SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0369-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID W. CAMPBELL, a/k/a
DAVID WILLIAM CAMPBELL,

Defendant-Appellant.

Submitted May 30, 2017 – Decided June 28, 2017

Before Judges Sabatino and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Indictment No. 11-06-00185.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Richard T. Burke, Warren County Prosecutor, attorney for respondent (Kelly Anne Shelton, Assistant Prosecutor, on the brief).

PER CURIAM

Following a judge's denial of defendant David W. Campbell's motion to suppress evidence of a controlled dangerous substance (CDS), lysergic acid diethylamide (LSD), defendant accepted a plea

offer and pleaded guilty before a different judge to one count of second-degree possession with intent to distribute LSD. At sentencing, the second judge rejected the plea bargain and sentenced defendant on the second-degree offense to a flat five-year custodial term. Defendant has appealed. He argues two points:

> POINT ONE
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> THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED WHEN NEW JERSEY STATE TROOPERS REENTERED DEFENDANT'S AUTOMOBILE TO CONDUCT A SECOND SEARCH THAT WAS NOT A CONTINUATION OF THE ORIGINAL SEARCH, CONTRARY TO THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.
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> POINT TWO
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> DEFENDANT'S SENTENCE WAS EXCESSIVE AND CONSTITUTED AN ABUSE OF DISCRETION, REQUIRING HIS SENTENCE TO BE VACATED AND THE CASE RETURNED TO THE TRIAL COURT FOR A NEW SENTENCE HEARING.

Because New Jersey State Troopers re-entered defendant's automobile while reasonably continuing their execution of a valid search warrant, we reject defendant's first argument and affirm his conviction. We are constrained, however, to vacate defendant's sentence and remand for re-sentencing. The sentencing judge did not appear to consider all relevant factors when it rejected a material term of the plea agreement, and did not afford defendant the opportunity to withdraw his plea.

In June 2011, a Warren County grand jury returned an indictment charging defendant with four crimes: first-degree possession with intent to distribute a CDS, LSD, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-5(b)(6) (count one); third-degree possession of a CDS, LSD, N.J.S.A. 2C:35-10(a)(1) (count two); third-degree possession with intent to distribute a CDS, hashish, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(11) (count three); and fourth-degree possession of a CDS, hashish, N.J.S.A. 2C:35-10(a)(3) (count four). Following his indictment, defendant filed motions to dismiss the indictment and suppress LSD police seized from the automobile he had been driving. The judge who conducted the pre-trial proceedings ultimately denied the motions.

Thereafter, defendant struck a plea bargain with the State in which he agreed to plead guilty to count one of the indictment, possession with intent to distribute a CDS, LSD, as amended to a second-degree crime. In exchange, the State agreed to dismiss the indictment's remaining counts and consented to the court sentencing defendant as a third-degree offender. During the plea proceeding, the judge assured himself defendant understood the sentence would be in the third-degree range of three to five years, stating that due to the presumption of imprisonment for second-degree crimes, defendant was "almost certain to go to prison for a term of something between three and five years."

At sentencing, the judge rejected the plea bargain and sentenced defendant to a flat five-year custodial term for the second-degree crime. Defendant received 207 days of jail credit, and the judge recommended defendant be considered for entry into the Intensive Supervision Program "at his earliest eligibility." The judge also imposed appropriate fines and assessments. Following sentencing, defendant filed this appeal.

Defendant first challenges the denial of his motion to suppress LSD police seized after impounding the car defendant had been driving before his arrest. The record of the suppression hearing reveals the following facts.

The relevant events occurred on June 28, 2010. That morning, at approximately 4:00 a.m., State Troopers Antonio Sousa and Joseph Palach drove their marked patrol car to the Allamuchy truck stop on Route 80 to conduct a routine property check. There, they saw a parked Honda Civic with its windows down. Trooper Sousa exited the police car and approached the Honda. When he came within three feet of the car, he smelled raw marijuana. He walked closer to the Honda's passenger side, shone his flashlight into the car, and saw two males asleep. He also saw a green plastic jar containing green vegetation on the passenger side armrest. Based on his training and experience, Trooper Sousa suspected the vegetation was marijuana.

Trooper Sousa waved to Trooper Palach, who walked to the Honda's driver's side. Trooper Palach also detected the odor of raw marijuana. Trooper Sousa again shone his flashlight into the car, "banged on the car, [and] stated New Jersey State Police[.]" The men woke up. Trooper Palach told them he smelled marijuana and Trooper Sousa observed marijuana in the car.

Trooper Palach asked the driver, defendant, for his license and registration, which defendant produced. Trooper Sousa asked the passenger for his license. As the passenger reached for his license, the trooper "observed a clear glass jar on the passenger side floorboard with green vegetation in it." Trooper Palach seized the jar, asked defendant to exit the vehicle, handcuffed him, and placed him under arrest. While searching defendant incident to the arrest, the trooper seized hashish from defendant's person.

Trooper Sousa simultaneously asked the passenger to turn over the green plastic jar, instructed him to exit the vehicle, placed him under arrest, and handcuffed him. The trooper searched the passenger but found nothing.

Defendant refused to consent to a search of the car. After arranging for a tow truck to tow the Honda to the police station, the troopers drove defendant and his passenger there.

After arriving at the station, Trooper Sousa prepared an affidavit and application for a search warrant, which a judge issued at approximately 12:10 p.m. the same day. The warrant required the troopers to execute a search "between the hours of 6:00 a.m. to 2:00 a.m. within ten (10) days from the issuance hereof and thereafter to forthwith make prompt return to [the judge] with a written inventory of the property seized within 10 days of the issuance of [the] warrant." The warrant authorized the officers to search the Honda for "illegal controlled dangerous substances, and/or evidence of the possession thereof, including but not limited to marijuana and hashish[.]"

After receiving the warrant, Trooper Palach, Trooper Sousa, and two other troopers searched the Honda. Police initially searched the Honda for about an hour, beginning shortly after 1:00 p.m. and finishing shortly before 2:00 p.m. The troopers seized money, CDS paraphernalia, two clear plastic bags containing marijuana, and hashish. They also seized multiple "papers that resembled small little perforated sheets." Each sheet contained numerous multicolored "tabs." The sheets were "relatively square" and contained thirty rows and thirty columns of tabs, for a total of 900 tabs per sheet.

Although Trooper Sousa had seen a "lens bottle" when he initially searched the Honda, and though other troopers thought

it "was out of the ordinary" for two males to have liquid nail polish remover, which the troopers had seen in the car, the troopers did not immediately understand the significance of these items. Trooper Susan Stafford, an experienced narcotics investigator who arrived later, understood their significance.[1]

Within "a couple of hours" of the troopers sorting and laying out the seized evidence in a room, Trooper Stafford arrived. She discussed with the other troopers how LSD is dabbed on the "tabs" on the perforated sheets as a means of distributing it for ingestion. Trooper Stafford recommended a further search of the Honda. During the ensuing search, the troopers located and seized a small glass nail polish container and a "lens relief plastic bottle," the latter of which contained LSD.

Trooper Sousa executed a "Return of Search Warrant" two days after the search, but the attached inventory sheet did not include the lens bottle. Trooper Stafford submitted an amended inventory sheet on August 18, 2010, identifying the lens container.

The judge who heard the suppression motion ultimately denied it. Defendant contests neither the warrantless searches at the truck stop nor the initial search of the Honda pursuant to the

[1] Trooper Stafford's last name changed to Mistretta between the day of defendant's arrest and the time of the suppression hearing.

warrant. He contests only the search that occurred when troopers re-entered the Honda after Trooper Stafford arrived at the station.

In a written decision, the motion judge found the re-entry and search lawful. The judge noted the troopers were searching for CDS, which the warrant authorized. The warrant did not restrict the search to certain types of CDS. Thus, the second time troopers entered the Honda, their purpose was the same as that for the initial entry, namely, to search for CDS.

The judge next noted the reason the troopers re-entered the Honda was because a trooper who did not participate in the initial search recognized the perforated paper as a medium for distributing LSD. The judge found it reasonable "for law enforcement officers to return to look for the missing components to this compound product. If they found a box of ammunition they would be expected to look for the gun; if they found a stolen jewelry box, they would be expected to look for jewelry." The judge concluded, "[t]he fact that the [t]roopers conducting the first part of the search did not recognize what they had in the perforated paper is no basis to find their return unreasonable." The judge held the re-entry of the car was "a reasonable continuation of the search . . . authorized by the search warrant." For those reasons, she denied defendant's suppression motion.

On appeal, defendant first contends the trial court erred when it denied his motion to suppress the evidence seized by the troopers when they re-entered the Honda and found LSD. Defendant argues the warrant did not authorize an additional search after the troopers completed their original search. The argument is unpersuasive. We affirm, substantially for the sound reasons expressed by the motion judge in her written opinion.

Our review of a trial court's factual findings is deferential. State v. Scriven, 226 N.J. 20, 32 (2016). That is particularly so as "to those findings of the trial judge which are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Johnson, 42 N.J. 146, 161 (1964). If the trial court's findings could reasonably have been reached on sufficient, credible evidence present in the record, our task is complete and we should not disturb the result. Id. at 162. Our review of the trial court's legal conclusions is plenary. State v. Rockford, 213 N.J. 424, 440 (2013) (citations omitted).

Under the "reasonable continuation doctrine," law enforcement officers executing a search warrant may, in limited circumstances, re-enter the location to continue their initial search. State v. Finesmith, 406 N.J. Super. 510, 519 (App. Div. 2009). Their re-entry must, however, be a continuation of the initial search.

> In order for a re-entry into premises to be considered a reasonable continuation of the search authorized by the warrant, two conditions must be satisfied: first, "the subsequent entry must . . . be a continuation of the original search, rather than a new and separate search," and second, "the decision to conduct a second entry to continue the search must be reasonable under the totality of the circumstances."
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> [Id. at 19 (citing United States v. Keszthelyi, 308 F.3d 557, 559 (6th Cir. 2002)).]

Here, the motion judge properly concluded the troopers reasonably continued their search when they returned to the Honda after Trooper Stafford, who was not present when troopers initially seized items from the Honda, reviewed the seized evidence and recognized a connection between the items seized and distribution of LSD. The search for LSD was well within the scope of the warrant, which authorized the troopers to search the Honda for CDS, including but not limited to marijuana and hashish. Once the troopers recognized the connection between the perforated sheets and the distribution of LSD, they re-entered the Honda almost immediately. Only two hours or less elapsed between the officers sorting the evidence they initially seized and returning to complete the search. See Finesmith, supra, 406 N.J. Super. at 521. These circumstances amply support the motion judge's determination that the re-entry into the Honda was both a

continuation of the initial search and reasonable under the circumstances.

In his second argument, defendant contends his sentence is excessive and the sentencing judge abused his discretion by imposing a sentence within the second-degree range, contrary to the plea agreement. We agree a remand is necessary.

The terms of the plea agreement included defendant being sentenced within the third-degree range. During the plea colloquy, the judge made certain defendant understood what pleading guilty to a second-degree crime but being sentenced as if for a third-degree crime meant. The judge explained the sentencing range was "[b]etween three and five years;" and, "notwithstanding the fact that [defense counsel] has negotiated a downward departure, so to speak, the presumption of imprisonment still applies. So it is almost certain you will go to state prison." As the plea proceeding concluded, the judge warned defendant:

> I tell you that between now and the time of sentencing, if you get into any additional trouble, particularly if the trouble consists of conduct similar to that which brings you here today, things will not go well for you at the time of sentencing. In point of fact, not only will you be more likely to face five years as opposed to three, you may face objectionable sentence bar of the portion of this plea agreement and be back in the second-degree range exposing you now to up to ten years in state prison. Clear?

[(Emphasis added).]

Defendant said it was clear.

It was also clear from the court's discussion with defendant that defendant would be sentenced to a prison term between three and five years. During the sentencing proceeding, without any advance warning to defendant, the judge determined not to follow the plea bargain. Rather, he imposed a sentence for a second-degree offense.

The judge found two aggravating factors: the risk of re-offense, N.J.S.A. 2C:44-1(a)(3), and the need for deterrence, N.J.S.A. 2C:44-1(a)(9). The judge also found two mitigating factors: defendant did not contemplate his conduct would cause others harm, N.J.S.A. 2C:44-1(b)(2), and defendant had no prior criminal history, N.J.S.A. 2C:44-1(b)(7). The judge found the mitigating factors did not substantially outweigh the aggravating factors. For that reason, and because the judge was not clearly convinced the interests of justice would be served by sentencing defendant as if for a third-degree crime, the judge sentenced defendant for his second-degree offense.

The State concedes the sentencing judge did not follow the plea agreement. Nonetheless, the State argues that defendant's "net exposure is the same." The State also argues the sentencing judge was not bound by the plea agreement, the judge had discretion

to accept or reject the agreement, and the judge did not abuse his discretion by rejecting it.

The State's argument correctly notes a judge's authority to set aside a plea agreement, but overlooks both a court rule and relevant precedent. Rule 3:9-3(e) provides that if the sentencing judge determines "the interests of justice would not be served by effectuating the [plea] agreement . . . or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea." [(Emphasis added).]

Here, the sentencing judge not only rejected the plea agreement term requiring defendant to be sentenced as if for a third-degree crime, but he imposed a sentence contrary to his previous indications of the likely sentence at the plea proceeding. There, the judge had made certain defendant knew he would be sentenced to a term between three and five years, and implied that if defendant remained offense free before sentencing, he would likely be sentenced closer to a three-year term than a five-year term. When the judge later decided not to accept the plea agreement, he should have afforded defendant a fair opportunity to withdraw his plea. We are mindful that defendant's trial counsel made no requests to withdraw the plea, but that does not preclude relief on appeal. R. 2:10-2.

Defendant next contends that in view of the plea bargain, the sentencing judge did not have to find that mitigating factors substantially outweighed aggravating factors in order to sentence defendant as if for a third-degree crime. The argument is not entirely correct. Nonetheless, the sentencing judge appeared to have overlooked authority requiring him to take the plea bargain into consideration.

To be sure, a court must be "clearly convinced that the mitigating factors substantially outweigh the aggravating factors and . . . the interest of justice" will be served before exercising its discretion to sentence a first- or second-degree offender "to a term appropriate to a crime of one degree lower[.]" N.J.S.A. 2C:44-1(f)(2); see also State v. Megargel, 143 N.J. 484, 496 (1996). If a judge is not so convinced, the judge need not sentence a defendant to a lower term merely because the parties' plea bargain requires a contrary result. State v. Moore, 377 N.J. Super. 445, 451 (App. Div.), certif. denied, 185 N.J. 267 (2005). But the plea bargain is not irrelevant. In State v. Balfour, 135 N.J. 30, 38-39 (1994), our Supreme Court explained:

> The court made the decision to "downgrade" defendant's sentence to the lower range assigned to second-degree sentences in the context of a plea agreement. The plea agreement can appropriately be considered and weighed in the decision to downgrade. Traditionally a guilty plea is a material

> factor bearing on the ultimate sentence. [State v. Thomas, 61 N.J. 314, 321 (1972); State v. Taylor, 49 N.J. 440, 455 (1967).] Thus, a guilty plea can have a lenient influence on the trial court's sentencing disposition, partly because it reflects a defendant's acceptance of responsibility for his or her criminal conduct and partly because it assists in the efficient disposition of cases. [See State v. Barboza, 115 N.J. 415, 420 (1989).]
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> In the present case, the guilty plea was part of an agreement that the State would recommend a downgrade of defendant's sentence to the range imposed on second-degree offenses. Thus, the agreement itself in some measure defines the mitigating effect of the plea on the court's discretionary decision whether to downgrade the sentence.

The sentencing judge in the case before us did not discuss these considerations in rejecting the plea term requiring defendant be sentenced as if for a third-degree offense. The considerations are relevant, but were omitted here presumably due to inadvertence. Defendant's trial counsel failed to call the trial court's attention to these omissions at sentencing. Nonetheless, we have elected to deal with the legal consequences of those omissions now, on direct appeal, rather than to leave them to a future petition for post-conviction relief. Accordingly, we vacate defendant's sentence and remand this matter to the trial court for further proceedings consistent with this opinion. If, after due consideration of all relevant factors, the court rejects

the plea term requiring defendant be sentenced as if for a third-degree offense, then the court should afford defendant the opportunity to withdraw his plea.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.