SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0865-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TONY HULLUM, a/k/a JAMES HOLMES, ANTHONY HULLUM, ANTHONY D. HULLUM, and TONY D. HOLLUM,

Defendant-Appellant.

Submitted March 21, 2017 – Decided July 18, 2017

Before Judges Rothstadt and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 13-07-0412.

Joseph E. Krakora, Public Defender, attorney for appellant (Alan I. Smith, Designated Counsel, on the brief).

Michael H. Robertson, Somerset County Prosecutor, attorney for respondent (Lauren Martinez, Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Tony Hullum of third-degree possession of a controlled dangerous substance (CDS), cocaine,

N.J.S.A. 2C:35-10(a)(1). The court sentenced him to a term of three years in prison.

On appeal, defendant argues:

> POINT I
>
> SINCE THE WARRANTLESS SEARCH OF DEFENDANT'S INVENTORIED CLOTHING WAS NOT RELATED TO INSTITUTIONAL SECURITY AT THE SOMERSET COUNTY JAIL, AND SINCE THERE DID NOT EXIST PROBABLE CAUSE OR AN EXIGENCY TO JUSTIFY THE WARRANTLESS SEARCH, THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE WARRANTLESS SEARCH OF DEFENDANT'S INVENTORIED CLOTHING WAS A PRETEXT THAT VIOLATED DEFENDANT'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS.
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> POINT II
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> DEFENDANT'S CONVICTION SHOULD BE REVERSED BECAUSE OF PROSECUTORIAL "OVERZEALOUSNESS" IN SUMMATION (NOT RAISED BELOW).
>
> POINT III
>
> THE THREE (3) YEAR CUSTODIAL SENTENCE IMPOSED ON DEFENDANT'S CONVICTION FOR THIRD DEGREE POSSESSION OF COCAINE WAS MANIFESTLY EXCESSIVE.

We conclude from our review of the record and applicable legal principles that defendant's arguments are without merit. We affirm.

Turning first to defendant's challenge to the denial of his suppression motion, the undisputed facts established at the suppression hearing are summarized as follows. Defendant was stopped by police for a motor vehicle violation. Because he could not produce a license and failed to properly identify himself, he was arrested, initially placed in a police headquarters' lock-up, and then transferred to the county jail. During his arrest and incarceration, he was subjected to several searches and "pat-downs" that did not yield any CDS. While he was in the county jail, his clothes were inspected after he removed them as part of his processing that included a strip search and changing into jail clothing. Again, no CDS was discovered. According to the officer who testified at the hearing, defendant's clothing was placed in a bag, tagged with his name and "locked in the secured area in [the jail's] basement[, the] clothing bag storage area."

Thirteen hours after his arrest, and while he was in the jail, the officer received an anonymous call informing him that defendant had CDS secreted in his pants, in a compartment located "in the flap of the jeans, by the zipper, [where] there should be a cut with possibly drugs hidden in that area." A further inspection of the pants based upon the information supplied by the caller revealed CDS. As a result, defendant was charged with possession.

At his suppression hearing defendant argued that the warrantless search of his clothing violated his constitutional rights. On March 30, 2015, Judge Julie M. Marino issued a nine-page written decision denying defendant's motion. Relying on the reasoning stated in State v. Adams, 132 N.J. Super. 256 (Law Div. 1975) - which followed our Supreme Court's holding in State v. Mark, 46 N.J. 262, 278 (1966) - and citing to U.S. v. Grill, 484 F. 2d 990 (5th Cir. 1973), cert. denied, 416 U.S. 989, 94 S. Ct. 2396, 40 L. Ed. 2d 767 (1974), the judge concluded that "no reasonable expectation of privacy was breached by an officer's taking a second look at the items."

Defendant argues that the judge's legal conclusion was erroneous. He contends that there was no institutional security need to reexamine his pants and that the search was merely a pretext for finding incriminating evidence against him. Moreover, there was no evidence about the reliability of the anonymous caller to justify the warrantless search and to allow law enforcement to search his clothes, which, he asserts, amounted to a violation of his due process rights. We disagree.

"In our review of the trial court's decision denying the motion to suppress, we 'must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record.'" State v.

Robinson, ___ N.J. ___, ___ (2017) (slip op. at 23-24) (quoting State v. Rockford, 213 N.J. 424, 440 (2013)). However, "[w]e owe no deference to a trial . . . court's interpretation of the law, and therefore our review of legal matters is de novo." Id. at 24 (quoting State v. Hathaway, 222 N.J. 453, 467 (2015)).

Our de novo review of Judge Marino's application of the controlling law to her factual findings leads us to conclude that the judge correctly denied defendant's suppression motion. We affirm essentially for the reasons expressed by the judge in her thorough written decision. We add only the following comments.

The Supreme Court of the United States (SCOTUS) has broadly stated "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell," Hudson v. Palmer, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402-03 (1984), but a pre-trial detainee is protected by a "diminished expectation of privacy," that must yield to an institution's security interests. Bell v. Wolfish, 441 U.S. 520, 557, 99 S. Ct. 1861, 1883, 60 L. Ed. 2d 447, 480 (1979). In Hudson, SCOTUS concluded that determining the reasonableness of an expectation of privacy "entails a balancing of interests," and, in the prison setting, the penal institution's interest in maintaining security outweighs the prisoner's privacy interests

in his cell. Hudson, supra, 468 U.S. at 527-28, 104 S. Ct. at 3200-01, 82 L. Ed. 2d at 403-04.

The New Jersey Supreme Court has taken a similar approach. Our Court has recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." In re Rules Adoption Regarding Inmate Mail to Attys., 120 N.J. 137, 146-47 (1990) (alteration in original) (quoting Turner v. Safley, 482 U.S. 78, 84, 107 S. Ct. 2254, 2259, 96 L. Ed. 2d 64, 75 (1987)); see also Jackson v. Dep't of Corr., 335 N.J. Super. 227, 232 (App. Div. 2000) ("Inmates do not shed all of their constitutional rights at the prison gate."), certif. denied, 167 N.J. 630 (2001). Nonetheless, the special needs of the institution have been held to justify intrusions that would not be permitted outside the institution. Hamilton v. N.J. Dep't of Corr., 366 N.J. Super. 284, 291-92 (App. Div. 2004) (rejecting challenge to taking of a urine sample of a convicted inmate, without a warrant, based on an anonymous tip).

A pre-trial detainee is "cloaked with the presumption of innocence. While that cloak may not shield him or his property from the prying eyes of his jailors in their efforts to maintain institutional security, it will insulate him from surreptitious attempts of the prosecutor to obtain evidence without the benefit of a warrant." State v. Jackson, 321 N.J. Super. 365, 379 (Law

Div. 1999); see also United States v. Cohen, 796 F.2d 20 (2d Cir.) (holding that search of pretrial detainee's cell at the behest of the prosecutor for the purpose of finding incriminating evidence was unconstitutional), cert. denied, 479 U.S. 854, 107 S. Ct. 189, 93 L. Ed. 2d 122 (1986). It will not insulate a pre-trial detainee from searches seeking "weapons, drugs and other contraband [that] present a serious danger to institutional order within the prison environment." Jackson, supra, 321 N.J. Super. at 373.

Applying these guiding principles, we conclude that there was nothing pretextual about the search of defendant's clothing or that it was done at the behest of a prosecutor seeking to gather evidence. Rather, the sheriff's department, having already searched and properly taken custody of defendant's clothing and having then received information that the clothes might contain CDS, did not violate defendant's constitutional right of privacy while he was incarcerated. The removal of CDS from the jail, wherever it was located, justified the search.

Next, we address defendant's contention about the impropriety of the prosecutor's remarks about the CDS found in defendant's pants during summation. Defendant, who did not testify at trial, takes issue with the prosecutor's reference to there being no evidence that the pants belonged to someone else or that anyone tampered with the clothing. According to defendant, these

references were tantamount to the prosecutor improperly commenting on defendant's right to not testify or produce any other evidence in his defense. We disagree.

Initially, we observe that defendant did not object at trial to the prosecutor's comments. When a defendant raises an issue for the first time on appeal, we review the issue for plain error, that is, error that "is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. The error must have been "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. McGuire, 419 N.J. Super. 88, 106-07 (App. Div.) (quoting State v. Taffaro, 195 N.J. 442, 454 (2008)), certif. denied, 208 N.J. 335 (2011). Additionally, "[t]he failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. The failure to object also deprives the court of an opportunity to take curative action." State v. Frost, 158 N.J. 76, 84 (1999).

We discern no error attributable to the prosecutor's remarks in this case. We acknowledge that we have repeatedly "caution[ed] against comments by prosecutors which may adversely affect an accused's Fifth Amendment rights[, stating that a] prosecutor should not either in subtle or obvious fashion draw attention to a defendant's failure to testify." State v. Engel, 249 N.J. Super.

336, 382 (App. Div.), certif. denied, 130 N.J. 393 (1991). "Contrary to defendant['s] assertion, [however,] we do not find in the prosecutor's remarks a studied attempt to comment on [his] election not to testify." Id. at 381. Rather, the prosecutor fairly commented upon what the evidence in the case demonstrated, without attributing the lack of evidence either directly or indirectly to an obligation on defendant to produce the evidence. There was no error.

Finally, we address defendant's contentions regarding his three-year sentence being excessive. As defendant acknowledges, the sentencing judge found three aggravating factors, the risk defendant would reoffend, N.J.S.A. 2C:44-1(a)(3), the extent of defendant's prior criminal record, N.J.S.A. 2C:44-1(a)(6), and the need for deterrence, N.J.S.A. 2C:44-1(a)(9), while also finding one mitigating factor, defendant's addiction, N.J.S.A. 2C:44-1(b)(4). Defendant's only challenge to the sentence is that those findings did not support the sentence he received.

We find defendant's argument to be without sufficed merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Suffice it to say, we discern no abuse of the judge's discretion in imposing the three-year term. See State v. Fuentes, 217 N.J. 57, 70 (2014); State v. Roth, 95 N.J. 334, 364-65 (1984).

Affirmed.