

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1378-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEROME HOLLEY, a/k/a JEROME D.
GANDY, ROME HOLLEY, and JERMONE
HOLLEY,

Defendant-Appellant.

Argued November 27, 2017 – Decided December 19, 2017

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
15-04-1111.

Alicia J. Hubbard, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Alicia J. Hubbard, of counsel and on the
brief).

Dylan P. Thompson, Assistant Prosecutor,
argued the cause for respondent (Damon G.
Tyner, Atlantic County Prosecutor, attorney;
Dylan P. Thompson, of counsel and on the
brief).

PER CURIAM

Defendant appeals his conviction and sentence following a conditional guilty plea to second-degree burglary, N.J.S.A. 2C:18-2(a). He argues the court erred by denying his motion to suppress a victim's out-of-court identification and by failing to award the jail credits the court said he would receive when he pleaded guilty. We vacate defendant's sentence and remand for resentencing in accordance with the plea court's assurances concerning the award of jail credits or renegotiation or withdrawal of his plea agreement.

I.

In the early morning hours of October 10, 2014, three individuals broke into the Pleasantville home of S.W.,¹ his wife D.C., her twenty-one-year-old son Billy and twenty-year-old daughter Betty. Two of the perpetrators went to the second floor and confronted Billy. One was armed with a handgun and ordered Billy into the bedroom S.W. and D.C. shared. Once in the bedroom, the armed perpetrator ordered S.W., D.C. and Billy to lay on the floor, demanded money and struck Billy on the head with the gun. The three perpetrators ransacked the residence and fled.

The police were called and arrived shortly after the perpetrators left. S.W. told the police he recognized the armed

¹ We use initials and pseudonyms to identify the victims to protect their privacy.

perpetrator because they had been incarcerated together in South Woods State Prison a year earlier. S.W. said he did not know the person's "information or whereabouts," but was "positive" the person lived in Pleasantville. S.W., D.C. and Billy described the man as a six-foot tall, slim, black male with slight facial hair. They described the second man as a six-foot tall black male with a full beard. The third perpetrator remained on the first floor and was never seen.

Later that day, Detective Steven Sample went to the home and spoke with D.C. and Billy. S.W. was not at home. Billy informed Sample that he reviewed photographs on the New Jersey Department of Corrections' website and identified defendant as the armed perpetrator.

A week later, Detective Miguel Lugo showed D.C. a photo-array consisting of six photographs. Lugo read D.C. instructions from the "Sequential Photo Lineup Form" and asked her to review the six photographs sequentially. After she reviewed the array, D.C. reported she was unable to positively identify a suspect. She pointed out the photos of defendant and another individual in the array and said "that one of the two could possibly be the person involved" but "she could not determine which of the two was in fact the actor in the crime."

On the same day, Lugo also showed S.W. a photo-array. Lugo read S.W. the written instructions from the "Sequential Photo Lineup Form," and S.W. signed the form. S.W. "positively identified" defendant's photograph and said he was the armed perpetrator. S.W. signed and dated defendant's photo, and signed a separate form confirming he selected defendant's photo.

Defendant was charged in an indictment with first-degree robbery, N.J.S.A. 2C:15-1; second-degree burglary, N.J.S.A. 2C:18-2(a); third-degree aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(2); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b);² three counts of third-degree criminal restraint, N.J.S.A. 2C:13-2(a); second-

² The indictment incorrectly states that the crime charged in count five, unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), is a first-degree offense. Unlawful possession of a handgun constitutes either a second or third-degree offense. N.J.S.A. 2C:39-5(b). A third-degree offense is committed when there is unlawful possession of a "handgun in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch, with sufficient force to injure a person." Ibid. Unlawful possession of any other handgun constitutes a second-degree crime. Ibid. Because defendant was not charged with the possession of the type of handgun that would render the offense a third-degree crime, the indictment charged a second-degree crime.

degree conspiracy to commit robbery, N.J.S.A. 2C:15-1 and N.J.S.A. 2C:5-2; and second-degree possession of a weapon by a certain person, N.J.S.A. 2C:39-7(b).

Defendant moved for suppression of the photo identifications made by S.W. and D.C. during Lugo's separate photo-array presentations.³ Defendant argued the police failed to sufficiently record and detail their interactions with S.W. and D.C. during the identification procedures. Defendant also claimed the police failed to record S.W.'s level of certainty concerning his identification of defendant during the identification procedure. Defendant further asserted that the photo-array shown to S.W. was suggestive because the background of S.W.'s photograph was lighter than the backgrounds in the other five photos in the array.

³ Defendant also challenged Billy's identification of defendant based on his review of the New Jersey Department of Corrections' website. See State v. Chen, 208 N.J. 307, 327-28 (2011) (holding that even where there is no police involvement, a court must conduct a hearing to determine the admissibility of identification evidence when the "identification was made under highly suggestive circumstances"). Defendant does not argue the court committed any error concerning Billy's out-of-court identification. In addition, defendant does not make any arguments concerning the admissibility of D.C.'s identification of defendant as a possible perpetrator during the photo-array identification procedure conducted by Lugo. We therefore address only defendant's argument that the court erred by denying his motion to suppress S.W.'s identification. See Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008) (finding any argument not briefed on appeal is waived).

After hearing argument, the court denied defendant's request for a hearing concerning the suggestiveness of the photographs shown to S.W. The court found defendant presented insufficient evidence of suggestiveness concerning the photographs to establish entitlement to a hearing. The court found the difference in the background of defendant's photograph was immaterial and not suggestive, and that the "race, age, skin tone, hair and the like" of the individuals in the six photographs were similar.

Although the court found defendant did not present sufficient evidence of suggestiveness concerning the photographs to warrant a hearing, it nevertheless ruled it would conduct a N.J.R.E. 104 hearing during which defendant could question the officers who administered the photo-array identification procedures about any "system variables" relevant to the suggestiveness of the process. See State v. Henderson, 208 N.J. 208, 250-61 (2011) (explaining the system variables relevant to determining the suggestiveness of an identification procedure). The court also stated that defendant could question witnesses about their interactions with S.W. and Billy, and inquire about whether they were shown any Department of Corrections photographs or provided any other identifying information "by anyone involved." The court found "there may be some indication of suggestibility regarding [S.W.'s] involvement with lay witnesses" and after a hearing it would

"revise [its] decision relative to any further suppression or limitation on introduction of eyewitness identification based on what [occurs] at the hearing."

The court entered an order denying defendant's motion to suppress the out-of-court identification but, in the same order, directed that a N.J.R.E. 104 hearing be held to permit defendant "to examine Detective Lugo regarding the photo lineup shown to [S.W.] based upon system variables." The order also permitted a N.J.R.E. 104 hearing to "examine the victims as to the limited issue of whether or not the photograph of [defendant] found by [Billy on the Department of Corrections' website] was shown to these witnesses[, including S.W.,] and whether it had any influence on them."

At a pretrial conference held a few months later, defendant's counsel advised the court that the State had extended a plea offer of five years subject to the requirements of the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Counsel stated defendant understood that his sentencing exposure exceeded 100 years and that defendant faced imposition of an extended term of life imprisonment. Counsel reminded the court that a N.J.R.E. 104 hearing was required prior to trial, and requested that the court schedule a plea cutoff proceeding.

The court addressed defendant and explained defendant's sentencing exposure. Defendant said he had been incarcerated for one year following his arrest on the charges, and his counsel informed the court that during that period defendant had been serving a sentence for a parole violation on a prior conviction.

The court informed defendant that he did not get jail credit for the time spent serving his parole sentence and that the "sooner [he] take[s] the [State's plea] offer, the better because then it starts counting as good time." The judge advised defendant that if he accepted the State's offer that day, his counsel could make a motion for discretionary jail credits and the court would consider the application and "decide how much credit [defendant] should get" after "a fair hearing." The judge reminded defendant that if he waited thirty days to plea on the plea cutoff date, "that's [thirty] more dead days against [his] sentence."

The court then advised defendant that "if you want to accept the [plea] offer today, we can ensure that you're at least getting credit starting today." The judge further stated that when defendant appeared at sentencing, he could request additional days of jail credit for the period following his arrest and prior to his parole revocation. The judge said he would give defendant a fair hearing on a request for such credit, but could not promise

it would be awarded. In response to the judge's statements, defendant said, "All right, I accept that."

Defendant then pleaded guilty to second-degree burglary, N.J.S.A. 2C:18-2(a), in exchange for the State's recommendation that the court impose a custodial sentence not to exceed five years subject to the requirements of NERA, and dismiss the remaining charges. During the plea colloquy, the court explained that at sentencing it would "consider [defendant's] parole status and any appropriate discretionary credits" and would provide defendant with a fair hearing on any request for jail credits. Defendant accepted the plea offer, and provided a factual basis describing his commission of the second-degree burglary. The judge accepted defendant's plea and scheduled defendant's sentencing.

Defendant's original sentencing date was adjourned for two weeks by the court. Defendant was sentenced by a different judge from the judge who accepted his plea. The sentencing judge awarded jail credits for the two-week delay in defendant's sentencing, but denied defendant's request for jail credits for the period during which defendant was serving his parole violation sentence. In accordance with the plea agreement, the court imposed a five-year custodial term subject to the requirements of NERA. This appeal followed.

POINT I

THE FAILURE OF THE POLICE TO RECORD THE DETAILS OF THE IDENTIFICATION PROCEDURE RENDERED THE OUT-OF-COURT IDENTIFICATION OF DEFENDANT PER SE INADMISSIBLE, REQUIRING THAT THE CONVICTIONS BE SET ASIDE. (U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. (1947) Art. I, PARS. 1, 9 AND 10).

POINT II

THE SENTENCING COURT ERRED IN DENYING MR. HOLLEY ADDITIONAL CREDIT PROMISED HIM AT THE TIME OF PLEA AND, THEREFORE, THE MATTER SHOULD BE REMANDED FOR A HEARING WHERE THE SENTENCE IS AMENDED TO EFFECTUATE THE TERMS OF THE PLEA OR HE HAS THE OPPORTUNITY TO WITHDRAW HIS PLEA. (U.S. CONST. AMENDS. V, VI, XIV; N.J. CONST. (1947) Art. I, PARS. 1, 9, AND 10).

II.

Defendant first argues the court erred by denying his motion to suppress S.W.'s out-of-court photo-array identification. Defendant asserts that the police did not record or adequately document the verbatim exchange between the police and S.W. during the procedure and, for that reason, the out-of-court identification should have been suppressed. Defendant argues that under State v. Delgado, 188 N.J. 48 (2006), law enforcement's failure to create a record of "the dialogue between the witness and the interlocutor" renders the out-of-court identification "per se inadmissible." Defendant also contends the police's failure to record S.W.'s level of confidence in his identification

of defendant required suppression of S.W.'s out-of-court identification.

In Delgado, our Supreme Court required that, "as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results." Id. at 63. The Court explained that "[p]reserving the words exchanged between the witness and the officer conducting the identification procedure may be as important as preserving" the photographs shown to a witness, and required that "[w]hen feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing." Ibid. When a verbatim account is not feasible, "a detailed summary of the identification procedure should be prepared." Ibid.

The Court subsequently adopted Rule 3:11,⁴ which details the requirements for the recordation of out-of-court identification procedures. The Rule requires the preparation of a "contemporaneous record[ation] of identification procedure[s] in

⁴ Rule 3:11 was "[a]dopted July 19, 2012 to be effective September 4, 2012." Pressler & Veniero, Current N.J. Court Rules, Note, R. 3:11 (2018).

writing, or, if feasible, electronically." R. 3:11(b). Where a written record is prepared, "it shall include, if feasible, a verbatim account of any exchange between the law enforcement officer . . . and the witness." Ibid. If "a written verbatim account cannot be made, a detailed summary . . . should be prepared." Ibid. Contrary to defendant's contention, law enforcement's failure to make the required record does not require suppression of the out-of-court identification. Under Rule 3:11(d), the decision to suppress an out-of-court identification based on a failure to make the required record rests within the "sound discretion" of the motion court.

In the first instance, we address the court's order on defendant's suppression motion. The order states defendant's motion to suppress S.W.'s out-of-court identification is denied,⁵ but clearly and unequivocally provides for a N.J.R.E. 104 hearing permitting defendant to challenge S.W.'s out-of-court identifications.

The order granted defendant's request for a N.J.R.E. 104 hearing to permit defendant to question the officer who

⁵ In its oral opinion, the court addressed only the difference in the darkness of the background of defendant's photograph from those of the other five photos in the array and ruled only that the difference did not demonstrate sufficient suggestiveness to warrant a hearing. Defendant does not challenge the court's determination on that issue on appeal.

administered the photo-array identification procedure about any "system variables" relevant to the suggestiveness of the process. System variables include the pre-identification instructions provided by law enforcement, information received by witnesses before and after the identification, confirmatory or post-identification feedback to the witness, and the witness's level of confidence in the identification that will be reflected in the required record of an identification procedure. Henderson, 208 N.J. at 250-61. Thus, the court's order directed a hearing on the precise issues defendant now claims required suppression of S.W.'s out-of-court identification.

The court further ordered a N.J.R.E. 104 hearing to consider whether the photograph Billy found on the New Jersey Department of Corrections' website was shown to S.W., and if so, whether it influenced S.W.'s identification. In its oral opinion, the court said defendant presented evidence of "suggestibility regarding [S.W.'s] involvement with lay witnesses" and the issue would be addressed in the N.J.R.E. 104 hearing. If defendant showed "some evidence of suggestiveness [tied to a system variable] that could lead to a mistaken identification" the burden would shift to the State to "offer proof to show that the proffered eyewitness identification is reliable" Id. at 288-89. However, defendant bears the "ultimate burden . . . to prove a very

substantial likelihood of irreparable misidentification." Id. at 289.

In sum, although the court's order states the suppression motion was denied, it permitted a N.J.R.E. 104 hearing concerning the system variables and S.W.'s exposure to other information and photographs to determine the admissibility of S.W.'s out-of-court identification. The court's opinion and order provided defendant with the opportunity to challenge the admissibility of the identification on all of the issues he currently raises on appeal, but defendant opted to forego the N.J.R.E. 104 hearing and instead pleaded guilty. Defendant was aware he could challenge the admissibility of S.W.'s out-of-court identification at a N.J.R.E. 104 hearing. At the pretrial conference proceeding, his counsel reminded the court that the N.J.R.E. 104 hearing was required before trial.

The hearing was not held because defendant pleaded guilty. Thus, the court was not required to determine whether the officers complied with the requirements of Delgado and Rule 3:11, whether it was feasible for them to do so and, if it was, whether suppression of S.W.'s out-of-court identification was the appropriate remedy. In his decision to forego the N.J.R.E. 104 hearing and plead guilty, defendant did not make the arguments he now asserts on appeal. We therefore decline to consider the merits

of defendant's arguments in support of his assertion that the court erred by denying his motion to suppress S.W.'s out-of-court identification. They were not "properly presented to the trial court" during the N.J.R.E. 104 hearing the court ordered but defendant opted to forego, and do not "go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

We next consider defendant's contention that he is entitled to a remand for either resentencing or withdrawal of his plea. He contends the court assured him he would receive jail credits for the period between his plea and sentencing dates, but failed to award the credits at sentencing. The State asserts the court never assured defendant he would receive any jail credits but only told defendant he could request jail credits at sentencing.

"It is fundamental that when a defendant pleads guilty pursuant to a plea agreement, the terms of the agreement must be fulfilled." State v. Kovack, 91 N.J. 476, 482 (1982) (citation omitted). "The terms of the plea agreements must be meticulously adhered to, and a defendant's reasonable expectations generated by plea negotiations should be accorded deference." State v. Brockington, 140 N.J. Super. 422, 427 (App. Div. 1976). Where a defendant has been misinformed "as to a material element of a plea

negotiation, which the defendant has relied thereon in entering his plea . . . , it would be manifestly unjust to hold the defendant to his plea." State v. Nichols, 71 N.J. 358, 361 (1976).

The record shows the plea judge advised defendant that he would begin to earn jail credits upon entry of his guilty plea. As noted, the court advised defendant that the "sooner [he] take[s] the [State's plea] offer, the better because then it starts counting as good time," and that if defendant waited to enter his plea, there would be "more dead days against [his] sentence." The court told defendant if he accepted the State's plea offer, it "ensure[d]" he would begin "getting credit" that day.

To be sure, the judge advised defendant that if he accepted the State's offer, he could also request jail credits for the period he was incarcerated prior to the entry of his guilty plea. A fair reading of the record, however, shows the court spoke separately about the jail credits for the time following the guilty plea, and the court assured defendant those jail credits would be awarded.

A guilty plea based on a "misunderstanding [concerning the award of jail credits] may fail to satisfy the constitutional requirement that a plea be voluntary, intelligently and knowingly entered, at least where the denial of the expected credits results in the imposition of a sentence longer in duration than the maximum

contemplated." State v. Alevras, 213 N.J. Super. 331, 338 (App. Div. 1986). Jail credits reduce a defendant's period of parole ineligibility on a day-for-day basis, State v. Hernandez, 208 N.J. 24, 37 (2011), and here the court imposed a period of parole ineligibility under NERA. Thus, the sentencing court's failure to award jail credits in accordance with the plea court's assurances increased the time defendant must serve before being eligible for parole. See Alevras, 213 N.J. Super. at 338 (finding the defendant's reasonable expectations in entering a guilty plea may not have been met where the jail credits improperly awarded at sentencing changed the length of his parole ineligibility period).

"[P]enal consequences attach to a loss of a parole opportunity and, accordingly, . . . [trial courts must] establish on the record that a pleading defendant is aware of any such loss that is part of the sentence to be imposed." State v. Johnson, 182 N.J. 232, 238-39 (2005). The plea court assured defendant he would accrue jail credits following his guilty plea, but the sentencing judge did not award the credits and thereby increased the length of time defendant reasonably could have expected to serve prior to becoming eligible for parole. Because the sentence imposed is inconsistent with the plea court's assurances, we are compelled to vacate defendant's sentence. See, e.g., id. at 241 (holding a defendant

is entitled to seek vacation of a guilty plea when not informed concerning "NERA's fixed period of parole supervision"); Kovack, 91 N.J. at 484 (finding a "sentence cannot stand" where the defendant was not informed during the plea proceeding that a period of parole ineligibility would be imposed).

The present circumstances parallel those in Kovack, where the sentencing judge did not preside over the defendant's plea proceeding and "was not aware of [the] defendant's understanding of" the conditions of the defendant's plea. Id. at 485. In addition, "defendant neither objected nor moved for resentencing . . . [and] hence, the sentencing judge had no opportunity to conform the sentence to the terms" described by the plea judge. Id. at 485-86. As found by the Court in Kovack, the "best accommodation of 'pragmatic necessity' and 'essential fairness'" requires we vacate defendant's sentence and remand for the court to consider resentencing defendant in accordance with the plea agreement and the plea court's assurances.⁶ Id. at 486. If the court determines it cannot sentence defendant in a manner

⁶ We express no opinion as to whether the court may impose a sentence consistent with the plea court's assurances to defendant. See Henderson, 208 N.J. at 48 (finding "there is no room for discretion in either granting or denying credits" under Rule 3:21-8). Defendant acknowledges in his brief that Rule 3:21-8 precludes the award of discretionary jail credits.

consistent with the plea court's assurances, defendant shall be given the option to "renegotiate the plea, if the State is willing to do so[,] or . . . withdraw his guilty plea subject to reinstatement of the dismissed counts and proceed to trial."⁷ Id. at 485.

Defendant also claims the judgment of conviction includes an error because it does not correctly allocate jail credits for the period between his initial incarceration following his arrest on the present charges and the date he began serving his parole revocation sentence, and otherwise incorrectly allocates the thirty-four days from March 13, 2015 to April 15, 2015, as gap-time credits. Because we vacate defendant's conviction and sentence, we do not address the alleged errors in the court's award of the credits other than to note that the record is incomplete or contains conflicting information concerning the dates pertinent to determination of the credits.⁸ If the court on


⁷ For the reasons noted, if on remand defendant withdraws his guilty plea, he shall be entitled to the N.J.R.E. 104 hearing on the admissibility of S.W.'s out-of-court identifications as set forth in the motion court's order.

⁸ For example, the presentence investigation report shows defendant was arrested on the present charges on January 26, 2015, and violated parole on March 13, 2015, but during the sentencing proceeding it was argued defendant was arrested on March 3, 2015 and his parole was revoked on April 15, 2015. The presentence report also does not include any calculation of jail or gap-time credits.

remand resentences defendant, any award of credits shall be based on information contained in the record and accompanied by findings of fact and conclusions of law supporting such an award. See R. 1:7-4.

Vacated and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION