SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1503-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TAHEEM DAVIS, a/k/a
TAHEEM J. DAVIS, and
JEROME DAVIS,

Defendant-Appellant.

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Argued November 28, 2022 — Decided December 7, 2022

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment Nos. 18-10-0775 and 18-10-0808.

Tiffany J. Barlow, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Margaret McLane, Assistant Deputy Public Defender, and Tiffany J. Barlow, of counsel and on the briefs).

Ali Y. Ozbek, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County

Prosecutor, attorney; Ali Y. Ozbek, of counsel and on the brief).

PER CURIAM

Defendant Taheem Davis appeals from a September 30, 2019 order denying a suppression motion. He also challenges his sentence. We affirm.

Defendant was charged with numerous drug offenses under two indictments. He filed a suppression motion, and at the hearing the trial judge heard testimony from Sergeant[1] Angel Perales of the Passaic County Prosecutor's Office (PCPO), and defendant's girlfriend, Yanae Thomas.

On December 29, 2017, Sergeant Perales received a call regarding a drug overdose death. He interviewed the victim's girlfriend, who stated she purchased narcotics from an individual she knew as "T" and gave the sergeant T's phone number. Sergeant Perales ran a LexisNexis Accurint inquiry on T's number, which identified defendant. The Accurint search retrieved two different addresses for defendant in Paterson; one on Ryerson Avenue and the other on Cliff Street. A search of New Jersey Motor Vehicle Commission (MVC) records listed only the Cliff Street address. Sergeant Perales showed the victim's girlfriend defendant's driver's license photo, and she confirmed defendant was

[1] Sergeant Perales held the rank of detective at the time of the motion hearing.

"T." The MVC records also indicated defendant owned a Chevrolet Cruze vehicle.

Police set up a controlled buy between the victim's girlfriend and defendant. Police followed her to the meetup location, while other units surveilled the Ryerson Avenue address. Detectives reported defendant's Chevrolet Cruze arrived at the Ryerson Avenue address. Sergeant Perales observed defendant pull out a black shopping bag from the vehicle's trunk and enter the Ryerson Avenue residence. Defendant exited the residence and proceeded towards the meetup location while texting the victim's girlfriend, who relayed the communications to police.

When defendant arrived at the meetup location and police approached him, they saw him throw a small item under a car, which officers suspected was a bag of heroin. Defendant was apprehended and police administered his Miranda[2] rights. Sergeant Perales requested defendant's consent to search the 54 Ryerson Avenue residence, but defendant "said he didn't know what they were talking about" and denied having gone to the location.

The front door to the residence was ajar, so Sergeant Perales entered and asked a man inside the building if he knew of anyone matching defendant's

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

description. The man directed the sergeant upstairs. On his way upstairs, Sergeant Perales noticed two women and asked if they knew of a person matching defendant's description. The women advised him the only Black family in the building resided on the second floor.

Sergeant Perales ascended to the second floor and knocked on the door, which was answered by Tashira Daye. She stated she was the lessee of the apartment. Sergeant Perales informed Daye about the investigation, defendant's arrest, and said defendant was outside. Daye told the sergeant defendant was her cousin and "he stays at the apartment occasionally, and that he had just [delivered] food." She allowed the sergeant into the apartment. There were two other women and four children present.

Daye told Sergeant Perales defendant occasionally stayed in the makeshift bedroom near the front of the residence. The sergeant testified the door to that room was "completely open" and Thomas was inside. Daye requested to speak with defendant and proceeded with the sergeant outside to the car where defendant was being held. She asked defendant what was going on and defendant responded, "don't do anything, don't sign nothing, they ain't got shit . . . ." Sergeant Perales recounted Daye "basically said I don't know what's

going on but I'm not going to lose my apartment nor my kids over whatever you're doing."

Back inside the apartment, Sergeant Perales read the PCPO consent to search form to Daye and allowed her to read it as well. She signed the form and allowed police to search the bedroom used by defendant. Detectives found crack-cocaine, "approximately 1,500 to 2,000 small glassine envelopes containing heroin," packaging materials, and money. They also recovered a PSE&G envelope addressed to defendant, but the sergeant could not recall the address on the envelope.

Sergeant Perales later asked defendant for consent to search his vehicle; he consented and signed a written consent form. Defendant crossed out the sections on the consent form relating to the search of a residence.

On cross-examination, Sergeant Perales was confronted by photos taken by Thomas showing the lock on the door of defendant's bedroom had no screws. He denied that the door was breached by police because it "would have much more damage around the wood area . . . ." He was also shown a picture the defense suggested was a second point of entry to defendant's apartment. However, he pointed out this would not be possible because it "was overloaded with a bunch of junk . . . ."

Thomas testified she would not lie for defendant. She claimed he was living at the Ryerson Avenue address in December 2017, and she visited defendant once per week. She denied knowing who Daye was and claimed the main door to Daye's apartment was not how she and defendant accessed defendant's bedroom. She claimed the door connecting defendant's bedroom to the rest of the apartment was always locked and police barged through the door on the day of the search. Thomas was unaware defendant had another address at Cliff Street.

The trial judge found both witnesses credible, but concluded Thomas had a "possible bias in favor of the defense" because defendant was "the father of her child and her boyfriend . . . ." The judge concluded Daye gave valid consent to search the apartment and, as the lessee, had authority to consent to the search of the entire premises. The judge credited Sergeant Perales' testimony stating the door to defendant's room was neither locked nor breached by police and concluded "the door . . . was open at all times, the door was open in[wards] and the room was open to all others in the apartment." Further, the damage to the door "appears to be more of a lock having its screws removed, which was not the testimony in the matter at hand." Crediting the sergeant's testimony, the

judge noted there was no splintering to evidence "the door [had] been breached or forced open by the police."

After the judge denied the suppression motion, trial began, but was interrupted due to the COVID-19 pandemic. Defendant then entered an agreement to plead guilty to one count under each indictment, namely first-degree operating a controlled drug substance (CDS) production facility, N.J.S.A. 2C:35-4, and third-degree possession with intent to distribute CDS within 1,000 feet of a school, N.J.S.A. 2C:35-7(a) and -5(a). The State recommended a sentence of fifteen years with a seven-and-one-half year period of parole ineligibility on the first-degree offense to run concurrent with an extended sentence of ten years with a five-year parole disqualifier for the third-degree offense. Defendant argued for an aggregate sentence of thirteen years with six and one-half years of parole ineligibility.

The sentencing judge found aggravating factor N.J.S.A. 2C:44-1(a)(3), the risk the defendant will commit another offense "based on the pattern of offenses [defendant has] been committing for a long period of time . . . going back almost [twenty] years." He also found aggravating factor N.J.S.A. 2C:44-1(a)(6), the extent of defendant's prior criminal record and the seriousness of the offenses of which defendant has been convicted. The judge noted defendant had

a juvenile record and his convictions included assault, terroristic threats, aggravated assault, distribution of CDS within 1,000 feet of school property, and unlawful possession of a handgun. He found aggravating factor N.J.S.A. 2C:44-1(a)(9), the need for deterring the defendant and others from violating the law. The judge found mitigating factor N.J.S.A. 2C:44-1(b)(11), the imprisonment of defendant would be an excessive hardship on him and his dependents, noting he had two young children.

The trial judge concluded the aggravating factors slightly outweighed the mitigating factor. He sentenced defendant to fourteen years and seven years of parole ineligibility on the first-degree offense because the level of manufacturing was small and there was uncertainty whether the drugs defendant manufactured killed the victim. The judge also sentenced defendant to a concurrent term of ten years with five years of parole ineligibility on the third-degree offense.

Defendant raises the following points on appeal:

> POINT I
>
> THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE APARTMENT LESSEE LACKED THE AUTHORITY TO CONSENT TO THE SEARCH OF DEFENDANT'S BEDROOM AND BECAUSE DEFENDANT WAS

PRESENT AND OBJECTING TO THE SEARCH OF HIS ROOM.

A. The apartment lessee lacked actual or apparent authority to consent to the search of defendant's bedroom.

B. Alternatively, the lessee's consent was made invalid because the defendant was physically present and objected to the search.

POINT II

THE COURT'S IMPROPER FINDING OF AGGRAVATING FACTORS AND FAILURE TO ADDRESS MITIGATING FACTORS RENDER DEFENDANT'S SENTENCE EXCESSIVE.

I.

In Point I, defendant argues Daye lacked authority to consent to the search because there was no evidence showing she "jointly occupied or had common authority over [defendant]'s bedroom." He asserts Daye's lack of authority was evidenced by the fact "she asked to speak with him before she signed the consent form." Defendant argues it was unreasonable for police to rely on Daye's consent because his girlfriend was in his bedroom during the search, which should have led police to inquire whether the bedroom was being used exclusively by defendant.

The scope of review on a motion to suppress is limited. State v. Ahmad, 246 N.J. 592, 609 (2021). "Generally, . . . a trial court's factual findings in support of granting or denying a motion to suppress must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). This is because of the trial court's "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Therefore, we "will not disturb the trial court's factual findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Goldsmith, 251 N.J. 384, 398 (2022) (quoting State v. Gamble, 218 N.J. 412, 425 (2014) (internal quotations omitted)). However, legal conclusions drawn from those facts are reviewed de novo. State v. Radel, 249 N.J. 469, 493 (2022).

"In a search of a home, the United States Supreme Court has recognized that, in certain circumstances, a third party—a person other than the defendant—can validly consent to a search of the defendant's home." State v. Cushing, 226 N.J. 187, 199 (2016) (citing United States v. Matlock, 415 U.S. 164, 170-71 (1974)). "To determine whether a valid consent to search was given, the State

must prove [the consenting third party] possessed 'common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" State v. Crumb, 307 N.J. Super. 204, 243 (App. Div. 1997) (quoting Matlock, 415 U.S. at 171). "Consent may be obtained from a third party so long as the consenting party has the authority to bind the other party." Id. at 242 (citing State v. Douglas, 204 N.J. Super. 265, 276 (App. Div. 1985), certif. denied, 102 N.J. 378; 102 N.J. 393 (1986)). "The . . . 'common authority' rule looks to the consenting party's right to consent 'in [their] . . . own right' and circumstances showing that the accused had 'assumed the risk.'" Id. at 243 (quoting Douglas, 204 N.J. Super. at 277). However, a co-occupant's consent will be deemed invalid if the other occupant/target of the search is present and objects to the search. Georgia v. Randolph, 547 U.S. 103, 110 (2006).

Furthermore, a denial of ownership does not mean a defendant has abandoned the item or place, nor does it strip the defendant of their right to challenge the validity of the search. See Johnson, 193 N.J. 528, 551 (2008). However, a denial of ownership can strip a defendant of the right to challenge the consent to search given to police by a third party with authority over the item or place. State v. Allen, 254 N.J. Super. 62, 68 (App. Div. 1992).

"Apparent authority arises when a third party (1) does not possess actual authority to consent but appears to have such authority and (2) the law enforcement officer reasonably relied, from an objective perspective, on that appearance of authority." Cushing, 226 N.J. at 199-200 (citing Illinois v. Rodriguez, 497 U.S. 177, 185-89 (1990)). "[P]olice officers need not ultimately be factually correct about a party's ability to consent to a search." State v. Coles, 218 N.J. 322, 340 (2014) (citing State v. Suazo, 133 N.J. 315, 320 (1993)).

Pursuant to these principles, we conclude the trial judge did not abuse his discretion by denying the suppression motion. Daye, as the lessee of the apartment, clearly had control over the premises. No evidence exists showing defendant was either a co-lessee or shared control over the apartment. The evidence shows otherwise, namely: Daye's statement to the police that defendant stayed at the apartment occasionally; Thomas's testimony defendant was at the residence only one day per week; records showing defendant resided elsewhere; and defendant's denial of anything to do with the residence. The judge's findings—that the door to the bedroom was open, and that the police did not force it—are supported by the record, and therefore require our deference.

II.

In Point II, defendant argues we should remand for resentencing. He claims the court: Failed to address and find mitigating factor N.J.S.A. 2C:44-1(b)(9); improperly found aggravating factor N.J.S.A. 2C:44-1(a)(9) without finding a need for specific deterrence; and the overall sentence was excessive.

We review sentencing determinations for an abuse of discretion and "must not substitute [our] judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014). A sentence will be upheld unless: (1) "the sentencing guidelines were violated;" (2) the court did not base its evaluation of the aggravating and mitigating factors on "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." Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)) (alteration in original) (internal quotations omitted). "When the trial court fails to provide a qualitative analysis of the relevant sentencing factors on the record, an appellate court may remand for resentencing." Ibid. (citing State v. Kruse, 105 N.J. 354, 363 (1987)). We "may also remand for resentencing if the trial court considers an aggravating factor that is inappropriate to a particular defendant or to the offense at issue." Ibid. (citing State v. Pineda, 119 N.J. 621, 628 (1990)).

Having reviewed the sentencing record, we are unconvinced the sentence contained reversible error or that the trial judge abused his discretion. N.J.S.A. 2C:44-1(b)(9), requires the court to consider whether "[t]he character and attitude of the defendant indicate that the defendant is unlikely to commit another offense." Defendant's sentencing memorandum argued the court should apply this factor because he complied with the court's instructions, "accepted responsibility and appears ready to change his life." However, the judge was not required to apply the mitigating factor if it was not supported by the evidence in the record. State v. Case, 220 N.J. 49, 68-69 (2014). To the contrary, the record supported the judge's finding defendant's record represented a "pattern of offenses" spanning "almost [twenty] years." Likewise, defendant's lengthy criminal history demonstrated the need for specific deterrence and supported the finding of aggravating factor N.J.S.A. 2C:44-1(a)(9). Finally, defendant's argument the sentence was excessive lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.