SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2574-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TERRANCE O. HOOKS, a/k/a
TERRENCE HOOKS,

Defendant-Appellant.

Submitted March 9, 2017 – Decided April 5, 2017

Before Judges Hoffman, O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 12-07-0782.

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Danielle R. Pennino, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A Cumberland County grand jury returned a two-count indictment, charging defendant Terrance Hooks with third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-

10(a)(1) (count one), and third-degree possession of a controlled dangerous substance with the intent to distribute, N.J.S.A. 2C:35-5(b)(3) (count two). Defendant moved, in relevant part, to suppress a police detective's pretrial identification and to disclose the identity of a confidential police informant (CI). Following a hearing, the judge denied these motions and the case proceeded to trial, where the jury found defendant guilty of both counts of the indictment.

The judge then determined defendant qualified for mandatory and discretionary extended term sentences. He sentenced defendant to six years of imprisonment with three years of parole ineligibility. On appeal, defendant argues (1) the testimony regarding the CI's introduction of defendant violated his right to confrontation; (2) the court should have disclosed the CI's identity; (3) the court should have suppressed the pretrial identification; and (4) he received an excessive sentence.

We have reviewed the arguments presented in light of the record and applicable law. For the reasons that follow, we affirm.

We begin by summarizing the testimony the State presented at the pretrial hearing on defendant's motions to disclose the CI's identity and suppress the pretrial identification of

defendant by the officer who bought the drugs. On June 23, 2011, Detective Elliot Hernandez conducted an undercover narcotics operation in Bridgeton. At approximately 3:00 p.m., Detective Hernandez approached Elmer Street in a vehicle; a CI accompanied the detective to introduce him to a suspected narcotics dealer. The detective described the weather that day as "sunny out, nice."

Detective Hernandez was equipped with a "Kel," an instrument that allows surveilling officers to hear the audio of a transaction. Detective Hernandez arrived at an address on Elmer Street, at which point an adult male crossed the street and approached the passenger side of his vehicle. The detective described the man's appearance over the Kel as he approached.

When the man arrived at the passenger side window, the CI introduced him to Detective Hernandez as "Terrance." The detective then purchased two bags of "rock cocaine" from Terrance for twenty dollars. The detective said Terrance "leaned over a little bit towards the passenger door, so I could see him right through the passenger window, which was down." This enabled him to see Terrance "face-to-face."

Approximately two to three minutes after this exchange, Detective Hernandez met Sergeant Rick Pierce and other officers at a rendezvous location. Five to ten minutes later, Sergeant

Pierce handed Detective Hernandez a single photograph of defendant and told him to "look at the photo." Detective Hernandez viewed the photograph and identified defendant as "the guy I just bought from." According to the detective, Sergeant Pierce simply handed him the picture and did not say anything to lead him to believe it was defendant.

Sergeant Pierce testified he observed the transaction from a distance. He said the seller entered a car after completing the transaction and "rode right directly by me, . . . and I felt without a doubt it was Terrance Hooks, Sr."[1] Sergeant Pierce also noted Detective Hernandez provided descriptions of defendant both prior to and during their rendezvous. The sergeant decided to request a printout of the photograph due to "collaborative information," stating, "I [saw] who I thought was Terrance Hooks. Hernandez comes back to me and gives me a description that fits Mr. Hooks, who I observed." The sergeant said he "just handed [Detective Hernandez] the picture and asked him if he knew that subject."

The officers provided similar testimony at trial. Detective Hernandez said as defendant approached his vehicle, he described defendant through the Kel as a black male with dark skin, approximately five-foot-six, 155 to 165 pounds, between

[1] Sergeant Pierce had prior contacts with defendant.

thirty-four and thirty-six years old. He further noted defendant was shirtless, had a dreadlock hairstyle, and wore "blue capri pants."

Detective Hernandez testified that defendant, upon arriving at his passenger side window, "was introduced to me as Terrance." He did not specifically mention the CI. The detective reiterated defendant "leaned over" and that he could see defendant's face. Regarding his subsequent identification of defendant's photograph, the detective stated, "[A]s soon as I saw the picture, I said, yes, that's the individual that they — that I was introduced [to] as Terrance."

Sergeant Pierce testified he was stationed in a minivan on Elmer Street during the transaction. Detectives Csaszar and Dick accompanied him in this vehicle. Sergeant Pierce used binoculars to view the transaction and observed a black male with no shirt, dreadlock hair, capri shorts, and dark sneakers approach Detective Hernandez's car. The sergeant recognized the man as "Terrance Hooks, Sr." After Detective Hernandez completed the transaction, he called Sergeant Pierce to report he "just made a purchase of cocaine from a gentleman on — a gentleman introduced to him as Terrance on Elmer Street." Sergeant Pierce identified defendant as this individual in court.

Detective Joshua Thompson of the Bridgeton Police Department testified that Sergeant Pierce directed him to drive to an address on Elmer street "and see who I can see standing out there in front." At that location, the detective observed a man matching the description Sergeant Pierce provided. The detective recognized this man as Terrance Hooks and identified him in court.

Sergeant Luis Santiago testified he heard the operation through his police radio. After speaking with Sergeant Pierce, Sergeant Santiago drove to the address on Elmer Street and observed an individual matching the above descriptions. Sergeant Santiago identified defendant as the individual in court.

Detective Scott Csaszar testified he observed an individual approach Detective Hernandez's car on Elmer Street. He could not see the individual's face due to the distance, but he could tell it was an African American male with dreadlock hair, no shirt, and "long like shorts" past his knees. After Sergeant Santiago completed his drive-by, Detective Csaszar observed the individual in question enter a green van and drive past the police minivan. The detective viewed the individual through the windshield, stating, "I observed the subject that I know by the

name of Terrance Hooks." Detective Csaszar identified defendant as this individual in court.

Defendant did not testify but called his brother to testify. The brother described his own hairstyle as "[d]readlocks," and said other family members and friends also have dreadlocks. When asked to state his own height, the brother responded, "Five-six;" when asked if he knew defendant's height, he replied, "I think about five-three, five-two." The brother further testified defendant has seven or eight tattoos and has had them since 2003.[2] The brother was not asked to describe the tattoos nor state their size or location.

After the trial court sentenced defendant, he filed this appeal. He presents the following arguments for consideration:

> POINT I
>
> THE DEFENDANT'S RIGHT TO CONFRONTATION AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 10 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE CONFIDENTIAL INFORMANT'S STATEMENT IMPLICATING THE DEFENDANT.
>
> POINT II
>
> THE TRIAL COURT SHOULD HAVE COMPELLED DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

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[2] Detective Hernandez acknowledged on cross-examination he did not notice defendant's tattoos during the drug buy, nor did he mention the suspect had tattoos in his police report.

POINT III

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE IMPROPER ADMISSION OF UNNECESSARILY SUGGESTIVE IDENTIFICATION EVIDENCE.

POINT IV

THE SENTENCE IS EXCESSIVE.

We address these points in the order presented.

I.

Defendant first argues the State violated his right to confrontation by eliciting trial testimony that an unnamed person introduced defendant to Detective Hernandez as "Terrance." We agree this testimony violated defendant's Sixth Amendment rights. However, because we find this error harmless, we decline to reverse on this basis.

Criminal defendants have the constitutional right to confront the witnesses against them. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10; State v. Branch, 182 N.J. 338, 348 (2005). "The right of confrontation is an essential attribute of the right to a fair trial, requiring that a defendant have a 'fair opportunity to defend against the State['s] accusations.'" Branch, supra, 182 N.J. at 348 (quoting State v. Garron, 177 N.J. 147, 169 (2003), cert. denied, 540 U.S. 1160, 124 S. Ct.

1169, 157 L. Ed. 2d 1204 (2004)). The Confrontation Clause generally prohibits the use of hearsay statements at trial that are "testimonial or meant to establish events related to the current prosecution." State v. Weaver, 219 N.J. 131, 152 (2014) (citing Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224, 237 (2006)).

In State v. Bankston, our Supreme Court noted, "It is well settled that the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so 'upon information received.'" 63 N.J. 263, 268 (1973) (citation omitted). However, testimony where "the officer becomes more specific by repeating what some other person told him concerning a crime by the accused" violates both the rules of hearsay and the defendant's right to confrontation. Id. at 268-69 (citations omitted).

"The principle distilled from Bankston and its progeny is that testimony relating [to] inculpatory information supplied by a codefendant or other non-testifying witness identifying the defendant as the perpetrator of a crime deprives the accused of his or her constitutional rights." State v. Farthing, 331 N.J. Super. 58, 75 (App. Div.), certif. denied, 165 N.J. 530 (2000). "[B]oth the Confrontation Clause and the hearsay rule are

violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." Branch, supra, 182 N.J. at 350 (citing Bankston, supra, 63 N.J. at 268-69).

In the instant matter, the court held a N.J.R.E. 104(c) hearing to determine the admissibility of the testimony regarding the CI's introduction. The State argued the testimony was admissible under the "adoptive admission" hearsay exception, contending defendant assented to this identification by failing to object to being introduced as "Terrance." See N.J.R.E. 803(b)(2). Conversely, defense counsel requested the court limit the testimony to reflect that Detective Hernandez traveled to Elmer Street "upon information received," pursuant to Bankston, supra, 63 N.J. at 268.

The trial judge agreed the statement was hearsay and acknowledged the confrontation issue. Nevertheless, the judge permitted Detective Hernandez to testify he "was introduced to an individual [named] Terrance" without saying who made the introduction. The judge later stated, "I'm allowing the fact that there was an introduction made to [the detective], yes. So if you want to call it an adoptive admission, then it's an adoptive admission."

The State urges us to find the judge correctly admitted this testimony under the adoptive admission hearsay exception. We disagree. The trial testimony that defendant "was introduced [to Detective Hernandez] as Terrance" clearly violated his right to confrontation under Bankston and its progeny. By testifying that an unnamed third party introduced him to a drug dealer named "Terrance," Detective Hernandez conveyed "information from a non-testifying declarant to incriminate . . . defendant in the crime charged." Branch, supra, 182 N.J. at 350. As such, we find the trial court erred by permitting this testimony.

Nevertheless, we find this error does not constitute a basis for reversal. "When evidence is admitted that contravenes not only the hearsay rule but also a constitutional right," we "must determine whether the error impacted the verdict." Weaver, supra, 219 N.J. at 154 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710-11 (1965)). "The test of whether an error is harmless depends upon some degree of possibility that it led to an unjust verdict. The possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." Bankston, supra, 63 N.J. at 273 (citing State v. Macon, 57 N.J. 325, 335-36 (1971)). "[T]he question is whether there is a reasonable

possibility that the [error] complained of might have contributed to the conviction." State v. Slaughter, 219 N.J. 104, 119 (2014) (alterations in original) (quoting State v. Dennis, 185 N.J. 300, 302 (2005)).

Based on the trial testimony as a whole, we conclude this error was "harmless beyond a reasonable doubt." Weaver, supra, 219 N.J. at 154 (quoting Chapman, supra, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710-11). Defendant urges the opposite result, noting both Detective Hernandez and Sergeant Pierce testified regarding the introduction, and the prosecutor highlighted the issue during summation. Defendant further asserts the State relied on this hearsay to confirm the reliability of Detective Hernandez's identification. He contends the jury instruction to consider extrinsic evidence in evaluating the identification led the jury to scrutinize the statements.

However, in addition to Detective Hernandez and Sergeant Pierce, the State presented three more officers who witnessed defendant commit the drug offense. The officers' descriptions were consistent, and they identified defendant in court. Therefore, we find the Confrontation Clause violation did not contribute to the conviction, nor did it lead the jury to a

conclusion it would not have otherwise reached. Bankston, supra, 63 N.J. at 273.

II.

Defendant next argues the trial judge erred by denying his motion to disclose the CI's identity. Defendant asserts disclosure was necessary so he could confront the CI regarding the incriminating introduction. We disagree.

"Protecting the identity of informants is a privilege afforded to the State in recognition of its compelling need to protect its sources of information concerning criminal activity." State v. Brown, 170 N.J. 138, 149 (2001) (citing Roviaro v. United States, 353 U.S. 53, 59, 77 S. Ct. 623, 627, 1 L. Ed. 2d 639, 644 (1957)). Our Rules of Evidence contain a general prohibition against disclosing an informant's identity. See N.J.R.E. 516; N.J.S.A. 2A:84A-28.

However, the privilege against disclosure is not absolute. See State v. Florez, 134 N.J. 570, 578 (1994). The judge may order disclosure if he or she finds it is "essential to assure a fair determination of the issues." N.J.R.E. 516(b). The privilege will not apply "where disclosure 'is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause.'" State v. Milligan, 71 N.J. 373, 383 (1976) (quoting Roviaro, supra, 353 U.S. at 60-61, 77 S. Ct. at

627-28, 1 L. Ed. 2d at 645). In deciding this issue, we must apply the following balancing test, first described in Roviaro, supra, 353 U.S. at 62, 77 S. Ct. 628-29, 1 L. Ed. 2d at 646:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Our Supreme Court has adopted this test. See Milligan, supra, 71 N.J. at 384.

Under this standard, disclosure may be warranted where the CI participates in the crime or "plays an instrumental role in its occurrence." Milligan, supra, 71 N.J. at 386. Further, "even when an informer's involvement falls short of active participation in a criminal offense," a defendant can overcome the privilege against disclosure by showing "that the testimony of the informer is essential to preparing his defense[.]" Id. at 390. Disclosure may be necessary where the informant "might have been a material witness" and "was the only witness in the position to support or refute the testimony of the governmental witness." Florez, supra, 134 N.J. at 580 (citing Roviaro,

supra, 353 U.S. at 63-65, 77 S. Ct. at 629-30, 1 L. Ed. 2d at 647).

Conversely, "[p]roof that the informer witnessed the criminal transaction, without more, is usually considered insufficient to justify disclosure." Milligan, supra, 71 N.J. at 388 (citations omitted). Where "the role of the informer is confined to introducing the undercover agent to [the] defendant, the majority of decisions have refused to compel disclosure of the informer's identity." Id. at 388-89; see also State v. Varona, 242 N.J. Super. 474, 480 (App. Div. 1990) (denying disclosure where the informant introduced an undercover officer to the defendants, but "did not negotiate, conduct or set up any of the sales"), certif. denied, 122 N.J. 386 (1990).

We review the trial court's decision on disclosure for an abuse of discretion. State v. Sessoms, 413 N.J. Super. 338, 342 (App. Div. 2010). In the instant matter, the trial judge found disclosure was unnecessary because there was "no strong showing of need." Relying on Milligan and Varona, the judge noted the CI only provided the introduction and did not participate in the transaction.

We agree with the trial judge. Under Milligan, supra, 71 N.J. at 388-89, a mere introduction by the informant is generally insufficient to compel disclosure. Moreover, the CI's

testimony was not material to this matter, nor was it the only testimony available to support or refute the State's witnesses. Florez, supra, 134 N.J. at 580. The State provided several police witnesses, and defendant offered his brother's testimony to challenge the police identifications. Although defendant's introduction as "Terrance" violated the Confrontation Clause, testimony from the CI was not "essential" to his defense. Milligan, supra, 71 N.J. at 390. Therefore, we decline to reverse on this basis.

III.

Defendant further argues the trial judge erred by denying his motion to suppress Detective Hernandez's pretrial photo identification. We disagree.

An "impermissibly suggestive out-of-court identification" procedure can deny a defendant's right to due process because it "may 'give rise to a very substantial likelihood of irreparable misidentification.'" State v. Madison, 109 N.J. 223, 239 (1988) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968)). As such, our Supreme Court adopted the two-prong test developed by United States Supreme Court to determine the admissibility of eyewitness

identifications.[3] See State v. Herrera, 187 N.J. 493, 503-04 (2006).

The first prong requires the court to "ascertain whether the identification was impermissibly suggestive." Id. at 503. One-on-one show-up identifications are "inherently suggestive," but do not automatically rise to the level of impermissibility. Id. at 504. Instead, the test for this prong turns on "whether the choice made by the witness represents his own independent recollection or whether it in fact resulted from the suggestive words or conduct of a law enforcement officer." State v. Adams, 194 N.J. 186, 203 (2008) (quoting State v. Farrow, 61 N.J. 434, 451 (1972)).

If the court determines the identification procedure was impermissibly suggestive, the second prong requires the court to decide "whether the impermissibly suggestive procedure was nevertheless reliable." Herrera, supra, 187 N.J. at 503-04. The court must consider the "totality of the circumstances . . .

[3] In State v. Henderson, 208 N.J. 208, 288-89 (2011), the New Jersey Supreme court expanded this framework into a four-step inquiry and altered the analysis of identification evidence. However, the Court applied this new rule "purely prospectively" to "cases in which the operative facts arise after the new rule has been announced." Id. at 220, 301-02 (quoting State v. Knight, 145 N.J. 233, 249 (1996)). The operative facts here occurred on June 23, 2011, and the Court decided Henderson on August 24, 2011. Therefore, the pre-Henderson framework applies. See, e.g., State v. Micelli, 215 N.J. 284, 287 (2013) (applying the older standard because the identifications were completed prior to the decision in Henderson).

in weighing the suggestive nature of the identification against the reliability of the identification." Id. at 504. Factors for determining reliability include "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." Id. at 507 (quoting Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977)).

We afford substantial weight to the trial court's factual findings on the admissibility of identification evidence. Adams, supra, 194 N.J. at 203. At the pretrial suppression hearing in the instant matter, the judge reviewed the testimony and found the officers credible. He then determined the identification was not impermissibly suggestive, noting, "The only information provided to [Detective Hernandez] was the photograph, do you recognize him?" The judge also concluded the identification was reliable because the detective purchased the drugs himself, viewed the suspect within two feet of his person, described him accurately, and viewed the photograph less than ten minutes after the transaction.

Based on our deferential standard of review, we discern no basis to disturb the trial judge's decision to allow the State to present testimony regarding Detective Hernandez's pretrial photo identification of defendant. Regarding the first prong, it is clear Sergeant Pierce did not speak or act in a way that could have influenced Detective Hernandez's identification. Detective Hernandez testified that Sergeant Pierce "just said look at the photo"; the judge found this testimony credible. Therefore, we find the identification was not "impermissibly suggestive." Herrera, supra, 187 N.J. at 503.

We further find the identification was reliable under the totality of the circumstances. Id. at 504. Detective Hernandez personally made the buy and observed defendant leaning into his vehicle. It was a clear and sunny day. The detective viewed the photograph at most fifteen minutes after the transaction. He is an experienced and highly trained undercover police officer. See State v. Little, 296 N.J. Super. 573, 580 (App. Div.) ("There can be no dispute that a trained undercover police officer has heightened awareness of the need for proper identification of persons who engage in drug purveyance."), certif. denied, 150 N.J. 25 (1997). Therefore, we decline to reverse on this basis.

IV.

In his final point, defendant argues he received an excessive sentence. Defendant contends the judge should have sentenced him to a lesser three-year term, rather than six-year term. We disagree.

First, a three-year sentence was impossible in light of defendant's mandatory extended term of five to ten years. Under N.J.S.A. 2C:43-6(f), a person convicted of possessing drugs with intent to distribute, N.J.S.A. 2C:35-5, and who also has a previous conviction for possessing drugs with intent to distribute, "shall upon application of the prosecuting attorney be sentenced by the court to an extended term" pursuant to N.J.S.A. 2C:43-7. This provision, N.J.S.A. 2C:43-7(a)(4), sets the term for a third-degree offense between five to ten years.

Prior to sentencing, the State applied for an extended term. The judge reviewed defendant's criminal history, finding he had a previous conviction for distributing drugs in a school zone, N.J.S.A. 2C:35-7. Therefore, the court correctly determined defendant was subject to a mandatory minimum five-year term.

Defendant further argues the judge erred in his application of the aggravating and mitigating sentencing factors. We review sentencing decisions pursuant to an abuse of discretion

standard. State v. Blackmon, 202 N.J. 283, 297 (2010). If the sentencing judge has identified and balanced the aggravating and mitigating factors, and the factors are supported by sufficient credible evidence in the record, we will affirm. State v. Cassady, 198 N.J. 165, 180-81 (2009). We will modify a sentence if it "shocks the judicial conscience." State v. Roth, 95 N.J. 334, 364 (1984) (citing State v. Whitaker, 79 N.J. 503, 512 (1979)). However, we must remand if the sentencing judge fails to find mitigating factors that "clearly were supported by the record." State v. Bieniek, 200 N.J. 601, 608 (2010) (citation omitted).

Here, the judge found aggravating factors N.J.S.A. 2C:44-1(a)(3) (risk defendant will reoffend); (6) (prior criminal record and seriousness of offense), and (9) (need for deterrence). The judge found mitigating factors N.J.S.A. 2C:44-1(b)(1) (defendant's conduct did not threaten or cause serious harm); (9) (defendant's attitude indicates he is unlikely to commit another offense); and (11) (substantial hardship to defendant or his dependents).[4] The judge then determined the mitigating factors "slightly outweighe[d]" the aggravating factors and sentenced defendant to six years of imprisonment.

[4] The judge did not specifically list mitigating factor one at the beginning of defendant's judgment of conviction, but he gave it "moderate weight" later in the document. Moreover, the judge found this factor during the sentencing hearing.

Defendant argues the judge incorrectly found aggravating factors three and nine, and should have found other mitigating factors. These arguments lack merit. The judge gave clear reasons for his conclusions, which the record supports. Cassady, supra, 198 N.J. at 180. Moreover, due to the statutory minimum term, defendant's six-year sentence does not "shock[] the judicial conscience." Roth, supra, 95 N.J. at 364.

Affirmed.