ineligibility consecutive to the sentence defendant was then serving on an unrelated crime.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). We are satisfied that although the judge misspoke as to the applicable sentencing range in one reference, a review of the entire transcript makes plain that she did not misapprehend the range available to her. The judge's findings and balancing of the aggravating and mitigating factors are supported by adequate evidence in the record, and the sentence is neither inconsistent with sentencing provisions of the Code of Criminal Justice nor shocking to the judicial conscience. See State v. Fuentes, 217 N.J. 57, 70 (2014); State v. Bieniek, 200 N.J. 601, 608 (2010); State v. Cassady, 198 N.J. 165, 180-81 (2009).

Although unaddressed by the State, defendant notes an obvious discrepancy between the sentence the judge imposed and the judgment of conviction with regard to his sentence for driving on the revoked list, N.J.S.A. 39:3-40. The sentencing transcript is clear that the judge imposed a ten-day jail term, six-month license suspension and waived any motor vehicle fees or fines. The judgment of conviction, however, states as to

that summons that "defendant is committed to the custody of the Commissioner of the Department of Corrections for a period of fourteen (14) years" to run concurrent to his term for eluding. We remand to the Law Division to correct the judgment of conviction to reflect the sentence imposed by the court for violation of N.J.S.A. 39:3-40. See State v. Vasquez, 374 N.J. Super. 252, 270 (2005).

Affirmed and remanded for correction of the judgment of conviction in accordance with this opinion. We do not retain jurisdiction.