SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1938-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK GREEN, a/k/a MARK SCOTT, ALTON GREEN, ALTUR GREEN and ANTON GREEN,

Defendant-Appellant.

Argued June 19, 2017 – Decided July 6, 2017

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 13-06-1139.

Mark H. Friedman, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Friedman, of counsel and on the brief).

Mary R. Juliano, Assistant Prosecutor, argued the cause for respondent (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Ms. Juliano, of counsel and on the brief; Anthony Valenzano, Legal Assistant, on the brief).

PER CURIAM

After entering an open plea, defendant appeals from his convictions for fourth-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1); third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(11); and third-degree possession of CDS with intent to distribute within 1000 feet of a school, N.J.S.A. 2C:35-7.

On appeal, defendant raises the following arguments:

> POINT I
>
> THE MOTION COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE ORIGINAL STOP OF DEFENDANT'S VEHICLE WAS ILLEGAL AND UNCONSTITUTIONAL. THE STATE FAILED TO SHOW THAT THE POLICE HAD AN ARTICULABLE SUSPICION THAT DEFENDANT'S TURN WITHOUT [SIGNALING] MIGHT HAVE HAD AN EFFECT ON TRAFFIC.
>
> POINT II
>
> THIS CASE MUST BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCING JUDGE'S BELIEF THAT HE WAS REQUIRED TO SENTENCE DEFENDANT TO A 36-MONTH PAROLE DISQUALIFIER ON A FIVE-YEAR BASE EXTENDED TERM CONFLICTED WITH THE PLEA AGREEMENT, WHICH SPECIFICALLY PROVIDED THAT DEFENDANT COULD BE SENTENCED TO A PAROLE DISQUALIFIER OF 20 MONTHS.

When reviewing a 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. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). "Those findings warrant

particular deference when they are 'substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the "feel" of the case, which the reviewing court cannot enjoy.'" Ibid. (alteration in original) (quoting Robinson, supra, 200 N.J. at 15). "To the extent that the trial court's determination rests upon a legal conclusion, we conduct a de novo, plenary review." Ibid. (citing State v. J.D., 211 N.J. 344, 354 (2012); State v. Gandhi, 201 N.J. 161, 176 (2010)). In applying this standard, we reject defendant's contention that the trial judge erred by denying his motion to suppress.

The United States and New Jersey Constitutions permit a brief investigative stop of a vehicle based on reasonable suspicion "that an offense, including a minor traffic offense, has been or is being committed." State v. Amelio, 197 N.J. 207, 211 (2008) (quoting State v. Carty, 170 N.J. 632, 639-40, modified by 174 N.J. 351 (2002)), cert. denied, 556 U.S. 1237, 129 S. Ct. 2402, 173 L. Ed. 2d 1297 (2009). An investigatory stop "is valid if it is based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity." State v. Mann, 203 N.J. 328, 338 (2010) (quoting State v. Pineiro, 181 N.J. 13, 20 (2004)). "The burden is on the State to demonstrate by a preponderance of the evidence that it possessed sufficient

information to give rise to the required level of suspicion." Amelio, supra, 197 N.J. at 211.

Reasonable suspicion of "[a] motor vehicular violation, no matter how minor, justifies a stop [even] without any reasonable suspicion that the motorist has committed a crime or other unlawful act." State v. Bernokeits, 423 N.J. Super. 365, 370 (App. Div. 2011). "To satisfy the articulable and reasonable suspicion standard, the State is not required to prove that the suspected motor-vehicle violation occurred." State v. Locurto, 157 N.J. 463, 470 (1999). That is, "the State need prove only that the police lawfully stopped the car, not that it could convict the driver of the motor-vehicle offense." State v. Heisler, 422 N.J. Super. 399, 413 (App. Div. 2011) (quoting State v. Williamson, 138 N.J. 302, 304 (1994)). The State must also show that an officer's belief that a traffic violation actually occurred must be objectively reasonable. State v. Puzio, 379 N.J. Super. 378, 383 (App. Div. 2005). However, the "fact that information an officer considers is ultimately determined to be inaccurate . . . does not invalidate a seizure." State v. Pitcher, 379 N.J. Super. 308, 318 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006).

The officer who pulled over defendant's vehicle testified that he observed defendant make a right turn without signaling. Defendant maintains the evidence at the motion to suppress hearing

was insufficient to prove that his failure to signal had the potential to affect traffic. N.J.S.A. 39:4-126 provides that "[n]o person shall so turn any vehicle without giving an appropriate signal . . . in the event any other traffic may be affected by such movement." The judge found the officer, who he believed, followed defendant's vehicle and observed that defendant failed to activate the directional signal. The reference to "other traffic" in the statute "could include a trooper's vehicle." See Williamson, supra, 138 N.J. at 304. Such is the case here.

Our review of sentencing determinations is limited. State v. Roth, 95 N.J. 334, 364-65 (1984). We will ordinarily not disturb a sentence unless it is manifestly excessive or unduly punitive, constitutes an abuse of discretion, or shocks the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16, 220 (1989). In sentencing, the trial court "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." State v. Case, 220 N.J. 49, 64 (2014). The court must then "determine which factors are supported by a preponderance of [the] evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." O'Donnell, supra, 117 N.J. at 215.

The judge sentenced defendant to five years in prison with three years of parole ineligibility. Defendant argues that even

though he entered an open guilty plea, the colloquy at the plea hearing supports his understanding that he would receive a twenty-month parole disqualifier. The record reflects discussion between the court and counsel on the subject of defendant's minimum period of parole ineligibility.

Defendant entered an open plea, meaning one without a sentence recommendation from the State or a sentencing indication from the court. Thus, there was no agreement as to the minimum period of parole ineligibility. Paragraph thirteen of the plea papers states "[p]lea is open. Defendant to be sentenced to an extended term pursuant to [N.J.S.A. 2C:43-6(f)]. The State will move for imposition of the extended term at the time of sentence." That statute fixes a three-year period of parole ineligibility. Anything less is illegal.

At oral argument before us, the State conceded defendant was entitled to a remand so that he may file a motion to withdraw his guilty plea. That is so because the record demonstrates defendant may have believed he would have received a twenty-month period of parole ineligibility. Remanding will give the parties and the court an opportunity to more fully develop the record and adjudicate disposition of the motion to vacate the plea. We do not retain jurisdiction.