SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1510-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EMIL B. FENNELL,

Defendant-Appellant.

Submitted September 13, 2016 – Decided March 9, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Accusation No. 14-08-0381.

Joseph E. Krakora, Public Defender, attorney for appellant (Amira R. Scurato, Assistant Deputy Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Garima Joshi, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Emil B. Fennell contends the trial court should have granted his Miranda[1] motion to suppress two custodial statements he made to Trenton police. After the court denied his motion, defendant pleaded guilty to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4a(1), of Shawn Marinnie. The State dismissed the indicted charges of first-degree murder, N.J.S.A. 2C:11-3(a)(2), and related weapons offenses, and the court sentenced defendant, consistent with the plea agreement, to a twenty-year term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant also challenges his sentence as excessive. We affirm.

I.

On December 15, 2011, Marinnie was shot in the head while standing on the 800 block of Stuyvesant Avenue in Trenton. Based on the subsequent investigation, police charged defendant with the crime and took him into custody on June 11, 2012. Mercer County Prosecutor's Office Detective Gary Wasko, and Trenton Police Detective Brian Egan and Sergeant Christopher Doyle interviewed defendant the day of his arrest and the next day.

Egan began the first interview by giving defendant the complaint. Egan told defendant that his bail was $800,000, and

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

began to read the Miranda rights form, asking defendant to read back each paragraph after Egan recited it. When Egan reached the paragraph about the right to counsel, defendant invoked his right in the following exchange[2]:

> DETECTIVE EGAN: Okay. You can sign here. Now, Emil, the second part of this form is called the Waiver of Rights, and the same thing, I'll read it to you and then you can read it.
>
> I have read the statement of my rights and I understand what my rights are. I'm willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. That one word, coercion, means that we're not forcing you [] to do anything. We're not trying to trick you into talking to us. Could you read this paragraph aloud?
>
> MR. FENNELL: I've read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time, which I kind of do.
>
> [(Emphasis added).]

[2] There are discrepancies in the transcript of the June 11, 2012 interrogation. The record contains a transcript prepared for the prosecution by a court reporter, prior to the October 3, 2013 motion hearing. There is also a transcript prepared by a court reporter during the hearing, when the interrogation video was played. Except as noted, we follow the transcript as prepared during the hearing.

Egan then confirmed that defendant was invoking his right to counsel, and terminated the interrogation:

> DETECTIVE EGAN: Do you -- you mentioned that you kind of want an attorney. Do you want to speak to an attorney first?
>
> MR. FENNELL: Yeah.
>
> DETECTIVE EGAN: Okay.
>
> MR. FENNELL: You already said that I got (indiscernible) --
>
> DETECTIVE EGAN: All right. That's no problem at all. What we'll do is, we'll terminate this interview here. I'll take your personal property, whatever you have, and put you in a cell and you can go from there. Okay.

Defendant responded by questioning the detectives about what would happen to him next.

> MR. FENNELL: So how long --
>
> DETECTIVE EGAN: I can't answer any questions, Emil.
>
> MR. FENNELL: Okay.
>
> DETECTIVE EGAN: No. How long what?
>
> MR. FENNELL: Would I be just waiting around?
>
> DETECTIVE EGAN: Well you're going to be put in a cell and, you know, whatever.
>
> DETECTIVE WASKO: (Indiscernible).
>
> MR. FENNELL: Until I make bail or not?
>
> DETECTIVE WASKO: Yeah. I mean if you post bail today, you got $800,000 —

Defendant then inquired about whether he could sign the Miranda form and waive his right to counsel and to remain silent.

MR. FENNELL: (Indiscernible).

If I would sign that and talk to you all about (indiscernible) that stuff anyway.

DETECTIVE WASKO: Well then we would have had an interview and --

MR. FENNELL: All right, well, if the government is going to interview me I want to know what's going on like, I'm lost right now. And if I sign I will not be able to still talk to a lawyer or I won't be able to stop then? Because the first one I signed said I can (indiscernible), and then stop certain questions, but the second one --

DETECTIVE WASKO: Here's what it boils down to, Emil. I mean, you've been charged with murder.

MR. FENNELL: Yeah, but I --

DETECTIVE WASKO: Hold on. You've been charged with murder, okay.

MR. FENNELL: Okay.

DETECTIVE WASKO: And you decided that you want an attorney before you talk to us about the murder charge, you know, so basically that's where we stand right now. So the complaints are already there. It's -- the Superior Court already signed it.

MR. FENNELL: All right. Well let's -- I'll talk to you all then, because I really want to know what's going on. Let me sign that, that second one.

DETECTIVE WASKO: You don't want to talk to an attorney first?

MR. FENNELL: There's no need to. I didn't do anything. I'm not hiding anything, anything, so I can talk to you all right?

Detective Wasko then left the room for about ten minutes. In the meantime, Egan talked to defendant about what he studied at school and his tattoos. When Wasko returned, they re-administered the Miranda warnings and confirmed that defendant wanted to waive his rights.

UNIDENTIFIED SPEAKER: Emil, is it true that when we went over the forms the first time and you requested a lawyer and then after going over those forms the first time you then changed your mind and told us you did not want a lawyer, is that true?

MR. FENNELL: Yeah.

UNIDENTIFIED SPEAKER: Okay. So it's true that you wanted to speak to us about this and that's why we just redid the forms?

MR. FENNELL: Yeah.

UNIDENTIFIED SPEAKER: That was your decision.

MR. FENNELL: My decision.

UNIDENTIFIED SPEAKER: Okay, sir.

DETECTIVE EGAN: So, do you still want to talk to us about what you're under arrest for without a lawyer, right now?

MR. FENNELL: Go over the charges again.

DETECTIVE EGAN: Without a lawyer, right now?

MR. FENNELL: Okay.

In the questioning that followed, defendant claimed he was home the day of the homicide, but became aware of it. He stated he knew of the victim, but denied interacting with him. Egan left the room, and Wasko answered defendant's questions about bail, his first appearance in court, and the appointment of counsel.

Then followed an exchange that defendant asserts amounted to an invocation of the right to remain silent:

> DETECTIVE WASKO: So they'll come talk to you at the Workhouse, and we'll go from there. That's what's going to happen.
>
> MR. FENNELL: That's crazy. I'm being charged with murder and I didn't do it. I hope you all have got enough evidence to charge me with this, though.
>
> DETECTIVE WASKO: Well, obviously we do, because we already have the complaint signed. You already got your paper.
>
> MR. FENNELL: All right.
>
> DETECTIVE WASKO: I mean, is there -- is there -- would you like to talk about it some more, or are you done talking, or would you like to explain to us your whereabouts[3], or --

[3] When reviewing the interrogation video, we clearly discern that Wasko asked defendant if he wanted to "explain your whereabouts," although the transcript recorded it as "indiscernible."

> MR. FENNELL: There's nothing else to, well, there's nothing else to talk about because[4] I didn't do anything, so -- you know, I just want one favor. Can I, like, since I'm being -- since I'm . . . here[,] can I [ ] go in[to] that phone and get my mother-in-law's number?
>
> DETECTIVE WASKO: Yeah. We'll be able to do that. We'll be able to do that for you.
>
> MR. FENNELL: All right. Can you all do me one more favor?
>
> DETECTIVE WASKO: What's that?
>
> MR. FENNELL: A Black and Mild [cigar].
>
> DETECTIVE WASKO: They might be able to do that for you. I don't know if we have any. We'll have to look.
>
> [(Emphasis added).]

Egan returned to the interrogation room, and Wasko summarized what he had told defendant regarding counsel, discovery, defendant's request to access his phone, and his request for a Black and Mild. Wasko then asked defendant if his summary was accurate, and defendant said it was, without claiming that he had invoked his right to silence.

Defendant received the cigar he requested and the officers continued to question him. He described Marinnie's own criminal

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[4] This statement did not appear in either transcript of the June 11, 2012 interrogation; however, at the motion to suppress, both parties stipulated that defendant stated, "There's nothing else to, well, there's nothing else to talk about because I didn't do anything."

activity and claimed Marinnie had killed and robbed multiple victims. Defendant then admitted that Marinnie had robbed him at gunpoint, after which he heard that Marinnie was going to rob him again and kill him. Defendant explained he killed Marinnie to prevent him from doing so.

The next day, a Trenton police sergeant contacted Egan to inform him that defendant wanted to speak to him again. Egan administered a new set of Miranda warnings, and obtained defendant's signed waiver of his rights. Defendant then confirmed that after he returned from court, he had asked a guard to convey his request to speak to Egan. Egan asked, "[W]hat is it that you want to tell us?" Defendant answered, "Yesterday I withheld just a little bit from you all." Defendant referred to a man known as "Loco Pete." In the first interview, defendant said he had heard of "Loco Pete," and he "probably chilled around him, but [he] wasn't my boy or nothing like that." However, in the second interview, defendant disclosed that Loco Pete gave him the gun used to kill Marinnie, and directed him where to leave the gun when he was done using it, so Loco Pete could retrieve it. Defendant admitted that he lied to the officers the previous day about how he obtained the gun.

Judge Thomas W. Sumners, Jr., denied defendant's motion in a thorough fifteen-page opinion. He concluded that after defendant

initially invoked his right to an attorney, he chose to waive that right. Judge Sumners rejected defendant's argument that the police failed to honor his initial assertion of rights. The officers had concluded interrogation, and then engaged in a non-interrogative exchange that defendant initiated about what would happen next. The court rejected defendant's argument that the officers' answers regarding bail and incarceration were coercive. The court noted that defendant then expressed a desire to waive his rights, after which the officers readministered Miranda warnings and affirmed that defendant wished to answer questions.

The court also rejected defendant's argument that the police refused to honor defendant's assertion of his right to remain silent when he stated, "there's nothing else to talk about because I didn't do anything . . . ." The court recognized that, taken in isolation, the statement could be so interpreted. But, viewed in context, it amounted to another denial of guilt, and not a request to stop the interrogation. The court found that "as the entirety of the videotape makes clear, the request made by defendant does not indicate finality of his participation in questioning but rather 'a reflective pause to collect his thoughts, consider his options, and attempt to keep his emotions in check as he confronted the enormity of what he had done.'" (quoting State v. Diaz-Bridges, 208 N.J. 544, 570 (2011).

As for the June 12 statement, the court rejected defendant's argument that it should be suppressed based on the "the fruit of the poisonous tree doctrine" set forth in Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 415-16, 9 L. Ed. 2d 441, 453 (1963), since the court found no predicate violation of defendant's rights.

II.

Defendant raises the following points on appeal:

> POINT I
>
> THE TRIAL JUDGE ERRED IN FAILING TO SUPPRESS THE DEFENDANT'S STATEMENTS WHICH WERE OBTAINED IN VIOLATION OF HIS RIGHTS. U.S. CONST. AMEND. V, VI, XIV; N.J. CONST. ART. 1, PARAS. 1, 9, 10.
>
> A. Law Enforcement Failed To Scrupulously Honor Defendant's Invocation Of His Right To Counsel.
>
> B. The Waiver Of Rights Was Not Made Knowingly Or Voluntarily.
>
> C. Law Enforcement Failed To Scrupulously Honor Defendant's Invocation Of His Right To Silence.
>
> D. The June 12 Statement Must Be Suppressed As It was Directly Derived From The Tainted June 11 Statement.
>
> POINT II
>
> THE DEFENDANT'S MAXIMUM SENTENCE OF TWENTY YEARS WAS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE PARTICULARLY AS APPLIED TO THE DEFENDANT AT THE TIME HE STOOD BEFORE THE COURT.

III.

As he did before the trial court, defendant contends that during the June 11 interrogation, the officers violated his rights by questioning him after he invoked his right to counsel and later after he invoked his right to remain silent. Although he initiated the June 12 interrogation, he argues it was tainted, because it derived from the unlawful questioning the day before.

We must "engage in a 'searching and critical' review of the record" when reviewing the trial court's denial of a Miranda motion. State v. Maltese, 222 N.J. 525, 543 (2015) (quoting State v. Hreha, 217 N.J. 368, 382 (2014)), cert. denied, ___ U.S. ___, 136 S. Ct. 1187, 194 L. Ed. 2d 241 (2016). We defer to the trial court's fact findings, if supported by sufficient credible evidence, Hreha, supra, 217 N.J. at 382, but we review legal questions de novo. State v. Rockford, 213 N.J. 424, 440 (2013).

With that standard of review in mind, we turn first to the June 11 interrogation.

We affirm the trial court's order, substantially for the reasons set forth in Judge Sumner's cogent opinion. We add the following comments with respect to defendant's argument that he sought to terminate the interrogation and invoke his right to remain silent when he said "there's nothing else to talk about[.]"

We are mindful that "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease." Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966).

As in this case, a question may arise as to whether a defendant has actually expressed the desire to remain silent. "[A] request to terminate an interrogation must be honored 'however ambiguous.'" State v. Bey, 112 N.J. 45, 64-65 (1988) (quoting State v. Kennedy, 97 N.J. 278, 288 (1984)). If a defendant's request is unclear, an officer may ask the defendant to clarify his or her meaning. State v. Alston, 204 N.J. 614, 623 (2011). A defendant is not required to speak with "the utmost legal precision." Bey, supra, 112 N.J. at 65. Nor do we expect officers to do so, since they often "converse in vernacular or use colloquial expressions[.]" Alston, supra, 204 N.J. at 627. We also recognize that "a minute parsing of the words used might yield an inaccurate picture of what was meant." Ibid. Therefore, a court must use "a totality of the circumstances approach that focuses on the reasonable interpretation of [a] defendant's words and behaviors." Diaz-Bridges, supra, 208 N.J. at 564.

Our analysis begins with Wasko's unfinished question, "is there -- would you like to talk about it some more, or are you done talking, or would you like to explain to us your whereabouts, or -- [.]" Fairly interpreted, Wasko was not asking defendant whether he wanted suddenly to invoke his right to remain silent. Rather, he was asking whether defendant had anything to add to what he had already said, particularly with regard to where he was at the time of the fatal shooting. Defendant's response — "there's nothing else to talk about because I didn't do anything" — was simply another way of saying that he had no further details to offer, and he was innocent.

Defendant's statement was unlike that of the defendant in Christopher v. Florida, 824 F.2d 836, 840 (11th Cir. 1987), cert. denied, 484 U.S. 1077, 108 S. Ct. 1057, 98 L. Ed. 2d 1019 (1988), who invoked his right to remain silent when he affirmatively and repeatedly stated, "I got nothing else to say[,]" and also demanded that he be taken into custody. (Emphasis omitted). Nor did defendant say at the outset of either interrogation, "I don't want to talk about it," as the defendant did in State v. Bishop, 621 P.2d 1196, 1198 (Or. Ct. App. 1980). See also State v. Johnson, 120 N.J. 263, 281 (1990) (discussing Christopher and Bishop). Here, defendant did not demand that he be taken to a cell, like the defendant in Christopher. Nor did he say he was unwilling to

talk, using the first person "I," as the defendants did in Christopher and Bishop. Instead, he commented on whether further discussion would be productive. See State v. Williams, 3d Dist. Allen No. 1-96-24, 1996 Ohio App. LEXIS 5297, at *10-12 (Nov. 12, 1996) (holding that the defendant did not invoke his right to remain silent when he said, "I don't know what else to say. You guys assume I did it."); cf. United States v. Adams, 820 F.3d 317, 322-24 (8th Cir. 2016) (defendant's statement — "Nah, I don't want to talk, man. I mean, I" — followed immediately by further conversation with officer did not ambiguously invoke his right to remain silent). In sum, we discern no error in the trial court's determination that defendant did not invoke his right to remain silent.

As there was no violation of defendant's rights during the June 11 interrogation, defendant's contention that the June 12 interrogation was "fruit of the poisonous tree" must fail. In all other respects, defendant's rights were honored during the second interrogation, which defendant initiated.

Finally, we discern no merit in defendant's challenge to his sentence. The court's findings of fact regarding aggravating and mitigating factors were supported by evidence in the record; the court correctly applied the sentencing guidelines; and the court did not abuse its discretion in imposing its sentence. See State

v. Cassady, 198 N.J. 165, 180-81 (2009); State v. Roth, 95 N.J. 334, 364-66 (1984).

Affirmed.