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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0682-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KAREEM T. TILLERY, a/k/a  
KAREEM ALI TILLERY, KAREEM  
A. TILLERY, KAREEM J. TILLERY,  
KARIM TILLERY, KARIEM A.  
TILLERY, KAREEM TILLERY-JONES  
AND KAREEM R. JONES,

Defendant-Appellant.

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Submitted June 8, 2017 - Decided July 18, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Indictment No.  
14-06-0084.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Michele E. Friedman, Assistant  
Deputy Public Defender, of counsel and on the  
briefs).

Christopher S. Porrino, Attorney General,  
attorney for respondent (Sarah D. Brigham,  
Deputy Attorney General, of counsel and on the  
brief).

PER CURIAM

Defendant Kareem T. Tillery appeals from an October 7, 2015 Judgment of Conviction, following a jury verdict and challenges the sentence imposed. On appeal, defendant seeks reversal of his conviction, based, in part, on what he contends was an involuntary custodial statement, which violated his Miranda<sup>1</sup> rights. Alternatively, he requests resentencing, arguing the judge improperly considered irrelevant facts. More specifically, defendant asserts:

POINT I

THE STATEMENT TO LAW ENFORCEMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE THE STATE FAILED TO MEET ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT [DEFENDANT] WAIVED HIS MIRANDA RIGHTS.

POINT II

THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

- A. THE SENTENCING COURT IMPROPERLY REPLACED ITS JUDGMENT FOR THAT OF THE JURY WHEN SENTENCING [DEFENDANT] FOR OFFENSES WHICH THE JURY DID NOT CONVICT HIM OF COMMITTING.
- B. THE SENTENCING COURT ASCRIBED UNDUE WEIGHT TO [DEFENDANT'S] PRIOR CONVICTIONS, RESULTING IN DUPLICATIVE CONSIDERATION OF HIS PRIOR RECORD.

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

We have reviewed these arguments in light of the record and applicable law. We affirm.

A cooperating informant told State Police, defendant, who he characterized as a family friend, sold firearms. A seven to eight month investigation commenced, culminating with defendant's arrest on August 22, 2013. During the investigation, police recorded telephone conversations and monitored the informant's "controlled buy" of guns at defendant's workplace, a local supermarket, and his designated residence in Union Township. Defendant was charged with eight counts of weapons offenses.

Prior to trial, Judge Martin G. Cronin conducted a Rule 104 evidentiary hearing to review defendant's challenges to the admissibility of his post-arrest custodial statements. State Police Detective Hugo Ribeiro testified and identified documents he completed at the time of arrest, including the Police Arrest Form, SP121; the arrest report; and the standard Miranda card that was signed and acknowledged by defendant. The State also relied upon the transcript of the August 22, 2013 custodial interview, which defendant acknowledged accurately recorded all statements captured on the audio recording. Both parties submitted written briefs and offered additional oral arguments.

Detective Ribeiro completed the arrest form in the interview room and informed defendant of his Miranda rights. Defendant

signed the Miranda card also signed by then Trooper Ribeiro, as the advising officer, and Detective Miguel Holguin, as a witness. Both troopers remained present during the interrogation.

On cross-examination, the defense demonstrated the claimed "biographical information," requested by Detective Ribeiro was not necessary because police had many of these facts. More importantly, the information was inadmissible because it confirmed defendant's address, place and address of employment, phone number, nickname, descriptive tattoos, and provided evidence which the State otherwise would be required to prove as part of its case against defendant.

Judge Cronin concluded defendant's statements made prior to the issuance of Miranda warnings exceeded permissible routine booking information and amounted to investigatory proofs. Therefore, those statements were inadmissible. Judge Cronin also found, despite the absence of an express waiver of rights, the totality of the direct and circumstantial evidence demonstrated defendant's post-Miranda statements were made knowingly and voluntarily. The judge required post-Miranda references to defendant's nickname be redacted, otherwise, the balance of the interview was admissible.

Following trial, the jury convicted defendant of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)

(count two) and fourth-degree unlawful disposition of a weapon, N.J.S.A. 2C:39-9(d) (count five). The jury hung on the remaining counts of the indictment. Judge Cronin granted the State's motion to impose a discretionary extended term, concluding defendant satisfied the requirements of a persistent offender. N.J.S.A. 2C:44-3(a). On count one, he sentenced defendant to a twenty-year prison term, subject to a ten-year period of parole ineligibility in accordance with the Graves Act. On count five, he imposed a concurrent prison term of eighteen months. The State dismissed the remaining counts of the indictment.

We consider defendant's challenges to the order denying his motion to suppress his custodial statement. Although he acknowledges Miranda warnings were administered, defendant argues the evidence was insufficient to prove he waived these rights.

To find police properly informed a suspect of his or her Miranda rights and that these rights were voluntarily waived "turn[s] on factual and credibility determinations . . . ." State v. W.B., 205 N.J. 588, 603 n.4 (2011). In our review, we determine whether there is "sufficient credible evidence in the record to sustain the trial judge's findings and conclusions." Ibid. If so, our "task is complete and [we] should not disturb the result . . . ." State v. Johnson, 42 N.J. 146, 162 (1964). We will defer to the trial judge's factual findings, which are

"substantially influenced by his [or her] opportunity to hear and see the witnesses and [develop a] feel of the case, which a reviewing court cannot enjoy." State v. Davila, 203 N.J. 97, 109-10 (2010) (quoting Johnson, supra, 42 N.J. at 161-62). However, if "a trial court's findings [are] so clearly mistaken 'that the interests of justice demand intervention and correction[,]' . . . an appellate court properly reviews 'the record as if it were deciding the matter at inception and make[s] its own findings and conclusions.'" State v. Hreha, 217 N.J. 368, 382 (2014) (quoting Johnson, supra, 42 N.J. at 162). Further, we are not bound by a trial court's resolution of legal issues, which remain subject to our de novo review. State v. Shaw, 213 N.J. 398, 411 (2012).

Defendant's challenge invokes his right to remain silent. "The Fifth Amendment privilege against self-incrimination, made applicable to the states through the Fourteenth Amendment, provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" State v. P.Z., 152 N.J. 86, 100 (1997) (quoting U.S. Const. amend. V); see also State v. Reed, 133 N.J. 237, 250 (1993) (holding "the right against self-incrimination is founded on a common-law and statutory . . . basis," and establishes "'no person can be compelled to be a witness against himself.'" (quoting State v. Zdanowicz, 69 N.J.L. 619, 622 (E.&A. 1903))). Attendant to this right is the "absolute

right to remain silent while under police interrogation . . . ." Reed, supra, 133 N.J. at 520.

Because the privilege against self-incrimination is not self-implementing, the right is safeguarded through the use of Miranda's "prophylactic-procedural safeguards . . . ." State v. Knight, 183 N.J. 449, 461 (2005) (quoting State v. Burris, 145 N.J. 509, 520 (1996)). Without question, "[c]onfessions obtained . . . during a custodial interrogation are barred from evidence unless the defendant has been advised of his or her constitutional rights." Ibid. (citing Miranda, supra, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 707). Moreover, it is the State which bears the burden of "prov[ing] the voluntariness of a confession beyond a reasonable doubt." State v. Galloway, 133 N.J. 631, 654 (1993); see also State v. Presha, 163 N.J. 304, 313 (2000) (holding the State bears the burden of proving a defendant's waiver of his or her rights was knowing, intelligent, and voluntary beyond a reasonable doubt.).

Indeed, a suspect who was administered and understood Miranda warnings, but did not invoke his rights, "waives the right to remain silent by making an uncoerced statement to the police." Berghuis v. Thompson, 560 U.S. 370, 388-89, 130 S. Ct. 2250, 2264, 176 L. Ed. 2d 1098, 1115 (2010). Therefore, contrary to defendant's assertion, an express waiver of rights is not required.

Rather, judges must evaluate the totality of the circumstances surrounding the interrogation and consider: "the suspect's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved." State v. Miller, 76 N.J. 392, 402 (1978) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854, 862 (1973)). The judge may also weigh a defendant's "prior experience with the police" and the "period of time between 'administration of the [Miranda] warnings and the volunteered statement.'" Knight, supra, 183 N.J. at 463, 466 (quoting State v. Timmendequas, 161 N.J. 515, 614 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001)).

For the reasons stated by Judge Cronin, we reject defendant's challenges and conclude the totality of the evidence upholds the determination defendant issued a voluntary statement knowing his Miranda rights did not require he speak. The judge considered all events, defendant's prior experiences with law enforcement, and his statement referencing a recognition he need not respond to the questions posed, noting he was "going to jail anyway." As Judge Cronin found, defendant's statement was "not otherwise the product of coercion or duress."



Defendant alternatively challenges the imposed sentence as excessive. More specifically, he argues resentencing is required suggesting the judge's reasoning was flawed when imposing the maximum second-degree sentence. Defendant argues the judge: (1) considered acts for which defendant was not convicted; and (2) ascribed undue weight to defendant's criminal record. We disagree.

Regarding the second point, the judge considered defendant's adult criminal record in Virginia and New Jersey, as well as juvenile adjudications. These offenses were committed while defendant was on probation. Accordingly, we conclude defendant's second point lacks sufficient merit to warrant further discussion in our opinion, R. 2:11-3(e)(2). See State v. Thomas, 188 N.J. 137, 153 (2006) ("A court's findings assessing the seriousness of a criminal record, the predictive assessment of chances of recidivism, and the need to deter the defendant and others from criminal activity, do all relate to recidivism, but also involve determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history.").

We focus on the first claimed error. Judge Cronin found no applicable mitigating factors, N.J.S.A. 2C:44-1(b), and applied aggravating factors three (risk of re-offense), six (defendant's criminal record), and nine (the need for deterrence). N.J.S.A.

2C:44-1(a)(3), (6), (9). The judge found strong legislative policy in relation to gun control to protect the public and noted defendant knew the informant, to whom he sold weapons, had a record of criminal convictions. The judge also noted he could consider other charges against defendant, even though the jury did not reach a verdict.

In United States v. Watts, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997), the United States Supreme Court held "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157, 117 S. Ct. at 637, 136 L. Ed. 2d at 565. Here, defendant was not acquitted; the jury hung. Defendant refutes application of this principle, citing State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011). We are not persuaded.

In Tindell, this court vacated a sentence imposed because the "trial judge took exception to the verdict," demonstrating the judge was "improperly influenced by [its] perception that the jury rendered an unjust verdict in defendant's favor." Id. at 568, 572. Further, we noted evidence of inappropriate interactions between the judge and the defendant, showed the judge's "sense of moral outrage" impacted his sentencing decisions. Id. at 571. Such is not the case in this matter.

Here, Judge Cronin noted sufficient evidence to prove each gun sale was proffered, allowing his consideration of those facts when assessing the weight afforded to applicable aggravating factors. Additionally, the judge's mention of facts surrounding the charges for which the jury could not reach a verdict, which the State dismissed, were not the sole basis used to apply any aggravating factor. For example, he noted defendant was on probation when the first alleged gun sale occurred. The reliance on these facts was not error. "[S]entencing judges may consider material that otherwise would not be admissible at trial, as long as it is relevant and trustworthy." State v. Smith, 262 N.J. Super. 487, 530 (App. Div.), certif. denied, 134 N.J. 476 (1993) (finding a sentencing judge could consider evidence from a doctor who had not been qualified as an expert).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION