SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5606-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KABAKA ATIBA, a/k/a CLARENCE BROWN, KABAKA ATITA and KABAKA ATIDA,

Defendant-Appellant.

Submitted January 31, 2017 – Decided March 7, 2017

Before Judges Yannotti and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 14-06-2075.

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

James P. McClain, Atlantic County Prosecutor, attorney for respondent (Melinda A. Harrigan, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following the denial of his motion to suppress cocaine seized pursuant to a warrant, defendant Kabaka Atiba pled guilty to first-

degree possession of more than five ounces of cocaine with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(1). In accordance with the plea agreement, defendant was sentenced to ten years in prison with fifty-four months of parole ineligibility. Defendant appeals the denial of his motion to suppress and his sentence. We affirm.

I.

Defendant's conviction arose out of a separate investigation of the murder of a teenager. In the afternoon of January 8, 2014, two individuals were shot. One of the victims was a teenager who died as a result of his wounds. The police located three witnesses. One of the witnesses reported that he had gotten into a fight with a juvenile identified as J.F. After the fight, J.F. threatened the witness by telling him, "you're lucky I didn't shoot you." After J.F. walked away, the witness heard gunshots and turned to see J.F. shoot the victims. J.F. then rode away on a green bicycle.

As part of their investigation, police obtained an address for J.F. While the police were applying for a warrant to search the residence, they established a surveillance at the residence. During the surveillance, a woman came out of the residence and informed the police that J.F. was not there. Shortly thereafter, the police observed a man leave the home in a GMC Yukon. Suspecting

that the driver might be removing evidence relating to the shootings and homicide, the police stopped the vehicle. The police then impounded the vehicle and, while taking the vehicle to a forensic unit, they noticed a plastic bag under the front seat. Based on this information, the police applied for and obtained a warrant to search the Yukon. That search revealed no evidence of the shootings or homicide, but the police did locate over 190 grams of cocaine and two cellular phones.

A grand jury indicted defendant on six counts for (1) first-degree possession of more than five ounces of cocaine with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and -5(b)(1); (2) second-degree possession of cocaine with the intent to distribute it within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1; (3) third-degree possession of cocaine with the intent to distribute it within 1000 feet of a school, N.J.S.A. 2C:35-7; (4) third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a); (5) third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1); and (6) fourth-degree obstruction of the administration of law, N.J.S.A. 2C:29-1.

Thereafter, defendant moved to suppress the physical evidence found during the search of his vehicle. Neither the State nor defendant called any witnesses. Instead, they submitted briefs, supporting papers, and presented oral arguments. After hearing

arguments, the trial court denied the motion finding that the warrant authorizing the search of the vehicle was based on sufficient probable cause. On December 17, 2014, the court issued an order memorializing the denial of the motion.

Thereafter, on February 3, 2015, defendant entered a plea of guilty to first-degree possession of cocaine with the intent to distribute. In the plea agreement, the State agreed to recommend a sentence of ten years of imprisonment with fifty-four months of parole ineligibility. The plea also recommended that the sentence be served concurrent to any sentence that might be imposed in a criminal matter pending against defendant in federal court. In that regard, the plea agreement provided that defendant's sentencing would be postponed for a reasonable period of time to allow defendant to address the federal charges. The plea agreement also called for the dismissal of all remaining State charges against defendant.

Defendant's sentencing was originally scheduled for May 2015, but was adjourned to June 12, 2015. Defendant made a motion to adjourn the sentencing again because the federal matter had not yet been resolved. The sentencing judge denied that motion reasoning that there was no indication of when the federal matter might be resolved and the State matter had been pending sentencing since February 2015. In making his ruling, the sentencing judge

noted that the date for defendant's sentencing had twice been adjourned.

Defendant was then sentenced in accordance with the plea agreement. Specifically, as noted earlier, he was sentenced to ten years in prison with fifty-four months of parole ineligibility. Defendant now appeals.

II.

On appeal, defendant presents three arguments for our consideration.

> POINT I — BECAUSE THERE WAS NO PROBABLE CAUSE TO BELIEVE THAT MR. ATIBA WAS DISPOSING OF EVIDENCE OR THAT EVIDENCE OF THE SHOOTING WOULD BE FOUND IN HIS VEHICLE, THE SEARCH OF HIS AUTOMOBILE WAS UNCONSTITUTIONAL. (U.S. CONST., AMENDS. IV AND XIV; N.J. CONST.[], [ART.] I, [¶] 7)
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> POINT II — THE TRIAL COURT IMPROPERLY DENIED THE MOTION FOR AN ADJOURNMENT OF SENTENCE (U.S. CONST., AMENDS. IV AND XIV; N.J. CONST.[], [ART.] I, [¶] 7)
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> POINT III — THE COURT FAILED TO PROPERLY CONSIDER THE AGGRAVATING AND MITIGATING FACTORS AND IMPOSED AN[] EXCESSIVE PERIOD OF PAROLE INELIGIBILITY

A. The Probable Cause for the Warrant

"[A] search executed pursuant to a warrant is presumed to be valid and . . . a defendant challenging its validity has the burden to prove 'that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable.'"

State v. Jones, 179 N.J. 377, 388 (2004) (quoting State v. Valencia, 93 N.J. 126, 133 (1983)). "Accordingly, courts 'accord substantial deference to the discretionary determination resulting in the issuance of the [search] warrant.'" State v. Keyes, 184 N.J. 541, 554 (2005) (alteration in original) (quoting Jones, supra, 179 N.J. at 388).

Deference to a judge's issuance of a search warrant, however, is "not boundless." United States v. Leon, 468 U.S. 897, 914, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677, 693 (1984). The warrant cannot be based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 549 (1983). Further, "probable cause is not established by a conclusory affidavit that does not provide a magistrate with sufficient facts to make an independent determination as to whether the warrant should issue." State v. Novembrino, 105 N.J. 95, 109 (1987).

In determining whether an affidavit is sufficient to support the issuance of a warrant, our Supreme Court has explained that

> usually the affidavits are prepared in the midst and haste of criminal investigation, and by police officers and detectives who are lay[persons] not possessed of the expertise in draftsmanship to be expected of a member of the bar or bench. Consequently a common sense approach must be taken in appraising the

> sufficiency of the factual allegations of the affidavit on which the request for the warrant is based. If the recitals would provide reasonable support for the belief of a prudent [person] that the law is being violated at a place reasonably identified, they will be deemed sufficient. Rigid and technical demands for elaborate specificity and precision are neither serviceable nor required in this area of criminal law.
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> [State v. Boyd, 44 N.J. 390, 392-93 (1965) (citations omitted).]

Defendant argues that the police did not have probable cause to believe that his vehicle contained evidence relevant to the shooting and murder investigation. Thus, he contends that the officers lacked sufficient facts to support the assertion that there was a "high probability" such evidence would be found in the vehicle. We disagree.

The police were investigating a shooting and murder, which had just occurred. As part of that investigation, the police learned that the juvenile suspect was believed to be a resident at a particular location. While surveilling that location, a woman came out and informed them that the juvenile was not present. It was reasonable under those circumstances for the police to believe that they had been observed and that there was an effort to get them to look elsewhere. Coupled with that suspicion, they then observed defendant leave the residence. Based on the officers' training and experience, the officers completed a search

warrant application stating that it was likely that defendant was leaving the residence with evidence relevant to the investigation. The record adequately supports the determination that there was probable cause to issue the warrant to search the vehicle.

B. The Request to Adjourn the Sentencing

"The trial court's decision to grant or deny an adjournment is reviewed under an abuse of discretion standard." State ex rel. Com'r of Transp. v. Shalom Money St., LLC, 432 N.J. Super. 1, 7 (App. Div. 2013) (citing State v. D'Orsi, 113 N.J. Super. 527, 532 (App. Div.), certif. denied, 58 N.J. 335 (1971)).

On February 3, 2015, defendant pled guilty to first-degree possession of cocaine with the intent to distribute. The plea agreement called for "reasonable sentence postponement[s]" to allow for the disposition of defendant's pending federal charges. Accordingly, when the plea was taken, the court initially scheduled the sentencing for May 2015.

The sentencing was thereafter adjourned and rescheduled for June 12, 2015. Defendant moved for a further postponement arguing that his federal charges were still pending. The sentencing court considered, but rejected defendant's request. In doing so, the court noted that the sentencing had been adjourned at least twice. The court also observed that defendant had not entered a plea in the federal case and there was no indication whether and when he

might do so or when the federal matter would be resolved. The sentencing court, therefore, determined that a further adjournment was not justified.

Defendant argues that the denial of the further adjournment was contrary to the terms of the plea agreement. Defendant also argues that the imposition of a state sentence before the federal sentence may result in sentences that are not concurrent.

There is nothing in the plea agreement that guaranteed defendant ongoing adjournments. Instead, the plea agreement references "reasonable sentence postponements[.]" We discern no abuse of discretion in the sentencing court's decision not to postpone the sentence beyond June 2015, when defendant had pled guilty four months before the sentencing took place.

There is also nothing in the plea agreement that guaranteed defendant that his state sentence would not be imposed before the federal sentence. While defendant now argues that it may be more difficult for him to have his federal sentence run concurrent to his state sentence, there is nothing that prevents the federal court from imposing a concurrent sentence.

C. The Sentence

Finally, defendant argues that the period of parole ineligibility imposed was excessive. He contends that the court placed too much weight on aggravating factor nine (the need to

deter defendant and others from violating the law), and ignored mitigating factor eleven (incarceration will cause defendant or his dependents excessive hardship).

Appellate review of sentencing decisions is deferential and governed by an abuse of discretion standard. State v. Blackmon, 202 N.J. 283, 297 (2010). "At the time of sentencing, the court must 'state reasons for imposing such a sentence including . . . the factual basis supporting a finding of particular aggravating or mitigating factors effecting sentence.'" State v. Fuentes, 217 N.J. 57, 73 (2014) (quoting R. 3:21-4(g)). If the sentencing court has not demonstrated "a clear error of judgment" or the sentence does not "shock the judicial conscience," an appellate court should not substitute its judgment for that of the sentencing judge. State v. Roth, 95 N.J. 334, 364-65 (1984).

Here, the sentencing court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (the risk defendant will commit another offense); six, N.J.S.A. 2C:44-1(a)(6) (the extent of his prior criminal record); and nine, N.J.S.A. 2C:44-1(a)(9) (the need for deterrence). The court noted that defendant had two prior indictable convictions and an extensive juvenile record. Those facts supported both aggravating factors three and six. The court also explained the need for deterrence, particularly when deterring drug offenses involving the intent to distribute.

The court also determined that there were no mitigating factors. In that regard, the record reflects that defense counsel did not argue for any mitigating factors. Defendant, however, now argues that the court should have found mitigating factor eleven, which considers whether incarceration will cause defendant or his dependents excessive hardship. N.J.S.A. 2C:44-1(b)(11). In support of that argument, defendant contends that he has been diagnosed with diabetes and that he was supporting two children at the time he was sentenced. Those facts, when balanced against the aggravating factors, do not establish an abuse of discretion by the trial court.

There was also no abuse of discretion in the imposition of fifty-four months of parole ineligibility. Defendant pled guilty to N.J.S.A. 2C:35-5(b)(1) and that statute mandates that "[t]he term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, during which the defendant shall be ineligible for parole." Defendant was sentenced to a ten-year term of imprisonment and, thus, he was subject to a mandatory period of parole ineligibility anywhere from forty months to sixty months. In accordance with the plea agreement, defendant was sentenced to fifty-four months of parole ineligibility.

Affirmed.