

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4841-14T1

STATE OF NEW JERSEY
IN THE INTEREST OF J.H.,
A JUVENILE.

Submitted April 26, 2017 – Decided September 8, 2017

Before Judges Fuentes and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FJ-20-0651-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Janet A. Allegro, Designated Counsel, on the briefs).

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Milton S. Leibowitz, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

J.H., a juvenile, appeals from an adjudication of delinquency entered by the Family Part following trial on a complaint alleging acts of delinquency that, if committed by an adult, would constitute third-degree unlawful possession of a weapon (rifle or

shotgun), N.J.S.A. 2C:39-5(c) (count one);¹ second-degree unlawful possession of a weapon, (assault firearm), N.J.S.A. 2C:39-5(f) (count two); fourth-degree possession of prohibited weapons and devices (hollow nose bullets), N.J.S.A. 2C:39-3(f) (count three); and fourth-degree possession of prohibited weapons and devices (a large capacity ammunition magazine), N.J.S.A. 2C:39-3(j) (count five).² Following the bench trial, the court entered a dispositional order committing J.H. to the custody of the Juvenile Justice Commission (JJC) to be incarcerated at the Training School for Boys for an aggregate term of thirty months. We affirm.

The record shows that on the afternoon of January 16, 2015, J.H. was the front seat passenger in an Audi bearing New York license plates that crashed into another vehicle following a high-speed police chase. After the crash, the Audi came to a complete stop in the middle of the street at the intersection of Watchung Avenue and East 6th Street in Plainfield, and its airbags deployed from the impact. The four occupants of the Audi immediately exited

¹ Prior to trial, the count was amended to correct the statutory citation, the degree of the offense and the weapon allegedly possessed.

² J.H. was also charged in count four of the complaint with obstructing the administration of law, a disorderly persons offense, N.J.S.A. 2C:29-1B. However, prior to trial, J.H. entered an admission to the charge and does not challenge the adjudication of delinquency on that charge or the concurrent six-month disposition in this appeal.

the vehicle and fled on foot. J.H. was apprehended trying to climb over a fence and provided a false name to police. The firearms and ammunition were found in plain view in the front and back seat of the Audi.

At trial, the evidence presented by the State consisted of the testimony of Plainfield Police Officers Ronald James, William Guy, Jesse McNeil, and Sergeant Ronald Fusco, as well as Lieutenant Michael Sanford who was qualified as an expert in forensic analysis and ballistics. J.H. testified on his own behalf.

James identified J.H. as the juvenile who was in the front passenger seat of the Audi. He chased J.H. for approximately 200 yards, through city streets and local yards, until he apprehended him climbing a fence. James arrested J.H. who stated that he was sixteen-years-old and provided the false name "John King." Guy corroborated James' account that J.H. was the front seat passenger from Guy's "clear view of him." While in pursuit of the Audi's fleeing occupants, McNeill observed two weapons in plain view as he passed the Audi, prompting him to stop to secure the vehicle. On the floor of the rear passenger seat, he observed a large assault weapon with an affixed ammunition magazine. McNeill testified that the assault weapon was so large that it could not fit under the car seat. On the front seat passenger side, wedged between the seat cushion and the door, was a large rifle protruding

in plain view. McNeill testified that he did not observe any carrying cases or containers for the firearms in the Audi.

Fusco, who arrived at the scene after the collision, confirmed the location of both firearms in the Audi. The driver, later identified as Tasheem Punter, and the rear passenger side occupant, later identified as Dave Fulford, both adults, were arrested. The fourth occupant, who purportedly sat in the rear driver side seat, escaped apprehension. Fulford stated that the "chopper," referring to the assault weapon, was his. Fusco secured the weapons, which were later stored at police headquarters.

Sanford tested both weapons and determined that they were both operable. He testified that the rifle was a semi-automatic SKS rifle loaded with ten 7.62 by 39mm hollow point bullets. According to Sanford, the assault weapon was a Cobray Model M-11 assault weapon with a detachable large capacity magazine which was loaded with fourteen 9mm hollow point bullets and one "full metal jacket cartridge."

J.H. testified that on the date in question, he was living in Newburgh, New York, and accompanied his friend's older brother, Fulford, and another acquaintance, Punter, in Punter's Audi from Newburgh to meet up with Punter's family in Plainfield. According to J.H., Punter was the driver, Fulford sat in the rear driver's side seat and J.H. sat in the rear passenger side seat. J.H.

testified that no one sat in the front passenger seat during the ride to Plainfield.

According to J.H., he dozed off for about thirty minutes during, what he approximated was, a two-hour ride. J.H. testified that while enroute to Plainfield, they stopped in Irvington to pick up one of Punter's friends, whom he identified as Rock. Thereafter, according to J.H., they drove to and around Plainfield and smoked marijuana in the car. J.H. testified that although he remained in the car for the entire trip, he did not observe Rock carrying anything when he entered the car, was not aware of any weapons found in the car, and could not explain their presence.

Following trial, Judge Robert Kirsch issued his written findings of fact and conclusions of law. He accorded great weight to the testimony of the four officers, finding them to be credible witnesses. Judge Kirsch stated that "[e]ach testified clearly and professionally, and exhibited excellent eye contact with the questioner[,]" acknowledging "when they could not recall in response to a posed question." Judge Kirsch found that "[n]one of the officers appeared to have an animus or even familiarity with J.H.," and "[t]here appeared to be no testimonial embellishments[.]" Judge Kirsch noted "importantly, the officers corroborated each other in multiple material respects." Judge

Kirsch found the expert testimony of Lieutenant Sanford "equally persuasive" and that he was "a most credible witness."

On the other hand, Judge Kirsch found J.H.'s testimony "incredible[,] "self-serving and utterly implausible" and "contrary to the corroborated evidence at trial[.]" He described J.H.'s testimony as "patently unreasonable[,] defying "common sense and common experience." According to Judge Kirsch,

If [J.H.] were seated in the front passenger seat, which the court finds based on the credible testimony of law enforcement, he would have necessarily been resting on the approximately 33 inch semi-automatic rifle, loaded with hollow nose bullets. If he were in the back driver's side seat, as he claimed, he would be but a few feet from the assault weapon, likewise loaded with hollow nose bullets, lying on the floorboard in the same rear compartment on the passenger's side, fully exposed, openly and notoriously, and within his easy grasp.

Judge Kirsch concluded that the State proved beyond a reasonable doubt that J.H. committed the charged offenses. Preliminarily, the judge recounted the elements of each offense as well as the principles of constructive and joint possession articulated in State v. Morrison, 188 N.J. 2, 14-15 (2006) and State v. Mendez, 175 N.J. 201, 212 (2002). As to the weapons possession charges, the judge cited State v. Bolton, 230 N.J. Super. 476, 480 (App. Div. 1989) to support his reliance on the permissive inference permitting the factfinder to infer possession

of the weapons by all occupants when the vehicle has more than one occupant. N.J.S.A. 2C:39-2. Applying his factual findings to the applicable legal principles, the judge reasoned:

J.H.'s position in the car necessitated that he be aware of, and likely in physical contact with, one of the weapons. In such a situation, wherein two rather large firearms are contained in a modestly sized vehicle and one of them rested by necessity against J.H.'s leg, the court finds that he was more than "merely present" in the vehicle with the weapons. The court draws the reasonable inference that if J.H. was aware of and in contact with the loaded rifle. . . , as necessitated by his position in the car, that he would have no knowledge of the similarly loaded assault weapon lying directly behind him on the floor of the backseat is entirely implausible. Furthermore, . . . [t]he court considers J.H.'s evasive actions as circumstantial evidence of his consciousness of guilt, bolstering the inference that he possessed the weapons. . . .

The court also draws a reasonable inference and finds that J.H. did not have a permit to bear the rifle J.H. did not present a valid firearms purchaser identification card, and in fact was too young to have obtained one at the time of the offense. . . . Similarly, the court finds that the assault weapon . . . could not have been properly licensed as to J.H. in accordance with N.J.S.A. 2C:58-5(b) for the same reason that J.H. could not have obtained a valid firearms purchaser identification card. Finally, Lieutenant Sanford credibly testified as to the testing he performed that demonstrated both weapons were operable.

Regarding the hollow nose bullets, which the court described "as evident to even the uneducated observer as they display a visible hole[,]" and the "detachable, and quite visible, high capacity magazine[,]" the judge noted:

J.H. was seated in the Audi within inches of the SKS rifle loaded with hollow nose bullets, and directly behind him in the vehicle the Cobray Model M-11 assault firearm, fitted with a [high capacity] magazine and likewise loaded with hollow nose bullets. . . . The court finds it highly implausible that he could be in possession of two loaded firearms, seated within inches of one and feet of another, for several hours, and be unaware that they were loaded. . . . The court thus finds that J.H. was in knowing possession of both hollow nose bullets and a high capacity magazine.

On May 1, 2015, Judge Kirsch conducted a dispositional hearing. After reviewing the Pre-Disposition Report, the judge found the following aggravating factors: the character and attitude of the juvenile indicate he is likely to commit another offense, N.J.S.A. 2A:4A-44(a)(1)(c); the juvenile's prior record and seriousness of prior adjudications of delinquency, N.J.S.A. 2A:4A-44(a)(1)(d); the need for deterring the juvenile and others from violating the law, N.J.S.A. 2A:4A-44(a)(1)(g); the fact that the juvenile on two separate occasions was adjudged a delinquent on the basis of acts which if committed by an adult would constitute crimes, N.J.S.A. 2A:4A-44(a)(1)(i); the impact of the offense on the community, N.J.S.A. 2A:4A-44(a)(1)(k); and the

threat to the safety of the public or any individual posed by the juvenile, N.J.S.A. 2A:4A-44(a)(1)(1). In mitigation, the judge found that the juvenile would participate in a program of community service, N.J.S.A. 2A:4A-44(a)(2)(g).

Acknowledging that J.H. was seventeen-years-old and a resident of New York, the judge noted J.H.'s recent prior New York adjudication for "a very serious aggravated assault" during which J.H. shot "another individual in the face repeatedly" and was "put on probation[.]" The judge also noted that given the nature of the weapons in this case and the fact that they were both loaded, "[t]he only purpose of these incredibly lethal weapons was to kill." The judge observed that possession of loaded weapons was not a victimless crime but rather crimes "awaiting a victim." Based on J.H.'s "prior assaultive adjudication . . . and in short order, his possession of these two loaded weapons," which the court characterized as "out of control dangerous behavior that could result in his death or somebody else's[,]" the judge concluded that "the aggravating factors qualitatively and quantitatively substantially outweigh" the sole mitigating factor. This appeal followed.

On appeal, J.H. raises the following arguments for our consideration:

POINT I

THE COURT'S FINDING OF DELINQUENCY WAS NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD AND MUST BE REVERSED.

A. THE COURT ERRED IN FINDING J.H. HAD CONSTRUCTIVE POSSESSION OF THE WEAPONS.

B. THE COURT ERRED IN FINDING THAT J.H.'S DEPARTURE FROM THE ACCIDENT SCENE CONSTITUTED FLIGHT.

C. THE COURT ERRED IN FINDING THAT J.H. CONSTRUCTIVELY POSSESSED THE AMMUNITION.

POINT II

THE SENTENCE IMPOSED BY THE COURT WAS EXCESSIVE.

Our scope of review in juvenile delinquency cases is the same as the one applicable to a court's decision after a bench trial. State ex rel. L.E.W., 239 N.J. Super. 65, 76 (App. Div.), certif. denied, 122 N.J. 144 (1990). In order to find a violation, the court must conclude that the State proved each element of the offense charged beyond a reasonable doubt. State ex rel J.G., 151 N.J. 565, 593-94 (1997). We are bound by the findings of the court that are supported by adequate, substantial, and credible evidence. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). We do not engage in an independent assessment of the evidence as if "[we] were the court of first

instance." State v. Johnson, 42 N.J. 146, 161 (1964). Rather, we give special deference to the trial judge's findings, particularly those that are substantially influenced by the judge's opportunity to observe the witnesses directly. Johnson, supra, 42 N.J. at 162. However, we need not defer to the trial judge's interpretation of the law. State v. Brown, 118 N.J. 595, 604 (1990).

J.H. argues that "[t]he trial court's decision finding J.H. guilty of all of the charges was not supported by sufficient, credible evidence, and therefore, the court's findings and legal conclusions should be afforded no deference." J.H. asserts that "the evidence was insufficient to show that J.H. constructively possessed the weapons and hollow point bullets recovered from the vehicle" because "[t]here did not exist scientific, circumstantial or evidence by inference" to establish constructive possession beyond a reasonable doubt. Further, J.H. asserts that his departure from the scene "was not sufficient evidence of consciousness of guilt." In addition, J.H. contends that his sentence "was unduly excessive" and "[t]he court clearly erred in only finding one mitigating factor[.]" We affirm substantially for the reasons set forth in Judge Kirsch's thorough and thoughtful written decision of April 23, 2015, and his oral findings during

the May 1, 2015 dispositional hearing. We add only the following brief comments.

Constructive possession arises out of an individual's conduct with regard to the subject item. State v. Schmidt, 110 N.J. 258, 268 (1988). Current immediate control and dominion are not required; rather, the State must prove beyond a reasonable doubt that the juvenile had the capacity, by direct or indirect means, to gain almost immediate physical control, and the ability to affect the item during the time in question. Id. at 270. In Schmidt, the Court listed clear applications of constructive possession in its opinion, including an apropos example wherein the Court found that the front seat passenger of a vehicle constructively possessed a flare gun on the car dashboard. Id. at 271 (citations omitted).

A determination of constructive possession is fact-sensitive and requires careful scrutiny by a court. See State v. Palacio, 111 N.J. 543 (1988). Here, the credible evidence adduced at trial demonstrated beyond a reasonable doubt that J.H. had the capacity, by direct means, to gain almost immediate physical control of both weapons, and the ability to affect same during the time in question. While mere presence alone cannot serve as grounds for inferring constructive possession, State v. Brown, 80 N.J. 587, 593 (1979), there is far more than mere presence in this case,

including J.H.'s proximity to the firearms, the size of the firearms compared to the size of the Audi, and J.H.'s flight as consciousness of guilt. These factors supported Judge Kirsch's rejection of J.H.'s argument that the absence of scientific evidence connecting him to the firearms was dispositive. Furthermore, under N.J.S.A. 2C:39-2, there is a statutory presumption that a firearm found in a vehicle is in the possession of all of the occupants, except under delineated exceptions, none of which apply in this case.

As to the disposition, we note that "[t]he rehabilitation of juvenile offenders is the goal of the juvenile justice system." State in Interest of K.O., 217 N.J. 83, 92 (2014). The Juvenile Code "balances its intention to act in the best interests of the juvenile and to promote his or her rehabilitation with the need to protect the public welfare." Ibid. "While rehabilitation of juveniles has historically been at the heart of juvenile justice, modern experiences with serious juvenile crimes have elevated the importance of punitive sanctions in juvenile dispositions." Ibid. (citations omitted). In this regard, our Supreme Court has noted that "the Legislature underscored that the Code's sanctions are not just for the purpose of accomplishing rehabilitation but are also designed to promote accountability and protect the public." Ibid. (citation omitted). The judge's decision that "the

aggravating factors qualitatively and quantitatively substantially outweigh[ed]" the sole mitigating factor finds ample support in the record and we discern no basis upon which to disturb his decision.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION