SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1339-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN D. WESLEY,

Defendant-Appellant.

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Submitted May 12, 2022 – Decided June 7, 2022

Before Judges Haas and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 12-10-0998.

Joseph E. Krakora, Public Defender, attorney for appellant (Morgan A. Birck, Assistant Deputy Public Defender, of counsel and on the briefs).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Jeffrey C. McElwee, Jr., Assistant Prosecutor, on the brief).

PER CURIAM

On December 4, 2014, Judge Robert C. Billmeier sentenced defendant Kevin D. Wesley on one count of first-degree aggravated manslaughter (amended count one), Indictment No. 12-10-0998, and one count of first-degree robbery (count one), Indictment No. 12-05-0527, to twenty-three years' imprisonment subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the manslaughter offense, and to a concurrent term of twelve years, also subject to NERA, on the robbery charge.[1] Defendant appeals and we affirm.

We recite the facts pertinent to this appeal. On Indictment No. 12-05-0527, defendant filed a motion to suppress the identification Martin Rodriguez, himself a suspect in multiple robberies, made that defendant was one of two persons who committed the robbery. During a May 31, 2011 videotaped interview, Rodriguez initially identified defendant as "Fingers," later

[1] The charges dismissed on Indictment No. 12-05-0527 included third-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); second-degree unlawful possession of a rifle or shotgun, N.J.S.A. 2C:39-5(c); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a); and second-degree certain persons not to possess, N.J.S.A. 2C:39-7(b). On Indictment No. 12-10-0998, the dismissed charges included second-degree possession of a firearm for an unlawful purpose, and second-degree unlawful possession of a handgun. A third indictment was dismissed in its entirety, No. 11-08-0856, third-degree failure to register as a sex offender, N.J.S.A. 2C:7-2(a); fourth-degree failure to verify address as a sex offender, N.J.S.A. 2C:7-2(e); and third-degree failure to notify police of a change of address as a sex offender, N.J.S.A. 2C:7-2(d).

volunteering that defendant's name was Kevin Wesley. Rodriguez said defendant "got caught on . . . dirt bikes a couple of weeks ago." Rodriguez described defendant as "black, a little chunky, black hair[,]" five foot eight or five foot nine, about 220 pounds, and a resident of Cleveland Avenue.

Rodriguez explained he knew defendant and a Robert Reading committed the pharmacy robbery under investigation because they had asked him to participate but he declined. Afterwards, Reading and defendant sent him a photograph of the pills they had stolen. When Rodriguez called them in response to the text, Reading and defendant confirmed they had followed through with the robbery.

Some time into the interview, a detective retrieved defendant's photograph. He showed it to Rodriguez, asking him if he knew the person's name. Rodriguez nodded and said, "Kevin Wesley." The detective then asked for defendant's nickname, which Rodriguez gave as "Fingers." He asked Rodriguez if he was sure the photo was of Fingers, and Rodriguez replied, "positive."

After a second break, the detectives showed Rodriguez a number of photographs of persons they suspected of having been involved, including defendant's picture. A detective instructed Rodriguez that they were going to

go through the photos again, and that they needed him to name the persons and "what you know about them." The detective showed Rodriguez three photographs, and when he showed him a fourth, Rodriguez promptly identified the individual as Kevin Wesley, whom he also knew as "Fingers." Rodriguez explained his familiarity with defendant, whom he had known for approximately a year or two, from "hanging out" in the same area. Rodriguez was also shown additional pictures of men he did not recognize.

The Honorable Thomas W. Sumners, Jr.,[2] the judge who conducted the motion hearing, watched Rodriguez's interview. He noted that State v. Henderson, 208 N.J. 208 (2011), was decided after the interview in this case, thus the ruling would not be given retroactive effect. Id. at 300-02. After considering the relevant precedents, he concluded that because defendant was well acquainted with Rodriguez, the procedure employed here, of showing him defendant's photograph—only one photograph initially—was neither impermissibly suggestive nor raised the specter of misidentification.

Judge Sumners opined that defendant and Reading's invitation to Rodriguez to "participate in the robbery" meant the men were well-acquainted.

[2] At the time of the motion hearing, Judge Sumners was in the Law Division. He is now in the Appellate Division.

Additionally, Rodriguez described defendant, knew where he lived, and knew his name and nickname. Accordingly, based on the evidence and relevant precedents, defendant could not meet the first prong of the test for granting a Wade[3] hearing—whether the procedure utilized by the police was impermissibly suggestive. State v. Adams, 194 N.J. 186, 203 (2008). Defendant failed to meet the second prong of the Wade test as well—because the identification was reliable. Adams, 194 N.J. at 203. Since the procedure was not impermissibly suggestive and was sufficiently reliable, no Wade hearing would be granted. Overall, defendant had not carried his burden of demonstrating a substantial likelihood of misidentification.

We discuss the factors Judge Billmeier relied upon at sentencing in the relevant section. On appeal, defendant claims the following errors were committed:

> POINT I
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A PRETRIAL HEARING TO DETERMINE THE ADMISSIBILITY OF THE IDENTIFICATION BECAUSE THE SINGLE-PHOTO LINEUP WAS IMPERMISSIBLY SUGGESTIVE.

[3] United States v. Wade, 388 U.S. 218 (1967).

A. Because the single photo "showup" was impermissibly suggestive, the trial court erred in denying [defendant's] request for a Wade hearing.

B. Upon remand, if the identification is suppressed, [defendant] should be given the opportunity to take back his plea.

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE AND THE COURT FAILED TO EXPLAIN THE REASONS FOR ITS IMPOSITION. THEREFORE, THE SENTENCE MUST BE VACATED AND THE MATTER REMANDED FOR RESENTENCING.

I.

In State v. Pressley, 232 N.J. 587, 592-93 (2018), the Court discussed confirmatory identifications, "which [are] not considered suggestive[,]" in which "a witness identifies someone he or she knows from before but cannot identify by name." Even if police show only one photograph to such a witness, the procedure is not considered suggestive. Ibid.

In this case, the witness not only knew defendant from living in the same community, he knew his nickname and his actual name, which enabled police to locate a photograph. They showed Rodriguez the photo to confirm the identity of the perpetrator he named, not because they had a suspect in mind and wanted to obtain Rodriguez's confirmation of their suspicion. Given Rodriguez's

familiarity with defendant, it was not even a confirmatory identification process. There was no need for a Wade hearing.

Denial of a Wade hearing is reviewed for abuse of discretion. State v. Ortiz, 203 N.J. Super. 518, 522 (App. Div. 1985). See also State v. Anthony, 237 N.J. 213, 234 (2019) (Rule 3:11(d) "empowers the court, 'in its sound discretion and consistent with appropriate case law' to 'declare the identification in admissible, redact portions of the identification testimony, and/or fashion an appropriate jury charge . . . .'"); State v. Ruffin, 371 N.J. Super. 371, 391 (App. Div. 2004) (grant of Wade hearing not an abuse of discretion).

On appeal, defendant suggests the statement made by Rodriguez lacks important details necessary to establish reliability, such as the frequency with which Rodriguez saw defendant, whether or not they were actual neighbors, whether or not Rodriguez could have been influenced by the fact the detective who showed him the photograph was involved in the investigation of the robberies. We do not agree. Given Rodriguez's videotaped statements and the information he supplied, additional details were not necessary, and the fact that a year had elapsed between the robbery and Rodriguez's interview was inconsequential. Rodriguez knew defendant before and after the robbery.

Henderson was decided months after Rodriguez's identification of defendant. The judge did not abuse his discretion in denying the Wade hearing.

II.

Judge Billmeier began his sentencing analysis with defendant's eight juvenile adjudications and four indictable convictions. As a result of defendant's record, the judge accorded strong weight to aggravating factor three, the risk that defendant would reoffend. N.J.S.A. 2C:44-1(a)(3). He similarly gave great weight to aggravating factor six, the extent of defendant's prior criminal history, N.J.S.A. 2C:44-1(a)(6). Finally, he considered the need to deter defendant and others from violating the law to be important, particularly in light of defendant's guilty plea to the taking of another's life. When sentenced, defendant was thirty years old. The court found no factors in mitigation.

Although the aggravating factors outweighed non-existent mitigating, the judge considered the agreement to be fair, if for no other reason than that it spared the victim's family a trial, and spared defendant the prospect of a far more substantial potential sentence if convicted after trial. As a result, the judge imposed the agreed-upon sentence in the plea agreement.

Defendant claims on appeal that the sentence should be vacated and the matter remanded for a resentence hearing because the judge did not engage in

an adequate qualitative analysis of the relevant factors and he double-counted. We see no evidence whatsoever of any double-counting, as a judge is entitled to consider a defendant's prior criminal history in finding both aggravating factors three and six. State v. Tillery, 238 N.J. 293, 327 (2019).

We deferentially review a trial court's sentencing determination and do not substitute our judgment for that of the sentencing court. State v. Rivera, 249 N.J. 285, 297 (2021). We affirm unless the sentencing guidelines are violated, the aggravating and mitigating factors found are not based upon competent credible evidence in the record, or the trial court's application of the sentencing guidelines make the sentence so clearly unreasonable as to shock the judicial conscience. State v. Roth, 95 N.J. 334, 364-65 (1984).

In this case, the judge imposed a negotiated plea sentence based on the presentations made by counsel, the presentence report, and defendant's criminal history. These details in the record amply supported his findings on the aggravating and mitigating factors. Judge Billmeier did in fact engage in a qualitative analysis of the statutory factors based on that information.

Overall, the sentence defendant received on the amended lesser charge does not violate the sentencing guidelines, the aggravating and mitigating factors were based on competent credible evidence, and the sentence does not

shock our conscience. Accordingly, even though the judge to a great extent relied upon defendant's prior criminal history in the absence of other considerations, no error occurred. Defendant's history and the offenses established a specific need to deter him as well as the public.

Affirmed.