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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1586-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAHEED M. CARSON, a/k/a
SHAHEED CARSON, SHAEED
CARSON, DWIGHT FINGER,
and LITTLE FAHEEM,

Defendant-Appellant.

Submitted May 8, 2023 — Decided May 25, 2023

Before Judges Whipple, Mawla and Walcott-
Henderson.

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Indictment No. 17-11-
1341.

Bailey & Toraya, LLP, attorneys for appellant (Adam
W. Toraya, on the brief).

Matthew J. Platkin, Attorney General, attorney for
respondent (Catlin A. Davis, Deputy Attorney General,
of counsel and on the brief).

PER CURIAM

Defendant Shaheed M. Carson appeals from a December 3, 2018 order denying his motion to suppress evidence and a January 5, 2022 sentence following a guilty plea to first and third-degree drug related offenses. We affirm.

On November 16, 2017, a Middlesex County grand jury indicted defendant on: fourth-degree obstruction of the administration of law, N.J.S.A. 2C:29-1(b) (count one); four counts of third-degree possession of a controlled dangerous substance (CDS), specifically heroin, phencyclidine (PCP), MDMA, and cocaine, N.J.S.A. 2C:35-10(a)(1) (counts two, five, eight, and eleven, respectively); third-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count three); three separate counts of possession with intent to distribute CDS on or near school property, N.J.S.A. 2C:35-5 and -7 (counts four, seven, and ten); first-degree possession with intent to distribute PCP, N.J.S.A. 2C:35-5(a)(1) and (b)(6) (count six); second-degree possession with intent to distribute MDMA, N.J.S.A. 2C:35-5(a)(1) and (b)(2) (count nine); and third-degree receiving stolen property, N.J.S.A. 2C:20-7(a) (count twelve).

Following indictment, defendant moved to suppress evidence recovered from his home by challenging the validity of a search warrant. The warrant was

issued on the application and affidavit of a New Brunswick police officer. According to the affidavit, officers were in contact with a confidential informant (CI) who advised that defendant was selling varying quantities of heroin, and this was known to him because he had previously purchased different quantities of narcotics from defendant. Officers arranged for the CI to make three controlled purchases of heroin from defendant, and they obtained suspected CDS on each occasion. Based on their surveillance and investigation, officers prepared the affidavit for a search warrant of defendant and his home. The affidavit also listed defendant's substantial criminal history of eleven felony convictions, as well as outstanding bench warrants in other states. A separate judge approved the warrant.

However, the original warrant was not executed as anticipated and officers were compelled to reapply for an extension and to "refresh" the warrant by submitting an updated affidavit, explaining that personnel issues resulted in the delay due to: 1) a recent homicide and several shootings within the city limits; 2) a "large influx of citizens" due to a Rutgers football game; and 3) an influx of students moving in at the beginning of semester. The officer certified as follows: "[W]e could not safely execute the [s]earch [w]arrant during our initial

granted [ten] daytime period. We are requesting an extension . . . due to those reasons."

In the meantime, officers executed an additional controlled buy of heroin to confirm that defendant was still selling purported CDS. The court granted the application to refresh and extend the warrant. Thereafter, officers executed the warrant, arrested defendant, and recovered CDS, including heroin, PCP, and cocaine, as well as drug-related paraphernalia.

Defendant initially challenged the admissibility of this evidence recovered from his home on the basis that the search warrant was improperly granted because the affidavit was insufficient. He made two arguments in support of his motion to suppress: 1) that officers were required to test the substances obtained in controlled buys prior to relying on the controlled buys for support; and 2) the warrant was stale and the search was conducted without probable cause.

Judge Joseph Paone considered the motion and rejected both arguments. First, addressing the sufficiency of the affidavit, the judge found that a Franks¹ hearing was unnecessary because:

¹ Franks v. Delaware, 438 U.S. 154 (1978) (holding that when a warrant affidavit contains a demonstrably false statement where a finding of probable cause is predicated, a corresponding warrant issued is presumptively deemed invalid).

[O]ur Supreme Court stated in State v. Jones, 179 N.J. 377, [389,] "[t]here is sufficient probable cause to issue a warrant under the totality of the circumstances even if the field or lab testing was not done to confirm, that the substances purchased by the informant were, in fact, narcotics."

. . . .

In this case the informant carried out four controlled purchases[,] . . . [t]he information was corroborated by the . . . police officer involved . . . [who] observed the controlled purchases and observed in addition several unknown individuals enter the defendant's residence . . . consistent, at least, with drug distribution activity.

Further, the affidavit reveals that the applying officer . . . had extensive experience in narcotics investigation.

In reaching his decision, the judge reasoned that, considering the totality of the circumstances, there was probable cause to issue the search warrant despite the lack of testing of the substance purchased in the controlled buys. The court also found defendant's argument that the warrant had "gone stale" was also "without merit . . . [as t]here was a reason for the failure to execute the first warrant. And there was additional probable cause[,] which . . . freshened up any stale information"

Following the court's ruling on the motion to suppress, defendant pled guilty to two counts of possession of CDS,² including a first-degree offense, with the State's recommendation for dismissal of the remaining counts. Judge Paone sentenced defendant within the second-degree range, consistent with the plea offer, to a term of nine-years incarceration with a four-year period of parole ineligibility. At sentencing, the trial judge addressed the mitigating and aggravating factors, finding aggravating factors three (risk of re-offense), N.J.S.A. 2C:44-4(a)(3); six (prior criminal record), N.J.S.A. 2C:44-4(a)(6); and nine (deterrence), N.J.S.A. 2C:44-4(a)(9), applied. The judge found no mitigating factors.

Defendant now challenges the conviction and sentence that he previously pled guilty to, arguing that the court denied him an evidentiary hearing on the validity of the search warrant, thereby depriving him of the right to confront officers regarding the reasons for the failure to test the suspected CDS as well as inconsistencies regarding the identification of the CI. He also maintains that his sentence was excessive and must be overturned because the court failed to

² Specifically, third-degree possession with intent to distribute on or near school property, N.J.S.A. 2C:35-7(a) and N.J.S.A. 35-5(a)(1) (count four), and first-degree possession with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(6) (count six).

properly weigh the aggravating and mitigating factors. Defendant raises the following points on appeal:

POINT I

THE COURT ERRED WHEN IT DENIED [DEFENDANT]'S SUPPRESSION MOTION, WITHOUT EVEN AFFORDING HIM AN EVIDENTIARY HEARING, THEREBY DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE.

POINT II

THE SENTENCE IMPOSED UPON [DEFENDANT] WAS EXCESSIVE BECAUSE THE COURT FAILED TO PROPERLY WEIGH THE AGGRAVATING AND MITIGATING FACTORS.

I.

We review the denial of a request for a Franks hearing under an abuse of discretion standard. State v. Broom-Smith, 406 N.J. Super. 228, 239 (App. Div. 2009). It is well-settled that a court abuses its discretion "when [its] decision is 'made without a rational explanation, inexplicably departs from established policies, or rests upon an impermissible basis.'" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

Moreover, we owe "'substantial deference' to judicial findings of probable cause in search warrant applications" State v. Andrews, 243 N.J. 447, 464

(2020) (quoting State v. Kasabucki, 52 N.J. 110, 117 (1968)). "Although probable cause 'eludes [a] precise definition,' it is generally understood to mean 'less than legal evidence necessary to convict though more than mere naked suspicion.'" State v. Gathers, 234 N.J. 208, 220 (2018) (quoting State v. Keyes, 184 N.J. 541, 553 (2005)). It is this "flexible nature of probable cause and . . . the deference shown to issuing courts[,]" State v. Sullivan, 169 N.J. 204, 217 (2001), which guides us to "balanc[e] 'the governmental need for enforcement of the criminal law against the citizens' constitutionally protected right of privacy.'" Keyes, 184 N.J. at 553-54 (quoting Kasabucki, 52 N.J. at 116).

Thus, our scope of review on a motion to suppress is limited. State v. Ahmad, 246 N.J. 592, 609 (2021). "Appellate courts reviewing a grant or denial of a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Lamb, 217 N.J. 300, 313 (2014).

Defendant does not dispute that the State's failure to test the substances recovered from his home was not a fatal defect to a finding of probable cause, and that there was no showing of any "deliberately falsified" information in the affidavit. However, defendant argues that "omissions may also negate a search warrant or at least establish a cause for a hearing[,]" and that the delay in

executing the original warrant raises questions that needed to be explored at an evidentiary hearing.

Defendant's arguments lack merit. In addressing defendant's first point, the trial judge determined that based upon the totality of the circumstances, relying on the experience of the investigating officer and affidavit, there was sufficient probable cause for the warrant. Moreover, the judge found defendant made no showing that there were any deliberate falsehoods in the warrant affidavit relied upon in issuing the original, or the warrant that was executed later.

Defendant's attack on the validity of the warrant rests primarily upon his view that the reasons given by officers for delaying execution of the original warrant were not credible. Defendant notes there was no football game scheduled and that it was not a designated move-in day for Rutgers students. However, this argument fails to consider the other reasons cited by officers, including that there were competing criminal matters in the New Brunswick area that left them without the necessary personnel to execute the original warrant.

Even if defendant could show that the failure to execute the original warrant within the ten-day timeframe was not due to a Rutgers game or student move-in schedule, these were insufficient reasons to grant for a Franks hearing.

Indeed, at best, these were collateral matters, which failed to make "a substantial preliminary showing of material misstatements . . . made knowingly or with reckless disregard for the truth" State v. Howery, 80 N.J. 563, 566 (1979). "The burden placed on the defendant is onerous because 'a Franks hearing is not directed at picking apart minor technical problems with a warrant application[,] but rather, 'it is aimed at warrants obtained through intentional wrongdoing by law enforcement agents[.]'" State v. Desir, 461 N.J. Super. 185, 190 (App. Div. 2019) (alterations in original) (quoting Broom-Smith, 406 N.J. Super. at 240).

After considering these arguments, Judge Paone concluded

[t]here was a reason for the failure to execute the first warrant. And there was additional probable cause[,] which . . . freshened up stale information that might have arisen as a result of the failure to execute the first warrant. So therefore, the [c]ourt finds that there was sufficient probable cause and there is no reason for a Franks hearing and therefore the evidence obtained will not be suppressed and defendant's motion to suppress this evidence is denied.

The record demonstrates that the warrant application was based on adequate facts indicating defendant's involvement in criminal activity, based on the affidavit and the experience of the officer who signed the warrant. As the judge correctly determined, there was sufficient corroborating evidence of probable cause to refresh the original warrant, including that officers conducted

an additional "control buy" from defendant using the same CI for the express purpose of ensuring that the investigation would not become stale.

As Judge Paone found,

under the totality of the circumstances there . . . was . . . sufficient probable cause . . . to issue a search warrant even though there was no field or lab testing to confirm that . . . the substance purchased by the informant was, in fact, a [CDS]. . . . [T]he lack of any testing was not a material omission and the defense here doesn't suggest any false statements that were knowingly, intentionally, or recklessly included in the affidavit. Accordingly, a Franks hearing is not warranted.

For these reasons, the denial of defendant's motion to suppress evidence was not an abuse of discretion.

II.

We now turn to defendant's claims that the sentence imposed by the trial court was excessive. Our review of a trial court's sentence is guided by an abuse of discretion standard. State v. Torres, 246 N.J. 246, 272 (2021). We will affirm a sentence so long as: 1) the sentencing guidelines were followed; 2) aggravating and mitigating factors were based upon competent credible evidence in the record; and 3) the application of the guidelines to the facts of the case do not shock judicial conscience. State v. Case, 220 N.J. 49, 65 (2014); see also State v. Bolvito, 217 N.J. 221, 228 (2014).

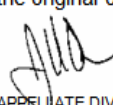
Defendant asserts that his sentence was excessive because the court failed to properly weigh the aggravating and mitigating factors and did not give any reasoning why it found aggravating factor nine. This argument lacks merit.

Defendant's aggregate sentence of nine years with a four-year period of parole ineligibility represented a substantial reduction from his maximum potential sentence. Judge Paone found aggravating factors three, six, and nine noting defendant's risk of re-offense, the extent and nature of his prior criminal record and that there was a need to deter based on defendant's extensive history of substance abuse, mental-health issues, and lengthy prior criminal activity. The judge found no mitigating factors.

Defendant's sentence was amply supported by the facts in the record. The judge neither misapplied the law nor abused his discretion by sentencing defendant consistent with the terms of the plea agreement.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION