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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1065-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

O.F.P.,[1]

Defendant-Appellant.

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Submitted September 11, 2023 — Decided September 21, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 19-03-0313.

Joseph E. Krakora, Public Defender, attorney for appellant (Thomas P. Belsky, Assistant Deputy Public Defender, of counsel and on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Regina M. Oberholzer, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

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[1] We use initials pursuant to N.J.S.A. 2A:82-46 and Rule 1:38-3(c)(9).

Defendant O.F.P. appeals from an April 14, 2021 order, denying a motion to suppress DNA evidence obtained from a buccal swab he gave police and challenges the financial penalty imposed as part of his sentence. We affirm in part and reverse and remand in part, for the reasons expressed in this opinion.

On October 20, 2018, the Hudson County Prosecutor's Office, Special Victim's Unit (SVU), began an investigation after learning from the Division of Child Protection and Permanency (Division) defendant's twelve-year-old daughter was pregnant. Defendant and his daughter were living with an immigration sponsor and her family, which included a son, son-in-law, and two teenage grandsons. Detectives interviewed the sponsor, defendant, and his daughter. The daughter claimed someone grabbed her, put a cloth over her mouth, and she later woke up on the sidewalk.

SVU Detective Francine E. Cifuentes interviewed defendant three times. The first time she read defendant his Miranda[2] rights in Spanish, defendant's first language, and had defendant read and sign a Miranda waiver form, which was also in Spanish, before interviewing him.

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

Several hours after the first interview, Detective Cifuentes conducted a brief follow-up interview of defendant. Prior to asking defendant questions, she confirmed he still understood his rights. This interview did not address any issues regarding the daughter but focused on defendant's life in Honduras. Defendant was permitted to leave following the interview.

The following day, detectives accompanied the child to retrace her route on the day of her alleged assault. However, she could not remember where she had been grabbed by her alleged assailant or where she had awoken following the incident. When detectives returned to the SVU, they learned defendant used the sponsor's credit card to purchase a one-way flight to Belize, which was leaving that evening. Detectives responded to Newark-Liberty International Airport intending to arrest defendant on child endangerment charges for abandoning his daughter. Defendant was not arrested because he agreed to accompany detectives back to the SVU for further questioning.

Detectives re-Mirandized defendant, he signed a waiver form, and a third interview ensued. Although he told detectives his immigration parole prevented him from returning to Central America, he claimed he was traveling to Belize to bring the child's mother back to talk to the child, even though he claimed the mother had no relationship with the child and had abandoned her. Defendant

initially told the detective he thought the mother lived in Belize, but later insisted he knew where she lived and had visited there before.

Detective Cifuentes informed defendant police collected DNA samples from the males residing in the sponsor's home to rule them out as the perpetrator and asked if defendant would consent to a buccal swab. Defendant gave oral consent, and the detective showed him a consent form written in Spanish, which she asked him to sign. The form did not say defendant had the right to refuse consent. Defendant read and signed the form. He told the detective he wanted to speak with his attorney after the detective completed the swab. The detective confirmed defendant's desire to confer with counsel after the swab. After taking the swab, the detective returned to the interview room and arrested defendant for endangering the welfare of a child by abandonment.

Defendant was fingerprinted, and as he was being escorted to a cell by SVU Sergeant Peter Kwon, asked to speak privately with the sergeant. Although Sergeant Kwon informed defendant he could not speak with him because he had invoked his right to counsel, he reiterated his desire to speak privately with the sergeant. Defendant was re-Mirandized by Detective Cifuentes in Spanish. Defendant also waived his Miranda rights orally and in writing in Spanish.

With defendant's consent, Sergeant Kwon conducted the fourth interview in English because the sergeant did not speak Spanish. In this interview, defendant admitted to sexually assaulting his daughter. Defendant was arrested and charged with aggravated sexual assault and a second charge of endangering the welfare of a child for sexual contact by a caretaker.

Detectives later learned the child informed Division workers defendant touched her inappropriately when they were living in Honduras and during their stay with the sponsor. She did not disclose the abuse because defendant threatened her. The pregnancy was terminated, and DNA testing confirmed defendant as the fetus's father.

A grand jury indicted defendant with first-degree aggravated sexual assault of a victim under the age of thirteen, N.J.S.A. 2C:14-2(a)(1), (count one); second-degree sexual assault of a victim under the age of thirteen by an actor at least four years older, N.J.S.A. 2C:14-2(b), (count two); second-degree endangering the welfare of a child — sexual contact with a child by a caretaker, N.J.S.A. 2C:24-4(a)(1), (count three); second-degree endangering the welfare of a child — abuse or neglect of a child by a caretaker, N.J.S.A. 2C:24-4(a)(2), (count four); and two counts of third-degree witness tampering, N.J.S.A. 2C:28-5(a)(1), (counts five and six).

Defendant moved to suppress the DNA evidence, and the State moved to admit the statements defendant made to investigators and for other relief not pertinent here. A trial judge conducted a hearing and considered: the testimony of Detective Cifuentes and Sergeant Kwon; the transcripts and video of defendant's interviews; and the Miranda and buccal swab consent forms.

Defendant argued he requested counsel before the buccal swab was taken. The State contended defendant consented to the swab before invoking the right to counsel. Regardless, the State asserted the evidence was admissible under the inevitable discovery doctrine because detectives would have obtained the DNA evidence while testing every male who resided with the child.

The trial judge found defendant consented to the buccal swab because the consent form "included knowledge of a right to refuse." He also rejected defendant's argument he invoked the right to counsel before the buccal swab because the record showed the detective clarified defendant wanted to speak with counsel after the swab. Further, although it was not the basis of his ruling, the judge also concluded the DNA would have inevitably been obtained as part of the investigation.

Defendant filed a second motion to suppress the DNA evidence, arguing he did not consent to the swab because he was not explicitly advised of his right

to refuse consent. He also moved to suppress his fourth statement as fruit of the poisonous tree, namely, the invalid seizure of his DNA.[3] This motion was considered by a separate judge and resulted in the order now on appeal.

The motion judge found "the buccal swab was taken without defendant's consent because he was not informed of his right to refuse consent" pursuant to State v. Johnson, 68 N.J. 349 (1975). However, he found the DNA evidence admissible under the inevitable discovery doctrine because the State proved by clear and convincing evidence the investigation would have led detectives to take defendant's DNA because of: the inconsistent statements by the child, the sponsor, and defendant; defendant's purchase of the one-way airline ticket; and detectives had already begun collecting DNA samples from the other males living in the household. Therefore, "[s]ince defendant lived with [the child], law enforcement would have taken the appropriate steps to obtain his DNA. This would have been the 'proper, normal[,] and specific police investigative procedures' that would have been initiated and pursued." (quoting State v. Sugar, (Sugar II), 100 N.J. 214, 240 (1985)). The judge denied the motion.

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[3] Although this issue is listed on defendant's criminal case information statement, we do not reach it because it has not been briefed on appeal. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

A third judge handled defendant's sentencing. Pursuant to a plea agreement, defendant pled guilty to count one and was sentenced to: twenty-one years in prison with a mandatory twenty-one-year period of parole ineligibility as required by N.J.S.A. 2C:14-2(a); Megan's Law, N.J.S.A. 2C:7-2; Parole Supervision for Life, N.J.S.A. 2C:63-6.4; an Avenel evaluation, N.J.S.A. 2C:47-1; and Nicole's Law, N.J.S.A. 2C:44-8. The sentencing judge also ordered mandatory surcharges and penalties, including a $2,000 penalty, payable to the Sex Crime Victim Treatment Fund (SCVTF).

Defendant raises the following points on appeal:

> POINT I BECAUSE THE STATE FAILED TO CARRY ITS BURDEN AND PRESENT SUFFICIENT EVIDENCE DEMONSTRATING THAT INVESTIGATORS WOULD HAVE INEVITABLY OBTAINED [DEFENDANT'S] DNA THROUGH INDEPENDENT LAWFUL MEANS, THE TRIAL COURT ERRED BY APPLYING THE INEVITABLE DISCOVERY DOCTRINE TO DENY [DEFENDANT'S] MOTION TO SUPPRESS.
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> POINT II BECAUSE THE TRIAL COURT DID NOT DETERMINE [DEFENDANT'S] ABILITY TO PAY BEFORE IMPOSING THE MAXIMUM SCVTF PENALTY FOR COUNT ONE, THIS COURT SHOULD REMAND THE MATTER FOR AN ABILITY TO PAY HEARING. (Not Raised Below).

I.

Our scope of review of a trial court's decision on a motion to suppress is limited. State v. Ahmad, 246 N.J. 592, 609 (2021) (citing State v. Robinson, 200 N.J. 1, 15 (2009)). 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)). "We ordinarily 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)). However, the legal conclusions to be drawn from those facts are reviewed de novo. State v. Hubbard, 222 N.J. 249, 263 (2015) (citing State v. Gandhi, 201 N.J. 161, 176 (2010)).

The inevitable discovery doctrine may be invoked to "preserve — if certain conditions are satisfied — the admissibility of evidence obtained without a warrant or a valid exception to the warrant requirement." State v. Camey, 239 N.J. 282, 301 (2019). The doctrine is an exception to the exclusionary rule and permits the admission of unlawfully obtained evidence when "the evidence in question would inevitably have been discovered without reference to the police

error or misconduct," thereby negating any taint. State v. Sugar (Sugar III), 108 N.J. 151, 156 (1987) (internal citation omitted). The rationale underlying the doctrine is that:

> the deterrent purposes of the exclusionary rule are not served by excluding evidence that, but for the misconduct, the police inevitably would have discovered. If the evidence would have been obtained lawfully and properly without the misconduct, exclusion of the evidence would put the prosecution in a worse position than if no illegality had transpired.
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> [Sugar II, 100 N.J. at 237.]

To prevail under this exception, the State must prove the following elements by clear and convincing evidence:

> (1) proper, normal[,] and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.
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> [Sugar III, 108 N.J. at 156-57 (citing Sugar II, 100 N.J. at 235).]

The State is not required to show "the exact circumstances of the evidence's discovery" or "the exclusive path leading to the discovery." Id. at 158. "Rather, '[t]he State need only present facts or elements — proving each

such fact or element by a preponderance of the evidence — that in combination clearly and convincingly establish the ultimate fact and lead to the conclusion that the evidence would be inevitably discovered.'" Camey, 239 N.J. at 302 (quoting Sugar III, 108 N.J. at 159). The State can meet its burden by showing inevitable discovery would have occurred "in one or in several ways," based on the totality of "the evidence understood in light of ordinary experience and common sense." Sugar III, 108 N.J. at 159, 163.

Defendant argues the State did not present any evidence of the alleged inconsistencies between his, the sponsor's, or the child's statements showing detectives suspected him of the assault. Further, there was no evidence the investigators took steps to obtain his DNA pursuant to Rule 3:5A in the event he did not consent to the swab. We are unpersuaded.

The lack of clarity of the child's description of where and how the assault occurred, coupled with: defendant's purported reasons for traveling to Belize; his inconsistent description of the child's mother's whereabouts; the purchase of a one-way airline ticket; and his discovery at the airport the day after he was first interviewed by investigators, clearly supported the conclusion detectives would be interested in defendant as part of their investigation. Given these surrounding circumstances, a necessary aspect of the investigation would have

been to obtain DNA from defendant by means of a warrant if defendant did not consent. Indeed, investigators had already tested the other male household members. The arc of the investigation showed investigators would inevitably seek a DNA sample from defendant, if for no other reason than to rule him out. The motion judge's findings were amply supported by sufficient credible evidence in the record.

II.

Finally, defendant argues the sentencing judge imposed the maximum SCVTF penalty without considering his ability to pay. The State agrees we should remand for an ability-to-pay hearing.

The Supreme Court has stated although the SCVTF penalty is mandatory, a sentencing court is free to impose a penalty amount "between a nominal figure and the upper limit prescribed by N.J.S.A. 2C:14-10(a) for the degree of the offense at issue." State v. Bolvito, 217 N.J. 221, 224 (2014). Further, "[i]n setting an SCVTF penalty, the sentencing court should consider the nature of the offense, as well as the defendant's ability to pay the penalty during any custodial sentence imposed and after his . . . release." Ibid. And "the sentencing court should provide a statement of reasons as to the amount of any penalty imposed pursuant to N.J.S.A. 2C:14-10(a)." Ibid.

The sentencing record lacks the necessary findings required by Bolvito. For these reasons, we remand the penalty portion of defendant's sentence for reconsideration. The court shall conduct a hearing and make the appropriate findings in support of the mandatory SCVTF penalty to be imposed.

Affirmed in part, and reversed and remanded in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION