SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0526-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DERRICK S. LEONARD, a/k/a D-HURT, LEONARD DERRICK, QUADIR BUSH, DEE HURT, DERRICK LEOMARD, DERRICK LEORNARD, and DERRICK WILLIAMS,

Defendant-Appellant.

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Argued December 20, 2023 – Decided March 3, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 17-06-1815 and 18-08-2522.

Brian P. Keenan, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Brian P. Keenan, of counsel and on the brief).

Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Caitlinn Raimo, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief; Frank J. Ducoat, on the brief).

PER CURIAM

Defendant Derrick S. Leonard appeals from his guilty plea convictions to first-degree robbery and second-degree unlawful possession of a handgun. He contends the trial court erred in denying his motion to suppress the firearm, claiming he was unlawfully detained as a passenger during a motor vehicle stop. He also contends the trial court erred in denying his motion to withdraw his guilty pleas based on two theories: (1) the trial court misapplied the factors spelled out in State v. Slater, 198 N.J. 145 (2009); and (2) the sentence imposed on his Graves Act[1] conviction pursuant to the package plea agreement was illegal because it was too lenient. After carefully reviewing the record in light of the governing legal principles and arguments of the parties, we affirm.

I.

[1] N.J.S.A. 2C:43-6(c) generally requires that defendants convicted of certain gun offenses be sentenced to at least a forty-two-month term of imprisonment.

On June 30, 2017, defendant was charged by indictment with (1) second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); (2) third-degree receiving stolen property, N.J.S.A. 2C:20-7(a); and (3) fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2).

In September 2017, defendant moved to suppress the handgun. After a two-day hearing, the trial court denied defendant's suppression motion on April 30, 2018.

On August 16, 2018, defendant was charged in another indictment with (1) second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and 2C:15-1; (2) first-degree robbery, N.J.S.A. 2C:15-1; (3) second-degree burglary, N.J.S.A. 2C:18-2; (4) second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and (5) second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a).

On May 6, 2019, defendant pled guilty to the first-degree robbery charged in the August 16, 2018 indictment and the second-degree unlawful possession of a firearm charged in the June 30, 2017 indictment. The plea agreement provided that defendant would be sentenced to a thirteen-year prison term for the robbery charge, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and a concurrent forty-two-month prison term with a forty-two-

month period of parole ineligibility for the firearm conviction. The plea agreement also provided that the remaining charges in both indictments would be dismissed.

Prior to sentencing, defendant moved to withdraw his guilty pleas. On August 28, 2020, the trial court denied that motion and sentenced defendant in accordance with the plea agreement.

Defendant raises the following contentions for our consideration:

> POINT I
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> THE MOTION COURT ERRED IN FAILING TO ADDRESS BOTH THE INITIAL VEHICLE STOP CHALLENGED BY THE DEFENSE AND MOST IMPORTANTLY, THE ILLEGAL STOP OF [DEFENDANT] REVEALED DURING THE SUPPRESSION HEARING, AND INSTEAD MISTAKENLY CONCLUDED THAT THE LOCATION WHERE THE HANDGUN WAS FOUND WAS DISPOSITIVE IN DENYING [DEFENDANT]'S MOTION TO SUPPRESS.
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> POINT II
>
> THE MOTION COURT ERRED IN DENYING [DEFENDANT]'S MOTION TO WITHDRAW HIS GUILTY PLEA.
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> POINT III
>
> THE SENTENCING COURT IMPOSED AN ILLEGAL SENTENCE REQUIRING REVERSAL OF [DEFENDANT]'S SENTENCE AND A REMAND TO ALLOW HIM TO WITHDRAW HIS GUILTY PLEA

OR REACH A NEW AGREEMENT WITH THE STATE BASED ON A LEGAL SENTENCE.

II.

We first address defendant's Fourth Amendment contention. The following facts were adduced at the suppression hearing. On May 3, 2017, Detective Stanton Holder of the Irvington Police Department initiated a motor vehicle stop for a seatbelt infraction. As Detective Holder was exiting his vehicle, he observed a passenger—later identified as defendant—getting out of the stopped car. The detective ordered defendant to get back in the car. Detective Holder saw defendant adjusting a handgun in his waistband. Defendant did not comply with the detective's command and instead ran from the scene through adjacent yards.

Detective Holder gave chase and called for backup. He saw defendant toss the handgun over a fence into a parking lot. Shortly after, two other officers intercepted defendant and arrested him. After defendant was arrested, Detective Jamar Neal went to the parking lot and recovered the discarded handgun.

We begin our analysis by acknowledging the scope of our review is limited. State v. Ahmad, 246 N.J. 592, 609 (2021). "Generally, on appellate review, 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)). Factual findings will not be disturbed on appeal unless they are "so clearly mistaken that the interests of justice demand intervention and correction." State v. Gamble, 218 N.J. 412, 425 (2014) (internal quotation marks omitted) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). However, legal conclusions drawn from those facts are reviewed de novo. State v. Radel, 249 N.J. 469, 493 (2022).

Defendant contends the detective had no lawful authority to order him back into the stopped vehicle, arguing "the initial motor vehicle stop, which was based on alleged illegal conduct by the driver, provided no basis to restrict the departure of [defendant], a passenger." As we explained in State v. Hickman, "if a stop for a motor vehicle violation is reasonable, the police do not have to show an independent basis for detaining the passengers, unless the detention goes beyond what is incident to a brief motor vehicle stop." 335 N.J. Super. 623, 634 (App. Div. 2000). Nothing in the record suggests the stop went "beyond what is incident to a brief motor vehicle stop." Ibid. Accordingly, the State was not required to establish an independent basis for detaining defendant. Ibid.

Defendant argues that under State v. Smith, 134 N.J. 599, 609 (1994), a "heightened awareness of danger" is required to seize a passenger during a motor vehicle search. However, Smith addressed the legal standard under the New Jersey Constitution for ordering a passenger to exit a lawfully detained vehicle, not the standard for ordering a passenger to remain in the detained vehicle. 134 N.J. at 618. Nothing in Smith authorizes a passenger to flee the scene of a lawful stop.

But even were we to assume for the sake of argument that Detective Holder's command to defendant to get back in the car was unlawful, the discarded gun that was recovered following the chase defendant precipitated would still be admissible under the attenuation doctrine. Under that exception to the exclusionary rule, the State must show the recovery of evidence is sufficiently attenuated from police misconduct considering: "(1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct." State v. Williams, 192 N.J. 1, 15 (2007) (quoting State v. Johnson, 118 N.J. 639, 653 (1990)). Our Supreme Court made clear in Williams that "a person has no constitutional right to flee from an investigatory stop, 'even though a judge may later determine the stop was unsupported by reasonable and

articulable suspicion.'" 192 N.J. at 11 (quoting State v. Crawley, 187 N.J. 440, 458 (2006)).

Defendant argues there was no attenuation in this instance because he "merely ran away and did nothing that cause[d] or threatened harm to others." We disagree. Defendant fled from police across other people's property while carrying a handgun. In Crawley, the Court stressed, "any flight from police detention is fraught with the potential for violence because flight will incite a pursuit, which in turn will endanger the suspect, the police, and innocent bystanders." 187 N.J. at 460 n.7. The potential for violence in this instance was amplified immeasurably because the pursuing officer saw defendant in possession of a handgun. See State v. Dunbar, 434 N.J. Super. 522, 528 (App. Div. 2014) (holding the seizure of a handgun the defendant discarded while fleeing from police was lawful, in part because defendant discarded the gun during a "headlong flight" (citing Crawley, 187 N.J. at 451)); see also State v. Hughes, 296 N.J. Super. 291, 296 (App. Div. 1997) (defendant's act of discarding object while police were following defendant constituted abandonment and relinquishment of Fourth Amendment rights).

Considering all relevant circumstances, we conclude the trial court correctly ruled the recovery of the handgun was constitutional and the handgun would be admissible at trial.

III.

We turn next to defendant's contention that he should have been allowed to withdraw his guilty plea. Motions to withdraw a guilty plea filed before sentencing are granted in the "interests of justice." R. 3:9-3(e). The decision whether to allow a defendant to withdraw a guilty plea requires consideration of four factors: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." Slater, 198 N.J. at 157–58. In reviewing a trial court's findings on the Slater factors, an appellate court applies the abuse of discretion standard. State v. Tate, 220 N.J. 393, 404 (2015).

The trial court conducted a thorough analysis of each factor. Under the first Slater factor, the trial court found defendant had not made a colorable claim of innocence. "A colorable claim of innocence is one that rests on 'particular,

plausible facts' that, if proven in court, would lead a reasonable factfinder to determine the claim is meritorious." State v. Munroe, 210 N.J. 429, 442 (2012) (citing Slater, 198 N.J. at 156). "It is more than '[a] bare assertion of innocence,' but the motion judge need not be convinced that it is a winning argument . . . ." Ibid. (alteration in original) (citation omitted).

The trial court considered, and rejected, defendant's contention that the robbery victim's account was implausible and that there were discrepancies between the account the victim gave to police and the account he gave to the defense investigator. Specifically, defendant cites to discrepancies with respect to whether the victim was entering the apartment with a friend or opening the door for a friend from the inside and whether the victim chased both co-defendant Hughes and defendant or only defendant. Defendant also argues it is implausible the victim chased an armed man and that defendant removed his mask during a three-minute robbery. Defendant further argues that "no gun or physical evidence was ever recovered" with respect to the robbery.

The trial court considered these arguments and noted that five other witnesses corroborated the victim's account given to police. Importantly, the court also noted that the robbery co-defendant inculpated defendant, admitting

he served as a lookout for defendant. We find no abuse of discretion in the trial court's conclusion that defendant failed to make a colorable claim of innocence.

As to the second Slater factor, the trial judge found the nature and strength of defendant's reason for withdrawal did not weigh in favor of granting the motion. The trial court was not persuaded by defendant's argument that co-defendant's counsel coerced defendant to plead guilty. The trial court, for example, rejected defendant's contention that co-defendant's counsel threatened defendant by relating what co-defendant would testify to if defendant's case went to trial. Advising a defendant as to the strength of the State's case is not a coercive circumstance within the meaning of Slater and affords no basis upon which to withdraw a guilty plea.

The trial court added that the plea colloquy belied the notion that defendant's guilty pleas were coerced. See State v. Simon, 161 N.J. 416, 445 (1999). We have no reason to second guess the trial court's conclusion that defendant was motivated by what the court characterized as "buyer's regret" and a desire to receive a shorter sentence than the one for which he bargained.

The trial court found the third Slater factor—the existence of a plea bargain—"moderately mitigate[d] against . . . withdrawing the plea." The court noted this factor "does not hold much weight in the balancing process, as the

[c]ourt recognizes that the vast majority of criminal cases are resolved by way of plea bargain." See Slater, 198 N.J. at 161.

As for the last Slater factor—unfair prejudice to the State or advantage for the defendant—the trial court acknowledged this also was "not a big factor." The court nonetheless noted the State had been prepared to go to trial and that "[t]he passage of time affects abilities of witnesses to recall" making "it more difficult for the State to proceed as time passes." The trial court thus concluded this last factor "does not support withdrawal."

In sum, we see no abuse of discretion in the trial court's determination that none of the Slater factors militate in favor of allowing defendant to withdraw his plea. See Tate, 220 N.J. at 404.

IV.

Finally, we address defendant's contention that his guilty pleas must be vacated because he received an unduly lenient sentence on the gun conviction. Defendant argues his forty-two-month sentence for second-degree unlawful possession of a handgun was illegal because that sentence falls within the third-degree sentencing range, N.J.S.A. 2C:43-6(a)(3).[2] Defendant argues that

[2] We note that the Legislature has also authorized a reduction in a Graves Act sentence upon motion by the prosecutor and approval of the assignment judge

because he pled guilty to a second-degree Graves Act crime, the sentencing judge had no authority to impose a term of imprisonment appropriate to a third-degree crime pursuant to N.J.S.A. 2C:44-1(f)(2) because that downgrade feature requires that the mitigating factors substantially outweigh the aggravating factors. Here, the judge found the aggravating factors outweighed the mitigating factors. Furthermore, defendant argues, the judge did not expressly state that the "interests of justice demands [a downgrade]," N.J.S.A. 2C:44-1(f)(2), or that there was a "'compelling' reason for the downgrade," State v. Megargel, 143 N.J. 484, 502 (1996).

Defendant relies upon our decision in State v. Moore, where we held the downgraded sentence violated N.J.S.A. 2C:44-1(f)(2) because the court was not clearly convinced that the mitigating factors substantially outweighed the aggravating factors. 377 N.J. Super. 445, 451 (App. Div. 2005). However, in State v. Balfour, our Supreme Court sustained a sentence downgrade notwithstanding that the trial court found the aggravating factors outweighed the mitigating factors because the downgrade decision had been made "in the context of a plea agreement." 135 N.J. 30, 38 (1994). The Court explained that

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under enumerated circumstances. N.J.S.A. 2C:43-6.2. The permitted reductions include reducing "the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole" to one year. Ibid.

"the agreement itself in some measure defines the mitigating effect of the plea on the court's discretionary decision whether to downgrade the sentence." Id. at 39.

Applying the commonsense reasoning in Balfour to the unique situation before us, we conclude the negotiated sentence in this case is not illegal as to require our intervention. See State v. Flores, 228 N.J. Super. 586, 594 (App. Div. 1988) (noting a reviewing court is not free to ignore an illegal sentence). Having bargained for the exact sentence defendant now complains is too lenient and having urged the sentencing court to impose that sentence, defendant cannot now rely on N.J.S.A. 2C:44-1(f)(2) to invalidate the sentence as a means to vacate his guilty pleas.[3]

To be sure, the plea agreement was generous. The agreed-upon sentence on the robbery conviction was below the mid-point of the first-degree range, and defendant was eligible for a life term based on his criminal history. See N.J.S.A. 2C:43-6(a)(1) and 2C:44-3. Other serious charges from both indictments were

[3] We note that imposition of a prison term greater than forty-two months would violate defendant's reasonable expectation and would be precluded as a matter of due process. See State v. Marzolf, 79 N.J. 167, 183 (1979). Defendant is not entitled to withdraw his guilty plea essentially because the sentence imposed met his reasonable expectation.

dismissed in consideration for defendant's guilty plea, and the Graves Act sentence defendant now challenges was made concurrent to the robbery sentence even though these were two temporally distinct crimes that might have justified consecutive sentences. See State v. Yarbough, 100 N.J. 627, 644 (1985).

We add, finally, that the Graves Act sentence defendant now claims to be illegal is wholly subsumed within the concurrent robbery NERA sentence, which is indisputably lawful. Considering all of these circumstances, defendant is hard pressed to nullify the sentence he bargained for as an innovative stratagem to vacate his guilty pleas.

To the extent we have not addressed them, any remaining contentions raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.