SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5468-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLEMENT ROMANS, a/k/a ANTHONY ROMANS, CLEMENT A. ROMANS, CLEMENT ROMAN, CLEMENTE ROMAN, and PAUL ROMAN,

Defendant-Appellant.

Argued January 26, 2017 - Decided March 24, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-12-2980.

Thomas R. Ashley argued the cause for appellant.

Arielle E. Katz, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Lila B. Leonard, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

A jury found defendant guilty of all five counts of an Essex County indictment, convicting him of third-degree aggravated assault with a deadly weapon, N.J.S.A. 2C:12-1(b)(2) (a lesser-included offense of count one); second-degree unlawful possession of weapons, N.J.S.A. 2C:39-5(b) (count two); second-degree possession of weapons for unlawful purposes, N.J.S.A. 2C:39-4(a) (count three); fourth-degree possession of hollow nose bullets, N.J.S.A. 2C:29-3(f) (count four); and fourth-degree tampering with evidence, N.J.S.A. 2C:28-6(1) (count five). The court merged count three into count one and sentenced defendant to eight years of imprisonment with four years of parole ineligibility, pursuant to the Graves Act, N.J.S.A. 2C:43-6(c). The court imposed the same sentence on count two, concurrent with count one, and sentenced defendant to concurrent eighteen-month sentences on counts four and five.

On appeal, defendant challenges the denial of his suppression motion and his sentence, raising the following arguments:

> POINT ONE
>
> THE STATE FAILED TO ADDUCE CLEAR AND CONVINCING PROOF THAT IT WOULD HAVE INEVITABLY DISCOVERED THE VIDEOTAPE [THIS ISSUE WAS RAISED IN THE COURT BELOW].
>
> POINT TWO
>
> THE UNRESOLVED ISSUE OF WHETHER THERE EXISTS A MASSACHUSETTS CRIMINAL CONVICTION REQUIRES THE SENTENCE BE VACATED AND THE MATTER

REMANDED FOR RESOLUTION AND RESENTENCING [THIS ISSUE WAS RAISED IN THE COURT BELOW].

After reviewing the record in light of the contentions advanced on appeal, we affirm.

I.

We discern the following facts from the record of the suppression hearing. On June 29, 2013, at approximately 10:30 p.m., a group of males flagged down Newark Police officers on Lyons Avenue. The males reported one of the individuals received a gunshot wound to his neck while in the vicinity of the Golden Krust restaurant, located on Lyons Avenue. Defendant co-owns the Golden Krust with his wife.

The police requested the major crimes unit respond to the scene. Shortly thereafter, Sergeant Jerome Ramsey, Detective Roberto Padilla, and Detective Pablo Gonzalez arrived at the area of the Golden Krust.

P.W., a golden Krust employee working that night, testified that around closing time two individuals entered the restaurant and assaulted her co-worker. She noted there were "about four kids" inside the store and "a lot" of people outside. P.W. also testified the Golden Krust had a video surveillance system, which would capture any individual who entered through the front door. She knew the system operated from the back office but had never accessed it herself.

R.S., another Golden Krust employee, also testified regarding the night in question. At approximately 10:30 p.m., defendant approached R.S. in the kitchen, handed him a gun, and instructed him to place it in a garbage can. Twenty minutes later, a police officer entered the kitchen and asked for the "boss." R.S. directed the officer to defendant's office, located beyond the kitchen. At this point, defendant, R.S., and several other employees were the only persons in the restaurant besides the police.

Sergeant Jerome Ramsey testified that, upon arriving at the scene, patrol officers informed him a juvenile had been shot, and the Golden Krust might have video of the incident; he then entered the restaurant and asked defendant if he could watch the video. Defendant gave him permission to do so. Sergeant Ramsey did not consider defendant a suspect at that point, as he had no reason to implicate defendant in the crime. If defendant refused to let him watch the video, Sergeant Ramsey stated he would have sought a warrant or subpoena.

Sergeant Ramsey determined defendant was a suspect while viewing the video in defendant's office. The video showed a person leave the restaurant and then return with a gun, which he "fumbled around with." Sergeant Ramsey realized the individual was in

charge of the restaurant after he observed the person come out of the office wearing a different shirt than when he entered.

The video further showed a person other than defendant place the gun in a garbage can. After viewing the video, Sergeant Ramsey went to remove the garbage bag from the can. Crime scene investigators photographed the gun inside the garbage bag, and then police took the gun from the bag and seized it. Sergeant Ramsey acknowledged neither defendant nor any other employee gave him permission to search the garbage can.

Detective Pablo Gonzalez testified as the lead investigator responding to the incident. He received notification of a shooting at Lyons Avenue and that emergency services were transporting the victim to Rutgers Hospital. According to the detective, upon arriving at the restaurant, defendant escorted Sergeant Ramsey to the rear of the store so he could view the surveillance video. The detective did not accompany the sergeant, stating, "I . . . informed Sergeant Ramsey that I would be responding to the hospital and to the second scene to attempt to gather information because we were told that the victim was in critical condition." He further instructed Detective Padilla to canvass the parking lot, noting, "There were several cameras located out there."

Detective Roberto Padilla testified that as the secondary detective, he was responsible for canvassing the area for security

cameras and witnesses. He located a camera belonging to a security company for the nearby mall; after leaving the restaurant, he arranged to obtain the footage. Sergeant Ramsey later viewed this "outside" camera as part of his investigation, which depicted a man in a black shirt and light colored pants exit a building to the left, go to a vehicle, and then approach a crowd of people. The crowd dispersed after the individual approached.

Defendant testified last, stating he was in his office when police arrived and escorted him outside. Defendant said he never gave Sergeant Ramsey permission to view the video.

At the conclusion of testimony, the court heard arguments from counsel. The prosecutor argued police lawfully viewed the Golden Krust footage and seized the gun under several legal theories, including consent, exigent circumstances, and abandonment. The trial judge rejected these theories, finding the State "failed to prove the validity and reasonableness of the warrantless search[,] [a]nd has also failed to satisfy any of the exceptions to the warrant requirement." The judge also found the testifying detectives "overall lacked some credibility and consistency in their testimony" because they could not agree on critical moments in the case, most notably, how they obtained defendant's consent to view the surveillance tape.

Nevertheless, the judge concluded the "inevitable discovery doctrine" rendered admissible both the surveillance footage and the gun. The judge therefore denied defendant's suppression motion on this basis.

On appeal, defendant argues the judge incorrectly applied the inevitable discovery doctrine. The State urges us to affirm, but in the alternative, argues the judge erred by rejecting exigent circumstances and abandonment as justifications for the weapon seizure.

We defer to the trial court's findings of fact in a suppression hearing "so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Elders, 192 N.J. 224, 243 (2007) (citation omitted). Conversely, we review the trial court's interpretation of the law de novo. State v. Rockford, 213 N.J. 424, 440 (2013); State v. Shaw, 213 N.J. 398, 411 (2012).

"The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution both guarantee '[t]he right of the people to be secure . . . against unreasonable searches and seizures[.]'" Shaw, supra, 213 N.J. at 409 (alterations in original) (quoting U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7). Warrantless searches and seizures by law enforcement officers are "presumptively invalid." State v.

Pineiro, 181 N.J. 13, 19 (2004). The State has the burden of proving that such searches and seizures are "justified by one of the 'well-delineated exceptions' to the warrant requirement." Shaw, supra, 213 N.J. at 409 (quoting State v. Frankel, 179 N.J. 586, 598, cert. denied, 543 U.S. 876, 125 S. Ct. 108, 160 L. Ed. 2d 128 (2004)).

Where no such exception exists, "[t]he exclusionary rule generally bars the State from introducing into evidence the 'fruits' of an unconstitutional search or seizure." Id. at 412-13 (quoting Wong Sun v. United States, 371 U.S. 471, 485, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441, 454 (1963)). "Under the exclusionary rule, 'the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.'" State v. Smith, 212 N.J. 365, 388 (2012) (quoting Nix v. Williams, 467 U.S. 431, 443, 104 S. Ct. 2501, 2508, 81 L. Ed. 2d 377, 387 (1984)).

The inevitable discovery doctrine is an exception to the exclusionary rule. Nix, supra, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d at 387. "If the State can show that 'the information ultimately or inevitably would have been discovered by lawful means . . . the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received.'" State v. Maltese, 222 N.J. 525, 551-52 (2015) (alterations in

original) (quoting Nix, supra, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d at 387-88), cert. denied, ___ U.S. ___, 136 S. Ct. 1187, 194 L. Ed. 2d 241 (2016).

In order to invoke the doctrine in New Jersey, the State must show by clear and convincing evidence that:

> (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of such evidence by unlawful means.
>
> [State v. Keaton, 222 N.J. 438, 451 (2015) (quoting State v. Sugar, 100 N.J. 214, 238 (1985) (Sugar II)).]

The State must demonstrate, "had the illegality not occurred, it would have pursued established investigatory procedures that would have inevitably resulted in the discovery of the controverted evidence, wholly apart from its unlawful acquisition." Sugar II, supra, 100 N.J. at 240. "[T]he central question to be addressed in invoking the 'inevitable discovery' rule 'is whether that very item of evidence would inevitably have been discovered, not merely whether evidence roughly comparable would have been so discovered.'" State v. Worthy, 141 N.J. 368, 390 (1995) (citation omitted). However, "the State need not demonstrate the exact circumstances of the evidence's discovery . . . . It need only

present facts sufficient to persuade the court, by a clear and convincing standard, that the [evidence] would be discovered." Maltese, supra, 222 N.J. at 552 (alterations in original) (quoting State v. Sugar, 108 N.J. 151, 158 (1987) (Sugar III)).

In his oral opinion denying defendant's motion to suppress, the trial judge made the following findings of fact supporting inevitable discovery:

> First, I find that dispatch indicated to Sergeant Ramsey and Detective [Padilla] and Detective Gonzalez that a juvenile was shot outside or in the vicinity of the Golden Krust restaurant, located at 467 Lyons Avenue.
>
> Two, that the restaurant was open to the general public, with enough traffic going in and out of the — in and out that the officers could suspect, at the very least, that someone inside the restaurant may have been able to provide information concerning the shooting.
>
> Three, as standard police procedures include canvasing the area where the crime occurred for surveillance footage.
>
> Four, surveillance footage recovered from a nearby business showed the shooting, an individual who appears to be the shooter walking into the Golden Krust restaurant.
>
> Refusal by a defendant — by the defendant, certainly would have aroused suspicion in the minds of the investigating officers as to the contents of the surveillance tape, which certainly would have led to the — as part and parcel of . . . normal investigative procedures, would have led to the application for and the granting of a search warrant for the subject tapes.

> And, of course, I also find that had the search warrant been granted, a review of the tapes would have revealed all of the information that the [c]ourt previously referred to as Mr. Romans' involvement in the subject incident.
>
> . . . .
>
> I also note that, from the facts presented to the [c]ourt, that regular police procedures were already being utilized by the officers conducting the investigation. . . . I note the officers' testimony as to their canvassing of the area, securing the premises [of] the restaurant[.]

The judge concluded the "combination" of these factors demonstrated, by clear and convincing evidence, that police would have inevitably discovered the surveillance video through normal police procedures, and this video would have inevitably led police to the gun in the garbage can.

Defendant challenges this reasoning, arguing his theoretical refusal to show police the footage cannot establish probable cause for a warrant. Defendant also raises factual challenges, asserting the judge erred because there were no patrons in the restaurant when police arrived. He further notes the Golden Krust did not have outdoor cameras, and police had already obtained outside footage "merely show[ing] a person with a weapon." Defendant contends the State did not prove the investigation would have resulted in police obtaining a search warrant, and inevitable

discovery is inapplicable where police misconduct "proximately causes" the discovery of incriminating evidence.

We reject these arguments. In applying the facts established at the suppression hearing, we find the State proved by clear and convincing evidence the three elements of the inevitable discovery doctrine. First, as the trial judge noted, the detectives followed normal procedures by canvassing the area for video cameras and witnesses. See Sugar II, supra, 100 N.J. at 238. Detective Padilla obtained footage from an outside security camera in this manner, which partially depicted the incident in question.

Second, considering all of the surrounding circumstances, canvassing the area for cameras and witnesses would have inevitably led the detectives to the Golden Krust security footage. See Ibid. The outside security video showed an individual come out of a building and cause a crowd to disperse. Police would have investigated the nearby buildings, leading them to the Golden Krust.

Moreover, police would have discovered the footage and gun by interviewing the witnesses. P.W.'s testimony suggests the incident stemmed from the initial assault of her co-worker. Police would have interviewed P.W. about this incident, leading them to discover her knowledge of the surveillance system. Police also would have interviewed R.S., who placed the gun in the trash can.

Detective Gonzalez further stated he planned to travel to the hospital to interview the victim about the shooting, which would lead him to the Golden Krust.

Last, we find the State proved that "discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means." Ibid. The trial judge noted, had defendant refused to show police the video, their suspicion would have led police as "part and parcel of . . . normal investigative procedures" to apply for and obtain a warrant. However, we find the record shows police had probable cause to obtain a warrant based on the other aspects of the investigation. Specifically, the outside video and witness statements, especially the information regarding an assault inside the restaurant, would have established probable cause for warrant "independent[]" of the police illegality. Ibid.

Therefore, we conclude the State presented clear and convincing evidence the police would have discovered the Golden Krust surveillance video wholly independently of its discovery by unlawful means. This footage would have inevitably led police to discover the gun. Consequently, we find no basis to disturb the trial judge's ruling. Because the trial judge did not err regarding his findings and conclusions as to the application of

the inevitable discovery doctrine, we decline to address the State's alternate arguments.

II.

Defendant also urges us to remand this matter for an evidentiary hearing and resentencing, alleging the trial judge relied on an inaccurate criminal history report as the basis for his sentence. After reviewing the record, we decline to reverse on this basis.

Defendant's argument stems from an alleged error in the State's presentence report (PSR). According to the PSR, Massachusetts convicted defendant of "[t]rafficking cocaine" in 1991, resulting in a five-to-ten year custodial sentence. Defendant, however, asserts Massachusetts acquitted him of this offense. He provides several documents from Massachusetts to support this claim, including a jury verdict sheet, the court clerk's log, and a report from the Massachusetts Criminal History Systems Board. These documents state defendant was found not guilty of trafficking cocaine on December 18, 1991.

The judge addressed this discrepancy during sentencing, noting he ordered the Probation Department to produce the current PSR after he learned of this issue. The judge found this information accurate, stating,

> [A]t least pursuant to the information provided to me by the Probation Department,

> [defendant's charge] resulted in an imposition of a custodial sentence of five to ten years. Now that's open to dispute, but as far as I'm concerned that's what the record shows.
>
> . . . .
>
> If it turns out to be that those records are incorrect, so be it. There's plenty of other information. There's plenty of other arrests and convictions . . . that the [c]ourt will address at the appropriate time.

The judge reviewed defendant's criminal history during his discussion of the aggravating and mitigating sentencing factors. He noted defendant had sixteen known arrests and/or complaints filed against him, resulting in one indictable conviction for trafficking the cocaine, as well as eight miscellaneous disorderly persons convictions, the latest occurring in September 2011, resulting in a two-year probationary term, as well as a 180-day sentence in the county jail.[1]

Based on this information, the judge found aggravating factor three, N.J.S.A. 2C:44-1(a)(3) (risk defendant will reoffend). He also found aggravating factor one, N.J.S.A. 2C:44-1(a)(1) (nature and circumstances of the offense), noting defendant shot a seventeen-year-old youth in the back of the neck.[2] He found

---

[1] As a result of this September 2011 conviction and sentence, defendant remained on probation at the time of the offenses under review.

[2] Defendant's judgment of conviction does not list aggravating factor one, but the transcript shows the judge made this finding.

aggravating factors six, N.J.S.A. 2C:44-1(a)(6) (prior criminal record and seriousness of offense), and nine, N.J.S.A. 2C:44-1(a)(9) (need for deterrence). The judge further determined, based on defendant's interview with the Probation Department, he failed to show remorse or accept responsibility for his actions.

We review the trial judge's sentencing determination for an abuse of discretion. State v. Blackmon, 202 N.J. 283, 297 (2010). We ordinarily will not disturb the sentence imposed unless it constitutes a clear error of judgment or "shocks the judicial conscience." Ibid. (quoting State v. Roth, 95 N.J. 334, 363-65 (1984)). We are bound to affirm so long as the judge properly identifies and balances the aggravating and mitigating factors, and their existence is supported by sufficient credible evidence in the record. State v. Cassady, 198 N.J. 165, 180-81 (2009).

The United States Supreme Court has addressed the issue of inaccurate information at sentencing, holding that a criminal sentence based on "assumptions concerning [the defendant's] criminal record which [are] materially untrue" violates the right to due process. Townsend v. Burke, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255, 92 L. Ed. 1690, 1693 (1948). Other federal courts have addressed this issue, vacating sentences where "the challenged information is (1) false or unreliable, and (2)

demonstrably made the basis for the sentence." Farrow v. United States, 580 F.2d 1339, 1359 (9th Cir. 1978).

New Jersey courts have reached similar conclusions. In State v. Pohlabel, 61 N.J. Super. 242 (App. Div. 1960), we reversed a sentence where we found "a strong probability that the quantum of [the defendant's] sentence was influenced by materially untrue assumptions and statements concerning his criminal record." Id. at 252 (emphasis in original). Our Supreme Court has similarly noted, "[P]resentence reports may not be used in a manner which is so unfair as to infringe on fundamental concepts of justice and due process." State v. Winqler, 25 N.J. 161, 179 (1957) (citing Townsend, supra, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690).

These cases suggest remand is appropriate when, but for the alleged inaccuracy, the sentencing judge would have reached a different result. Such is not the case here. The judge made clear he believed the disputed conviction was essentially irrelevant in light of defendant's other charges. The record leaves little doubt the judge would have imposed the same sentence with or without this conviction.

Moreover, second-degree offenses generally carry a term of imprisonment between five to ten years. N.J.S.A. 2C:43-6(a)(2). Here, defendant, while on probation, illegally possessed and fired a gun into a crowd, shooting a teenager in the neck with a hollow-

point bullet. Defendant's eight-year sentence does not "shock the judicial conscience." Blackmon, supra, 202 N.J. at 297.

Affirmed.