SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4092-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANK J. BUSH, III a/k/a
FRANK J. BUSH,

Defendant-Appellant.

Submitted September 27, 2017 – Decided January 23, 2018

Before Judges Fuentes, Manahan, and Suter.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-06-1048.

Evan F. Nappen, attorney for appellant (Louis P. Nappen, on the brief).

Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney for respondent (Lisa Sarnoff Gochman, Legal Assistant, of counsel and of the brief).

PER CURIAM

Defendant Frank J. Bush, III appeals the September 25, 2015 order that denied his motion to suppress evidence, the April 22,

2016 order that denied reconsideration, and the May 2, 2016 judgment of conviction. We affirm the orders and judgment.

A Monmouth County grand jury indicted defendant Frank J. Bush, III charging him with two counts of fourth-degree possession of prohibited weapons, N.J.S.A. 2C:39-3(e) (counts one and two); fourth-degree possession of a large capacity ammunition magazine, N.J.S.A. 2C:39-3(j) (count three); fourth-degree possession of a weapon other than a firearm by a certain person not to have weapons, N.J.S.A. 2C:39-7(a) (count four); and second-degree possession of a firearm by a certain person not to have weapons, N.J.S.A. 2C:39-7(b)(1) (count five). After the trial court denied his motion to suppress and reconsideration, defendant was tried before a jury and convicted of all five counts in the indictment. The trial court sentenced defendant to a term of seven years in prison with five years of parole ineligibility on count five, second-degree possession of a firearm by a certain person not to have weapons, N.J.S.A. 2C:39-7(b)(1). In addition, he was sentenced to nine-month concurrent terms on the other four counts.

Defendant now appeals arguing the trial judge erred in denying his motion to suppress and made a number of improper pre-trial evidential rulings. We affirm. We gather the following facts from the record developed before the trial court.

I

On September 12, 2013, defendant's mother called 911 to report that her son, a heroin addict who was living with her, threatened to trash or burn down her house because she would not give him money. Officers Raymond Sofield and Adam Colfer of the Middletown Township Police Department went to her residence. Officer Sofield testified at the suppression hearing that defendant's mother was outside when they arrived and gave them permission to go in the house. When Officer Sofield entered the house, he saw furniture was overturned in the living room and there was broken glass. When he and Officer Colfer went upstairs, Sofield observed that the ceiling in one of the rooms appeared to have been shot by a shotgun at some point. The door to defendant's bedroom, which was upstairs, was locked. The officers knocked on the bedroom door and announced themselves. A male voice inside said "hold on" and Officer Sofield testified he could hear a mechanical noise that he could not identify. After a few minutes, defendant opened the door and Officer Sofield could see inside the room. He testified that he saw "a lot of different knives and weapon-type devices." He did not remember seeing any firearms. Defendant was arrested and charged with criminal mischief, N.J.S.A. 2C:17-3, and other offenses.

Defendant's mother requested a temporary restraining order (TRO) that evening against defendant under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to 2C:25-35, (the Act) and signed a victim witness statement.[1] She told Officer Sofield that defendant had several guns in the house. Because the Family Part was not available at that the time of the night, a municipal court judge issued a telephonic TRO and a warrant that authorized the responding officers to search and seize all weapons defendant kept in the residence.[2] Officer Sofield returned to the house, accompanied by defendant's mother. Sofield and another officer, searched defendant's room. They found and seized a Baretta handgun, Marlin rifle, high capacity ammunition magazine, spiked baseball bat, and a switchblade. The handgun was registered to defendant's girlfriend, E.H.[3]

Officer Sofield testified at the suppression hearing that the TRO form was completed after the search was conducted. He explained that was why it said they were authorized to search for "rifles and handguns belonging to [E.H.]." The TRO also mistakenly

[1] The statement was not included in defendant's appendix.

[2] See N.J.S.A. 2C:25-28.

[3] We use initials to maintain her privacy. R. 1:38-3(d)(9).

described the search "premises or location" as "rifles and handguns."

Defendant's mother later withdrew her request for a TRO, which was dismissed by order on October 2, 2013. That order stated there was no finding of domestic violence.

Defendant's motion to suppress evidence of the firearms was denied on September 25, 2015, following a hearing. Defendant's mother testified that the police searched for weapons before the TRO was entered and that she had not requested a TRO.

In the court's written statement of reasons, it found that the "TRO and search warrant were valid at the time of seizure" even though defendant's mother later recanted. The TRO and warrant were based on statements by Office Sofield and defendant's mother that an act of domestic violence (criminal mischief) had occurred, that the victim was in fear of her son and that he kept weapons in the house. The court found the officers returned to defendant's home to conduct the search after they had the warrant. They found all the weapons in plain view. The court found that while the handgun was registered to E.H., the other weapons belonged to defendant. The switchblade, high capacity magazine, and spiked bat were recognizable as prohibited weapons "on sight." The police

later learned that defendant had been convicted of offenses which rendered him not able to possess weapons under N.J.S.A. 2C:39-7.

The court rejected defendant's argument that the post-seizure review of defendant's criminal record by the police was a search. "[C]hecking the criminal record was not an additional search, and the illegal nature of the lawfully seized weapons was readily apparent [once] defendant's criminal record was checked." The court thus denied defendant's motion to suppress the firearms.

Defendant filed a motion for reconsideration arguing the amnesty law, L. 2013, c. 117, allowed him to possess the guns and to make lawful disposition of them within 180 days. The court rejected reconsideration on April 22, 2016, finding there was no proof defendant possessed the guns when the amnesty law went into effect nor did it apply to persons who acquired firearms illegally during the 180-day window.[4]

At the January 5, 2016 pre-trial conference, the parties agreed to written stipulations, signed by counsel and defendant,

[4] After the trial court denied defendant's motion for reconsideration, the Supreme Court decided State v. Harper, 229 N.J. 228, 232 (2017), making clear that this law did not provide blanket immunity for the entire amnesty period.

to be read during trial.[5] Of relevance here, the third stipulation related to the certain persons offenses in counts four and five of the indictment. They agreed that defendant "has previously been convicted of a predicate offense which prohibits him from owning, possessing, purchasing, or controlling firearms and weapons."

Defendant's counsel asked to waive a bifurcated trial on the prohibited weapons and the certain person's charges "for the sake of efficiency and presentment." Defendant testified under oath that he understood the case could be bifurcated "as a matter of strategy" discussed with his counsel, he wished to go forward in one case that was not bifurcated. The court found defendant's waiver of bifurcation was "knowing, intelligent, and voluntary." Defendant has not challenged this finding on appeal.

In January 2016, defendant was convicted by a jury of all five counts in the indictment. He was sentenced on May 2, 2016.

On appeal, defendant raises the following issues.

POINT 1

THE COURT BELOW ERRED BY FAILING TO GRANT DEFENDANT'S MOTION FOR ACQUITTAL SINCE NO

[5] The parties stipulated that the police were "lawfully present inside defendant's home" and that the arrest of defendant and search of the bedroom were "lawful acts." Defendant also agreed there was no issue about the "chain of custody" of the items that were recovered in the search.

PROOFS OF TWO DIFFERENT N.J.S. 2C:39-7A AND B PRIOR OFFENSES PER THE INDICTMENT WERE PRESENTED BELOW (5T99-2 TO -11; 5T106-6 TO -18).

POINT 2

THE COURT BELOW ERRED BY FINDING THAT THE FIREARMS AT ISSUE SEIZED FOR DOMESTIC VIOLENCE SAFEKEEPING PURPOSES MAY BE USE TO FACILITATE CRIMINAL PROSECUTION (Da14).

POINT 3

THE MUNICIPAL COURT JUDGE BELOW HAD NO AUTHORITY TO ISSUE A TELEPHONIC SEARCH WARRANT, AND THEREFORE THE WARRANT LACKED JURISDICTION AND IS INVALID, AND PROPERTY SEIZED PURSUANT TO IT WERE UNLAWFULLY SEIZED (Da37; Not Raised Below)

POINT 4

THE COURT BELOW ERRED BY NOT FINDING THAT DEFENDANT POSSESSED THE FIREARMS AT ISSUE DURING THE 180-DAY STATEWIDE FIREARM AMNESTY PERIOD DURING WHICH HE WAS ENTITLED BY LAW TO RETAIN POSSESSION WITHOUT FEAR OF PROSECUTION (3T19-254 to 3T20-6; Da22).

II

Defendant contends that the trial court erred by failing to grant defendant's motion for acquittal. R. 3:18-1. We review this issue under the plain error standard because the argument

raised on appeal is different than was raised at trial.[6] See R. 2:10-2.

Here, defendant contends the stipulation that he committed "a" predicate offense was not adequate to support his convictions under both N.J.S.A. 2C:39-7(a) (count four) and N.J.S.A. 2C:39-7(b)(1) (count five) because these statutes require the State to prove two different types of predicate offenses, but the stipulation submitted to the jury stated defendant was convicted of only one prior offense.

There was nothing that was "clearly capable of producing an unjust result" about this. See R. 2:10-2. The record supports that defendant agreed to the stipulation that he committed "a" predicate act. The stipulation to a single, generic prior conviction inured to his advantage because the jury then did not hear that he had been convicted in 2006 of prior offenses[7] that could serve as predicate acts for the certain person offenses.

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[6] At trial, defendant asked for acquittal on grounds that one of the objects, the bat with spikes, was not a prohibited weapon under N.J.S.A. 2C:39-3(e). Defendant also argued that the State did not prove he had the intention or ability to control any of the weapons that were seized.

[7] The 2014 indictment referenced in count four a conviction for possession of a controlled dangerous substance and in count five a conviction for the crime of terroristic threats. We see no evidence at all to corroborate defendant's speculation that the indictment was given to the jury.

We see no error in the application of this stipulation to support defendant's conviction under both statutes. Indeed, were this not the case, we would conclude that the defense invited error. See State v. Munafo, 222 N.J. 480, 487 (2015) (providing that the doctrine of invited error operates to bar a "disappointed litigant" from arguing on appeal that an adverse decision below was the product of error, "when that party urged the lower court to adopt the proposition now alleged to be error") (quoting N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010)). The doctrine "is implicated only when a defendant in some way has led the court into error, while pursuing a tactical advantage that does not work as planned." State v. Williams, 219 N.J. 89, 100 (2014) (quoting State v. A.R., 213 N.J. 542, 561-62 (2013)). The defense acknowledged the stipulation was a matter of its strategy and should not now be able to claim error by the court.

Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.