SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0521-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANCISCO DELAROSA-LUNA,

Defendant-Appellant.

Submitted February 15, 2022 – Decided April 6, 2022

Before Judges Fisher and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 17-12-0213.

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

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Daniel Finkelstein, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant appeals from his convictions of several drug offenses following a second jury trial,[1] contending the court erred in not declaring a mistrial after the State introduced new evidence in the second trial. He also asserts his sentence is excessive. We affirm.

I.

Defendant was charged in an indictment with one count of first-degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(1), and one count of third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1). The charges arose out of a buy-bust operation where law enforcement used a confidential informant (CI) to arrange a meeting with defendant where the CI would purchase heroin. The transaction took place in the CI's car.

A.

During trial, a state police detective testified that he searched the CI and the CI's vehicle prior to the meeting. He explained this is done to ensure the CI does not bring any contraband, narcotics, weapons, or money to the operation. While searching the vehicle, the police looked for anything "suspicious"

[1] The first trial resulted in a deadlocked jury. Unless stated otherwise, we refer to testimony from the second trial.

including "tool marks" and "hidden compartments." The detective stated that he did not detect a hidden compartment in the CI's vehicle prior to the operation.

When defendant arrived at the designated meeting place, police noted he was carrying a gift bag when he entered the CI's car. After a few minutes, the CI got out of the car and approached the trunk, which was the pre-arranged signal for law enforcement to "move in."

As law enforcement approached the CI's car, the detective stated defendant was still in the passenger seat and had the gift bag between his legs on the floor. The detective further testified that he directed defendant out of the car and handcuffed and searched him and the vehicle. The detective retrieved the gift bag, which contained a heavily wrapped cellophane package, inside of which was approximately a kilogram of heroin.

Defendant testified during the first trial. The audio recording of that testimony was played during the second trial. Defendant stated he met the CI approximately eight months before the drug transaction when the CI became a client of defendant's barbershop. During their conversations, the CI told defendant he was in the business of buying and selling expensive cars. Defendant responded that he also sold cars, usually damaged, older, less-expensive cars. Defendant repaired these cars and then sold them. Defendant

inquired of the CI how he might get into the business of selling higher-end vehicles. Eventually, defendant began to think the two could work together in the car business.

About a month before the October 5, 2017 drug deal, defendant said the CI suggested the two meet together outside the barbershop to talk about business. Then, on October 4, the CI called defendant and set up a meeting for the following day, although he did not provide any details regarding a place or time of day.

At the time of these events, defendant lived in Philadelphia. On October 5, he planned on driving to his sister's house in New Jersey[2] to spend the day with her. He knew the CI lived in New Jersey and figured that when the CI contacted him, they could meet. He also stated he planned to pick up his sister and her children and drive them back to his house in Philadelphia for a party later that night.

According to defendant, as he drove his minivan to his sister's house, it began "to lose strength," so he called a transport company he was familiar with

[2] Defendant was not sure whether his sister lived in Jersey City or West New York, New Jersey.

to meet him at a gas station in Maple Shade. The transport company dropped him off at a bus stop in West New York where his sister met him.

At some point during the morning, defendant stated he received a text message from the CI providing an address of a Home Depot parking lot in Ewing for the meeting.

While defendant and his sister were sitting at a Chinese restaurant, his sister received a call from her son's school instructing her to pick her son up because he was ill. According to defendant, his sister called him an Uber to drive him to the meeting location. Defendant's sister also gave him a present for his niece, which was in a gift bag. Defendant testified that the gift bag contained "two sweatshirts, [or two] sweaters, things that belong to a woman."

The Uber driver testified during the trial that he picked up defendant in Union City and dropped him off at the Home Depot in Ewing. He recalled defendant carrying a gift bag that appeared to contain something.

Defendant texted the CI several times, stating he was on his way and then stating he would be arriving shortly. After he located the CI's car, defendant got into the passenger seat. He testified he placed the gift bag between the two front seats. According to defendant, as he was sitting next to the CI, the CI "lifted up the thing in-between the seats . . . where you put cups and stuff, he was touching

everything." Then, the CI "pressed a button. It was underneath the steering wheel and something lifted up." Defendant testified that he "heard . . . a small buzzing sound and then [the CI] took something out from underneath the [driver's] seat. It was inside a cover." Defendant described the object as a small, black, grocery store bag, and he said the CI placed it next to defendant's gift bag. At that point, the CI got out of the car and walked towards the trunk. At the same time, police came to defendant's side of the car, pulled him out, and arrested him. Defendant said he never saw the CI put the drugs in the gift bag. But the heroin was there when police took the gift bag out of the car.

B.

As stated, the first trial resulted in a deadlocked jury. The second trial began on January 23, 2019. During opening statements, the State told the jury they would hear defendant's testimony about the hidden compartment or trap located in the CI's car. The deputy attorney general (DAG) advised the jury that police "know about traps" and that "top people at the New Jersey State Police . . . . know about traps" and when they searched the car prior to the operation they ensured there were no traps in the CI's car. The State also said the jury would

hear testimony from the state police officers who searched the car and found no hidden compartments or traps.[3]

On the following day, the State informed the court and defense counsel it had located the CI's car used in the drug transaction. On January 25, the State moved to admit the car as newly discovered evidence. According to the State, after hearing defendant's testimony in the first trial regarding a hidden compartment in the CI's car from which the CI retrieved a bag which he put between the two men, the DAG instructed state police to find the car.

The State described to the court the steps taken over several weeks to locate the vehicle. Late on January 23, police had found the car in North Carolina, registered to another person. The Raleigh police performed a "meticulous and detailed inspection" of the vehicle and did not find a hidden compartment or any evidence of tampering. On January 24, the State advised the court and defendant of these developments and that the State was towing the car to New Jersey to have its expert inspect the car. The vehicle would also be available for inspection by an expert of defendant's choosing on January 28.[4]

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[3] Law enforcement explained to the jury that a trap was a hidden compartment used to hide narcotics and other contraband.

[4] Both parties had listed trap experts on their witness lists.

Defendant objected to the admission of the car, stating the case was a year old, it had already gone to trial once, and the State did not act with reasonable diligence in locating the car. In her objection, defense counsel stated she thought the only remedy was a mistrial but there was no further reference or request for a mistrial.

To the contrary, defense counsel stated, "[I]t's not a mistrial that we're seeking here, obviously, would be the only remedy that would be acceptable if the [c]ourt was going to let the—allow the evidence in but really, it's, you know, barring it is what needs to be done here for all the reasons stated." Defense counsel argued the evidence was not admissible under State v. Carter[5] because it was not material to any issue in the case and it was discoverable before the start of trial. She also stated she might have changed her opening statement had she known about the car beforehand.

In response, the State distinguished these circumstances from State v. Smith[6] because there, the defense was not given a chance to review and examine the new evidence. Here, both experts would be given the opportunity to inspect

[5] 85 N.J. 300 (1981).

[6] 29 N.J. 561 (1959).

the car, determine if there was a trap in it currently, and if there was a trap previously in the car that had been removed.

The State argued the car was "the most relevant and material piece of evidence in [the] case" and it was unaware of the necessity of admitting the car as evidence until defendant testified during the first trial in October 2018. The State had not kept the car because it did not know defendant's theory was there was a trap from which the CI removed the drugs and placed them in defendant's bag. Once they heard the testimony and the first trial deadlocked, the State began its search for the car.[7]

The following day, the car was inspected by Sergeant Matthew Pierson, who the State intended to use as its trap expert. During the inspection, Pierson found a hidden compartment in the center console. He did not find a modification to the steering wheel area or steering column, or under the driver's seat.

On January 30, 2019, after reviewing Pierson's report, the court issued an oral decision admitting the evidence of the car. The court stated:

> [T]he evidence of the recovery and inspection of the subject vehicle is relevant. It goes to the heart of the defense which, during the first trial through testimony

[7] The DAG stated he contacted the state police about locating the car in late 2018 or the first days of 2019.

> and argument, was essentially that the [CI] who had a long criminal record and was under a cooperation agreement utilized his own car which contained a trap compartment and that the [CI] set up . . . defendant. With the discovery of indeed a trap compartment in the car this week, this certainly is material. It's relevant and it qualifies as Brady material inasmuch as it is exculpatory in that respect.

The court ordered the State to provide defendant with Pierson's report and the report of the state trooper who authenticated the car as formerly belonging to the CI and being the vehicle used in the drug transaction. Later that afternoon, after receiving Pierson's report, defendant withdrew its objection to the admissibility of the evidence regarding the recovery and inspection of the car.

During his trial testimony, Pierson explained several steps were necessary to open the hidden compartment in the car's center console—the ignition switch and seat heater had to be turned on, and the emergency brake and center console armrests needed to be in the "up" position, which released the switch in the center console panel and exposed an opening where contraband could be stored. He testified further that a person did not need to manipulate the steering wheel or steering wheel area to activate the trap and the trap did not make a buzzing sound.

The jury found defendant guilty of all charges. After merging the counts, the court sentenced defendant to seventeen years in prison with seven years of parole ineligibility.

II.

Defendant presents two points for our consideration:

> POINT I
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL BECAUSE A MANIFEST INJUSTICE WAS CREATED BY THE STATE'S INEXPLICABLE FAILURE TO OBTAIN [THE CI'S] CAR UNTIL THE MIDDLE OF TRIAL.
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> POINT II
> DEFENDANT'S SENTENCE IS EXCESSIVE.

A.

A decision to grant or deny a motion for mistrial is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of discretion. State v. Smith, 224 N.J. 36, 47 (2016); State v. Jackson, 211 N.J. 394, 407 (2012); McKenney ex rel. McKenney v. Jersey City Med. Ctr., 167 N.J. 359, 376 (2001). "The grant of a mistrial is an extraordinary remedy to be exercised only when necessary 'to prevent an obvious failure of justice.'" State v. Yough, 208 N.J. 385, 397 (2011) (quoting State v. Harvey, 151 N.J. 117, 205 (1997)). "[A]n appellate court will not

disturb a trial court's ruling on a motion for a mistrial, absent an abuse of discretion that results in a manifest injustice." Jackson, 211 N.J. at 407 (alteration in original).

Defendant asserts he was denied due process and a fair trial when the court admitted the CI's car into evidence and allowed a police expert to testify regarding his inspection of it and the workings of the hidden trap compartment.

To begin, it is unclear whether defense counsel requested a mistrial. When opposing the State's motion to admit the newly discovered evidence of the CI's car, defense counsel asserted "it's not a mistrial that we're seeking here," but then added that a mistrial "would be the only remedy . . . acceptable if the [c]ourt is going to . . . allow the evidence [of the CI's car] in . . . ."

However, before the court ruled on the State's motion to admit the car as evidence, the State disclosed its expert report in which the expert advised his inspection revealed a trap in the center console. The judge admitted the evidence and ordered the State provide defendant with its expert reports. Thereafter, defendant withdrew his objection to the admission of the evidence and did not present his trap expert at trial. There was no further request for a mistrial and the court never made a ruling on any mistrial application.

Based on the above, we find defendant's argument meritless. There was no clear request for a mistrial, nor did defendant ask for a ruling on any purported mistrial motion. To the contrary, defendant withdrew his objection to the admission of the car and the expert evidence because it was favorable to him. The jury heard defendant's testimony from the first trial that he observed the CI open a hidden compartment in the steering column and withdraw something, and place it next to defendant's gift bag on the floor. It was left to the jury to assess the conflicting testimony regarding the location of the trap and its mechanisms.

A mistrial is granted only "in those situations which would otherwise result in manifest injustice." State v. Harris, 181 N.J. 391, 518 (2004) (quoting State v. DiRienzo, 53 N.J. at 360, 383 (1969)). Defendant has not demonstrated a manifest injustice related to the admission of the car and related evidence.

There also was no error in the admission of evidence of the car and the expert's inspection of it. After defendant testified in the first trial regarding his version of events that took place inside the car, including the hidden compartment, the State began a search for the car. When the car was located on the night of the first day of trial, the State advised the court and defendant about it. The court properly found the evidence to be relevant and material and gave the State and defendant's expert the opportunity to inspect the car. In addition,

the court ordered the State to produce its expert reports prior to any defense inspection. When the trap was discovered, defendant withdrew his objection to the evidence. We discern no error in the trial court's handling of this evidential issue. See State v. Gonzalez, 249 N.J. 612, 632-33 (2022) ("Evidentiary decisions are . . . reviewed by appellate courts under the deferential abuse of discretion standard . . . .").

B.

In turning to defendant's second point, he asserts his sentence is excessive because the court erroneously assigned "great weight" to aggravating factor five, gave "great weight" to aggravating factor nine, did not give "great weight" to mitigating factor seven, and should have found mitigating factor eleven. See N.J.S.A. 2C:44-1(a)-(b).

We review a court's sentence for an abuse of discretion. State v. Jones, 232 N.J. 308, 318 (2018). We affirm the sentence if the aggravating and mitigating factors are identified and the sentence is "supported by competent, credible evidence in the record, and properly balanced," and it does not "shock the judicial conscience." State v. Case, 220 N.J. 49, 65 (2014) (first citing State v. Natale, 184 N.J. 458, 489 (2005)) (then quoting State v. Roth, 95 N.J. 334, 365 (1984)). We will not "substitute [our] judgment for that of the sentencing

court." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). And we will only "intervene and disturb . . . a sentence with a remand for resentencing" where the sentencing judge applied aggravating and mitigating factors unsupported by the record. State v. Bieniek, 200 N.J. 601, 608 (2010) (citing State v. Carey, 168 N.J. 413, 430 (2001)).

In finding aggravating factor five, N.J.S.A. 2C:44-1(a)(5), the "substantial likelihood that . . . defendant is involved in organized criminal activity," the court noted defendant was stopped by police in Philadelphia three months before his arrest here. At the time, he was carrying 200 grams of heroin. He told Philadelphia police that he was "a middle man and delivering the drugs." The drugs were shipped from New York to Philadelphia.

The sentencing judge found the prior events similar to the evidence presented here where defendant left Philadelphia and traveled to northern New Jersey after the CI arranged a meeting to buy a large quantity of heroin. The court stated: "[T]he nature of the offense alone . . . supports a finding for [a]ggravating [f]actor [n]umber [five] and particularly so considering defendant's admission to Philadelphia Police of being a middle man for a heroin distribution network just three months earlier." The judge assigned the factor "great weight."

The court also gave "great weight" to aggravating factor nine[8]—the need to deter defendant and others from violating the law. N.J.S.A. 2C:44-1(a)(9). The court found the factor was warranted because defendant previously admitted he was a "middle man" in a heroin distribution scheme and that "there is a need for general deterrence to prevent others from engaging in narcotics distribution . . . on such a large scale." We discern no abuse of discretion. The court provided its reasons for applying factor five and nine and giving them "great weight."

As to mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), the absence of delinquent or criminal history, the court gave "considerable weight" to the fact that defendant had no previous convictions, although it acknowledged the bench warrant detainer from Philadelphia for the heroin distribution investigation. Defendant's contention that this factor should have been accorded greater weight lacks merit.

Defense counsel did not request mitigating factor eleven—the "imprisonment of . . . defendant would entail excessive hardship to . . . defendant or . . . defendant's dependents." N.J.S.A. 2C:44-1(b)(11). However, the court

[8] The trial judge misspoke when discussing aggravating factor nine as, after he provided his reasoning for finding the factor, he concluded, "I, thus, find aggravating factor number 5 [sic] and give it great weight."

noted defendant had two children: a seven-year-old daughter with his wife and an eleven-year-old child who lived in Santo Domingo with her grandmother. In addition, defendant's wife's fifteen-year-old stepson lived with the couple. There was no evidence regarding defendant's financial responsibility other than he was employed. There is no specific hardship demonstrated. In addition, the judge stated he had "carefully considered all . . . mitigating factors and [found] that no other mitigating factors exist[ed]."

As our Court has stated, it is "sufficient that the trial court provides reasons for imposing its sentence that reveal the court's consideration of all applicable mitigating factors in reaching its sentencing decision." Bieniek, 200 N.J. at 609 (citing State v. Pillot, 115 N.J. 558, 565-66 (1989)). We are satisfied the trial court did not abuse its discretion in sentencing defendant.

Affirmed.