

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0021-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES TODD, a/k/a JAMES RED TODD,
JAMES R. TODD,

Defendant-Appellant.

Submitted October 10, 2017 – Decided January 10, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 11-
03-0617.

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

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Tiffany
M. Russo, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

An Essex County grand jury indicted defendant James Todd, and co-defendants, Quasean Nixon and Rafiyq Harding, charging them with: first-degree murder of Chad Butler, N.J.S.A. 2C:11-3a(1) (count one); first-degree felony murder, N.J.S.A. 2C:11-3a(3) (count two); first-degree robbery, N.J.S.A. 2C:15-1 (count three); second-degree conspiracy to possess a controlled dangerous substance (CDS) with the intent to distribute, N.J.S.A. 2C:5-2 (count four); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b (count five); second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4a (count six); second-degree aggravated arson, N.J.S.A. 2C:17-1a(2) (count seven); third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3b (count eight); and second-degree disturbing or desecrating human remains, N.J.S.A. 2C:22-1a (count nine). The State tried defendant separately, and, following the close of the State's case, the judge dismissed counts one, two, three, six and seven.

The jury convicted defendant of the remaining counts. The judge imposed concurrent ten-year sentences of imprisonment with five-year periods of parole ineligibility on the conspiracy and weapon convictions, a consecutive five-year term with two and one-half years of parole ineligibility on the hindering apprehension conviction, and a consecutive ten-year term with five years of

parole ineligibility on the desecration conviction. In all, defendant was sentenced to twenty-five years' imprisonment, half of which was to be served prior to parole eligibility.

Defendant raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS [DEFENDANT'S] STATEMENT BECAUSE THE STATE FAILED TO MEET ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT HE WAIVED HIS MIRANDA RIGHTS.

POINT II

THE WEAPON CONVICTION WAS FATALLY FLAWED BECAUSE THE TRIAL COURT FAILED TO ISSUE A UNANIMITY INSTRUCTION WITH RESPECT TO WHICH WEAPON(S) FORMED THE BASIS FOR THE CONVICTION, AND FAILED TO PROVIDE THE JURY WITH A SPECIAL INTERROGATORY REGARDING THE WEAPON(S) FORMING THE BASIS FOR ITS FINDING. THE CONVICTION UNDER COUNT FIVE MUST THEREFORE BE REVERSED.

POINT III

THE PROSECUTOR COMMITTED MISCONDUCT WHEN ERRONEOUSLY ADVISING THE JURY THAT [DEFENDANT] DID NOT NEED TO CONSPIRE IN ORDER TO COMMIT THE CONSPIRACY OFFENSE. (NOT RAISED BELOW)

POINT IV

THE TRIAL COURT ERRED TO [DEFENDANT'S] DETRIMENT IN FAILING TO CHARGE THE JURY ON THE LESSER-INCLUDED OFFENSE OF CONSPIRACY TO POSSESS CDS. (NOT RAISED BELOW)

POINT V

THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCE IS MANIFESTLY EXCESSIVE AND UNDULY PUNITIVE.

A. THE SENTENCING COURT ASCRIBED UNDUE WEIGHT TO AGGRAVATING FACTORS THREE AND NINE.

B. THE SENTENCING COURT FAILED TO EXPLAIN THE BASIS FOR IMPOSING THE PERIOD OF PAROLE INELIGIBILITY ON COUNT FIVE. IN ANY EVENT, THE PAROLE DISQUALIFIERS ON COUNTS FOUR, FIVE, EIGHT, AND NINE SHOULD BE RENDERED UNCONSTITUTIONAL.

I. THE COURT FAILED TO ARTICULATE ITS RATIONALE FOR IMPOSING A FIVE-YEAR PERIOD OF PAROLE INELIGIBILITY ON COUNT FIVE.

II. THE PAROLE DISQUALIFIERS ON EACH COUNT SHOULD BE RENDERED UNCONSTITUTIONAL BECAUSE THEY ALLOW FOR AN ENHANCED PUNISHMENT BASED ON A FINDING OF FACT MADE BY A JUDGE, RATHER THAN A JURY.

Having considered these arguments in light of the record and applicable legal standards, for the reasons expressed in Point II, we reverse defendant's conviction for unlawful possession of a firearm, vacate his conviction on count five and remand for a new trial, if the State so chooses. We otherwise affirm defendant's convictions. We also vacate the sentences imposed on counts four, eight and nine, and remand the matter for re-sentencing.

I.

On June 27, 2010, members of the Newark Fire Department were dispatched to Woodlawn Cemetery to extinguish a car fire. They discovered the victim's body wrapped in plastic on the back seat and determined a flammable liquid was used to set fire to the car. Forensic examination revealed the victim died, not from the fire, but from gunshot wounds to his torso.

Police obtained and executed a search warrant for an apartment in Newark, where they found traces of blood in the kitchen and hallway, as well as evidence that the apartment was cleaned recently with bleach and cleanser. Police recovered a .9mm shell casing from the kitchen sink and bullets from the walls of the apartment. They also recovered a live .32 caliber round on the kitchen counter and a live .45 caliber round in the top drawer of a bedroom dresser. DNA tests proved the blood was the victim's, and ballistic tests on the recovered bullets proved they matched those taken from the victim's body at autopsy.

There was no eyewitness to the shooting. The State conceded in its opening statement that defendant did not shoot the victim, but rather he was culpable as either a co-conspirator of, or accomplice to, the other defendants. Critical to the State's case was a statement defendant gave to police, which was played for the jury.

Defendant admitted that for approximately one year, he had been selling PCP out of the apartment for someone named "Tyree." Defendant said the victim was one of the "customers" and came to the apartment that night to trade his a gun for PCP. Defendant was putting a gun away for Tyree in a closet in the front room of the apartment when he heard five shots fired in the kitchen. Defendant saw the victim fall; Harding had a gun in his hand. Defendant, Harding and Nixon ran out of the apartment, but he and Nixon eventually returned. Nixon cleaned up the apartment with the help of some "customers." Defendant claimed he watched as they wrapped the body in plastic and carried it to a car.

An upstairs neighbor heard the shots but did not call police. About 1:30 or 2:00 a.m., she saw several men "yelling and screaming" as they carried "something very large" down the front steps. She knew defendant and testified he was "in the back" and not actually carrying the item.

Defendant did not testify or call any witnesses.

II.

The judge held a pretrial hearing pursuant to N.J.R.E. 104(c) to determine the admissibility of defendant's statement to police. The judge had already viewed the video recording before Detective Stanley Rosa testified. Detective Rosa read defendant his Miranda¹

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

rights from a form, had defendant initial the form after each right was read and then read a "waiver" of those rights, specifically:

I have been advised and I have read the statement of my rights shown above. I understand that my rights – what my rights are. I am willing to answer questions and make a statement and do not want a lawyer at this time, but understand that I may have one at any time if I so desire.

I also understand that I may stop answering questions at any time. I understand and know what I am doing. No promises or threats have been made to me. No pressure of any kind has been used against me.

Detective Rosa asked defendant if he understood and then asked him to sign the form, which defendant did. At the hearing, Detective Rosa testified about defendant's demeanor. Defense counsel submitted without making any argument.

The judge found that the statement was taken in the afternoon and defendant did not appear to be under the influence of alcohol or drugs. Further, the judge concluded defendant was not in distress and the statement did not "implicate" defendant in the shooting. The judge found beyond a reasonable doubt that defendant knowingly, voluntarily and intelligently waived his rights and provided the statement to Detective Rosa.

Before us, defendant argues for the first time that Detective Rosa may have asked defendant if he understood his rights, but he

failed to ask defendant expressly if he waived those rights before questioning began. We reject this argument.

"When faced with a trial court's admission of police-obtained statements, an appellate court should engage in a 'searching and critical' review of the record to ensure protection of a defendant's constitutional rights." State v. Hreha, 217 N.J. 368, 381-382 (2014) (quoting State v. Pickles, 46 N.J. 542, 577 (1966)). We "must defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015) (citing State v. Gamble, 218 N.J. 412, 424 (2014); State v. Elders, 192 N.J. 224, 243 (2007)). "A trial court's interpretation of the law, however, and the consequences that flow from established facts are not entitled to special deference." Id. at 263 (citing State v. Gandhi, 201 N.J. 161, 176 (2010)). We review the trial court's legal conclusions de novo. Ibid.

"A confession or incriminating statement obtained during a custodial interrogation may not be admitted in evidence unless a defendant has been advised of his or her constitutional rights." Id. at 265 (citing Miranda, 384 U.S. at 492). "Once a defendant has been so advised, the defendant may waive his or her Miranda rights and confess, but that waiver must be 'voluntary, knowing, and intelligent.'" Hreha, 217 N.J. at 382 (quoting Miranda, 384

U.S. at 444). "[T]he State shoulders the burden of proving beyond a reasonable doubt that a defendant's confession was actually volunteered and that the police did not overbear the will of the defendant." Id. at 383 (citing State v. Galloway, 133 N.J. 631, 654 (1993)). "In determining the voluntariness of a defendant's confession, we traditionally look to the totality of the circumstances to assess whether the waiver of rights was the product of a free will or police coercion." State v. Nyhammer, 197 N.J. 383, 402 (2009) (citing State v. Presha, 163 N.J. 304, 313 (2000)).

Defendant relies upon dicta in United States v. Obregon, 748 F.2d 1371 (10th Cir. 1984). Obregon concerned the admissibility of a statement made by a defendant who asserted his Miranda rights to one police officer, but waived those rights to a second. Id. at 1381. The court held that the latter statement was admissible, but commented that, in the realm of Miranda waiver, "it [may be] desirable . . . to utilize two distinct forms, one . . . captioned Advice of Rights . . . and a second . . . captioned Waiver of Rights." Ibid.

Defendant cites no authority that compels this two-step process. Here, the judge considered the totality of the circumstances and concluded defendant understood his rights, waived those rights and voluntarily provided a statement to

Detective Rosa. We find no basis to disturb the judge's factual findings or legal conclusions.

III.

Turning to the argument defendant raises in Point II, at the close of the State's case, defendant moved for acquittal as to several counts in the indictment, including the two firearms offenses. The prosecutor referred to defendant's statement, in which he mentioned three guns at the scene of the homicide: the one defendant was putting away in a closet; a gun the victim brought to trade for PCP; and the gun Harding used to shoot the victim. When the judge asked pointedly which gun defendant possessed "under [the State's] theory" of the case, the prosecutor responded, "Can be either/or. . . . The jury may believe one or the other." The judge dismissed count six, possession of a handgun for an unlawful purpose, but did not dismiss count five.

The prosecutor began his summation by reviewing the remaining counts of the indictment. As to count five, he told the jury that defendant unlawfully possessed a handgun, "that is a handgun that was used and possessed to shoot and kill [the victim]." Later, when specifically addressing count five, the prosecutor asked rhetorically, "Did [defendant] have general access to weapons in that house? Of course he did." The prosecutor then described the gun defendant was putting in a closet as "a tool of the [drug-

dealing] business. . . . [T]hose guns were there to facilitate and protect those gentlemen as they conducted their business."

Later, the prosecutor returned to the firearms charge:

[T]here were guns in that house. Certainly the gun that was used to kill [the victim].

. . . .

We know, at least, two guns were in there – three. The gun [the victim] had brought to trade; the weapon used to kill him, .9mm; and the weapon in the closet.

In closing, the prosecutor reiterated: "[Defendant] is guilty of possessing the gun that was in that house to facilitate the operations of his drug activities and to take the life of [the victim]."

The judge preliminarily charged the jury on possession, both actual and constructive, as well as sole and joint possession. He then provided instructions pursuant to Model Jury Charge (Criminal), "Unlawful Possession of a Handgun (N.J.S.A. 2C:39-5(b))," (rev. Feb. 26, 2001). In that portion of the model charge defining the elements of the crime, because there was no particular weapon identified at trial, the judge appropriately told the jury the State must prove beyond a reasonable doubt "[that] there was a handgun."

Defendant contends the judge was required to sua sponte provide a "specific unanimity instruction," telling jurors that

they must "unanimously agree regarding the handgun(s) [defendant] possessed." Defendant argues this was necessary because of the State's alternative theories of culpability as to three different guns.

The New Jersey Constitution mandates unanimous verdicts in criminal trials. N.J. Const. art. I, ¶ 9; R. 1:8-9. "General charges on unanimity are insufficient where there is the risk of jury confusion or a fragmented verdict." State v. Tindell, 417 N.J. Super. 530, 555 (App. Div. 2011) (citing State v. Gandhi, 201 N.J. 161, 193 (2008)). Therefore, the court should instruct the jury it must "unanimously agree on the facts underlying the guilty verdict . . . when there is a specific request for those instructions and where there exists a danger of a fragmented verdict." Gandhi, 201 N.J. at 192 (quoting State v. Parker, 124 N.J. 628, 637 (1991)).

In the absence of a request for a specific unanimity charge, however, a court's failure to give the charge will not "necessarily constitute reversible error," id. at 193, unless the failure is "clearly capable of producing an unjust result." Parker, 124 N.J. at 638; R. 2:10-2. The alleged error must so substantially affect the rights of the defendant as to "convince the court that of itself the error possessed a clear capacity to bring about an

unjust result." State v. Camacho, 218 N.J. 533, 554 (2014) (citation omitted) (emphasis added).

Here, the prosecutor resisted defendant's motion for acquittal on the weapons offenses by claiming the jury could convict defendant of possessing any of three different guns without unanimously agreeing that he possessed a particular gun. That was a misstatement of the law; and, while not particularly important to our decision, it was a harbinger of what was to come in the prosecutor's summation.

The State's evidence of defendant's possession of a firearm relied almost exclusively upon the statement defendant made to police, in which he mentioned three different guns. Defendant claimed that he fleetingly possessed one, which he picked up from the floor and was putting in a closet when shots rang out. The victim brought a second gun to the apartment, and Harding used a third to kill the victim.

While the evidence might have been sufficient to prove defendant was guilty of possessing the weapon he placed in the closet, it was not sufficient to prove he possessed, constructively or jointly, either of the other weapons. Nevertheless, the prosecutor's repeated references to defendant's possession of multiple weapons in his summation, including the weapon that killed

the victim, clearly had the capacity to confuse the jury and lead to a non-unanimous verdict.

We view the situation as similar to that presented in State v. Jackson, 326 N.J. Super. 276 (App. Div. 1999). There, we held the evidence was insufficient to establish a prima facie case that the defendant possessed cocaine found in a dresser drawer, although the State had established a prima facie case that the defendant possessed other cocaine found in the pocket of some pants. Id. at 279. Therefore, because the jury charge failed to distinguish between the two, we held "it [was] possible that some of the jurors convicted defendant based only on possession of cocaine found in the dresser drawer. Thus, the jury's required unanimity was compromised." Id. at 282.

We conclude the failure to give a specific unanimity charge under the facts of this case was plain error requiring reversal of defendant's conviction on count five.

IV.

The arguments defendant raises in Points III and IV lack sufficient merit to warrant discussion in a written opinion. R. We proceed, therefore, to the sentencing issues raised in Point V.

At sentencing, the judge found aggravating factors three, five and nine. See N.J.S.A. 2C:44-1(a)(3) (the risk of re-

offense); (a)(5) (involvement in organized criminal activity); and (a)(9) (the need to deter defendant and others). He found no mitigating factors. See N.J.S.A. 2C:44-1(b). The judge then considered whether to impose concurrent or consecutive sentences by evaluating the factors set forth in State v. Yarbough, 100 N.J. 627, 643-44 (1985). In imposing the maximum concurrent sentences and maximum period of parole ineligibility on counts four and five, the judge stated the crimes were connected to the illegal drug activity in which defendant participated.

Defendant argues the judge overly emphasized aggravating factors three and nine, because defendant was only twenty-two years old and his prior adult criminal record was minimal. He also argues the judge failed to articulate why he imposed a mandatory minimum sentence on count five,² or any of the other counts.

² Defendant posits the judge may have imposed the mandatory minimum on count five under N.J.S.A. 2C:39-5(i), which was held unconstitutional in State v. Grate 220 N.J. 317, 334-36 (2015), the Graves Act, N.J.S.A. 2C:43-6(c), or the general sentencing provisions of N.J.S.A. 2C:43-6(b). In any event, he argues the judge failed to explain and justify the period of parole ineligibility imposed on count five. Pursuant to the Graves Act, the judge was required to impose a period of parole ineligibility between one-third and one-half of the sentence. N.J.S.A. 2C:43-6(c). Since we are reversing defendant's conviction on count five and vacating the sentence, the specific argument defendant raises as to count five is moot.

We begin by noting that "[a]ppellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011).

As the Court has reiterated:

The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

Here, the judge adequately explained his findings regarding the aggravating sentencing factors, and we find no basis to disturb them. We also find no reason to disturb the judge's imposition of consecutive sentences. See Miller, 205 N.J. at 129 ("When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal.").

However, we address the imposition of maximum sentences with maximum periods of parole ineligibility on counts four, eight and nine. In imposing the maximum sentence on count four, the judge noted that the conspiracy and the firearm offense were "second-degree" crimes, demonstrating the serious nature of defendant's

criminal conduct. He did not specifically explain why he imposed the maximum sentences on counts eight and nine.

The Court has made clear that in imposing maximum consecutive sentences, the judge must "carefully weigh the [Yarbough] factors," not "double count[]" by considering the degree of the crime in "calculating the length of sentence," and not use the same factors in sentencing a defendant to a maximum term for each offense as used for imposing consecutive terms. State v. Miller, 108 N.J. 112, 122 (1987). "Where the offenses are closely related, it would ordinarily be inappropriate to sentence a defendant to the maximum term for each offense and also require that those sentences be served consecutively, especially where the second offense did not pose an additional risk to the victim." Ibid.

Further, imposition of discretionary extended terms of imprisonment "are the exception and not the rule." State v. Case, 220 N.J. 49, 66 (2014). While the judge properly stated he was "clearly convinced that the aggravating factors substantially outweigh[ed] the non-existent mitigating factors," see N.J.S.A. 2C:43-6(b), he did not explain why he chose to impose the maximum discretionary period of parole ineligibility for each count.

Particularly in light of our decision regarding count five, it is appropriate to remand the matter for reconsideration of

defendant's sentence consistent with the principles set forth above.

Defendant's conviction on count five is reversed, the sentence imposed is vacated and the matter is remanded for a new trial if the State so chooses. We affirm defendant's convictions of the remaining counts, but remand for resentencing consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION