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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1968-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONELL A. CHEEK,

Defendant-Appellant.

Submitted November 30, 2022 – Decided January 10, 2023

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 16-12-1784.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Amanda G. Schwartz, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Donell A. Cheek pled guilty to second-degree making a false public alarm and second-degree robbery. He appeals from his judgment of conviction, contending the trial court erred by granting his motion to proceed as a self-represented litigant and therefore his conviction and seven-year sentence should be reversed. We disagree and affirm.

I.

On November 4, 2016, the Metuchen Police Department received a phone call from Metuchen High School reporting a bomb threat to the school. A school secretary reported that a male with a thick Middle Eastern accent called the school and said, "[i]t's a beautiful day. The bombs are going off in [twenty] minutes. You should get everyone out." In response, police, fire officials, emergency medical services, and bomb detection dogs were dispatched to the school.

About an hour later, emergency dispatchers received a panic alarm call from TD Bank in Metuchen. A 9-1-1 call also was made concerning a male running out of TD Bank dressed in black and carrying a bag. Bank staff later told law enforcement that a man dressed in black and wearing a mask had entered the bank, jumped over the counter, and demanded money. A teller opened the drawers, and the man removed the cash. After the suspect left the

bank, police arrived and found a two-way handheld radio that had been dropped inside.

The suspect unknowingly took a tracking device that was imbedded in the stolen cash. Manufactured by 3SI Security Systems (3SI), the device consisted of components that connect to satellites and cellular towers, which allow law enforcement agencies to track and pinpoint the device's location. 3SI's records indicated that the device was activated at 12:06 p.m., but did not report a location until 12:12 p.m. Robert Stevens, a 3SI employee who testified for the State, explained how the device operates to establish its location when hidden in a vehicle.

The tracking device eventually reported its location as traveling on Interstate 287 in South Plainfield. Every six seconds, the device updated its location as it traveled toward Piscataway, ultimately coming to a stop near 329 Barbour Place. 3SI communicated this information to the police departments involved.

While investigating the bomb threat at the high school, Detective Sergeant Robert Belluscio and his partner, Detective Keane,¹ heard a dispatch call regarding the panic alarm at TD Bank and headed towards the tracking device.

¹ Detective Kean's first name is not mentioned in the record.

Dispatch informed the detectives that the tracking device had exited Interstate 287, became stationary on Wyckoff Avenue, and moved to River Road. When the detectives arrived on River Road, they saw unmarked police cars from Piscataway turning onto Barbour Place, directly behind a stopped Buick Lacrosse, which coincided with the reported location of the tracking device.

Piscataway officers arrested the driver of the vehicle, later identified as Dashawn Cheek, and his brother, defendant, who was in the passenger seat. At the time of the arrests, Belluscio observed a dark-colored sweatshirt in the backseat of the vehicle. The vehicle was towed to police headquarters. While in tow, the GPS information indicated the tracking device followed the same route as the towed vehicle defendant had been riding in.

Later that day, a telephonic search warrant for the Buick Lacrosse was issued based on a sworn verbal statement given by Belluscio. During their search of the vehicle, the officers found a black backpack in the trunk containing \$21,883 in cash embedded with the bank's GPS tracking device, a pair of size twelve sneakers, a Cobra two-way radio, which matched the one that was found at TD Bank, two black knot beanie caps, one with the top cut off, a pair of black sweatpants, a black hooded sweatshirt, and a pair of black sunglasses.

A second search of the vehicle yielded a piece of paper with two phone numbers found inside the center console—one number for the Metuchen Board of Education, and the other number for Metuchen High School. A Walmart bag was also found on the floor of the front seat passenger side containing receipts from the Walmart store in Linden.

The Walmart receipts were for purchases of a Phillips head screwdriver, two-way radios, and two beanie caps. The bag also contained empty packaging for the Cobra two-way radios and the top portion of the beanie cap that had been removed. Belluscio and Keane went to the Walmart store in Linden, and a loss prevention officer provided them with surveillance footage of defendant and his brother, Dashawn, purchasing the items, which were found in the vehicle.

Defendant was charged with second-degree conspiracy to commit false public alarm and robbery, N.J.S.A. 2C:5-2(a)(1), N.J.S.A. 2C:33-3(b), N.J.S.A. 2C:15-1; second-degree false public alarm, N.J.S.A. 2C:33-3(b) or (a) and 2C:2-6(c)(1)(b); and three counts of second-degree robbery, N.J.S.A. 2C:15-1(a)(2) and 2C:2-6(c)(1)(b).²

² The indictment also charged co-defendant Dashawn Cheek with the same offenses.

On August 14, 2017, during a discovery motion hearing, defendant requested that the court hear his motion to proceed as a self-represented litigant, which was previously filed. The court informed defendant he faced substantial imprisonment if convicted, and it could not assist him at trial. The court acknowledged defendant had some understanding of the law, but that he would be taking a "big chance" representing himself and "not hav[e] the benefit of an attorney." Defendant explained to the court he wanted to represent himself because of a "conflict of interest" with the attorney assigned to him from the Public Defender's Office.

Thereafter, the supervising attorney at the Middlesex County Public Defender's Office met with defendant and his assigned counsel to investigate the alleged conflict of interest. Following the meeting, the supervisor determined defendant's assigned counsel would continue to represent him. Defendant was dissatisfied with the decision.

At a hearing on October 2, 2017, the court continued its inquiry and discussion with defendant to determine whether he was knowingly and intelligently waiving his Sixth Amendment right to counsel. Defendant's assigned counsel and her supervising attorney were present at the hearing. The court extensively questioned defendant regarding the elements of his charges

and the exact statutory citations for second-degree robbery and false public alarm. The court also reviewed the conspiracy charge with defendant and advised him that he faced consecutive sentences, if convicted. In addition, the court asked defendant to explain the sentence he was facing.

In response to the court's colloquy, defendant detailed the statutory citation for second-degree robbery and his understanding that a robbery conviction is subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. Defendant testified NERA means "[eighty-five] percent" of the term would have "to be served on those charges." He also stated he was "extended term eligible" and understood this meant he could be sentenced "to first[-]degree time" because of his prior criminal history.³ Defendant told the court "that under the statute for the second-degree robbery . . . they're a five to ten."

Throughout the court's questioning, defendant acknowledged the "exposure" involved and "the tremendous amount of time" he faced if convicted, and reiterated he had consecutive sentencing exposure. In order to ascertain defendant's understanding of his sentencing exposure, the court explained:

³ See generally N.J.S.A. 2C:44-3(a) (setting the criteria of the imposition of an extended term sentence for individuals qualifying as "persistent offenders"); N.J.S.A. 2C:44-7 (setting the custodial term ranges for individuals qualifying for extended term sentences).

you obviously have a good understanding of what you're facing and the time, but it's a lot of time. These are serious charges. The extended term could push you up to first[-]degree time.

And so, you know, that's a big step, to say I want to take responsibility for this, and given the exposure here, you're putting yourself in a position if you're convicted of a tremendous amount of time in terms of your sentence.

Defendant also expressed his understanding that the State had the burden of proof as to each offense.

With regard to any available defenses, the court was careful not to have defendant disclose his strategy but wanted to ensure he "ha[d] considered everything he should." The court asked the two attorneys present on defendant's behalf if there were any statutory defenses available, and they responded in the negative. At the request of defendant's attorneys, the court went through the elements and Model Criminal Jury Charges for each offense: robbery in the second-degree, false public alarm, conspiracy, and theft of movable property. The record shows the court read the jury charges from printed documents and inadvertently printed out the wrong charge for conspiracy. The court printed out the correct conspiracy jury charge and read it to defendant.

In addition, the court explained to defendant the prosecution had to prove the elements for each of these crimes beyond a reasonable doubt. The court also

told defendant it was his "job" as his own attorney to undermine the State's proofs. The court then asked defendant if he wanted to say anything. Defendant responded the "complaint warrant" was defective and he wanted a transcript of the statement given to the court by Belluscio in support of the search warrant application. Defendant also requested a "Franks hearing."⁴

Defendant told the court he had limited access "to certain legal databases at the facility where [he's] housed," and he requested "standby counsel to assist [him] with being able to get motions and research done" in light of his inability to make "certain calls," request "experts or investigators." The court told defendant that if he represented himself, he would give up his right to file a post-conviction relief (PCR) ineffective-assistance-of-counsel claim based on his own performance. The court granted defendant's request for standby counsel but reminded him he was required to comply with the rules of court, the rules of evidence, and the rules of criminal procedure. Further, the court warned defendant of the risk of incriminating himself to a jury and re-emphasized that

⁴ Franks v. Delaware, 438 U.S. 154 (1978). In Franks, the United States Supreme Court held: "where the defendant makes a substantial preliminary showing that a false statement knowingly and intelligently, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request." Id. at 155-156.

he had a prior criminal record, making him extended term eligible. And, the court informed defendant of his absolute right to testify.

After a lengthy discussion related to the potential negative consequences of representing himself, defendant stated:

I'm well aware of the downside to it. I have the rules of evidence in my possession . . . I pretty much have every book that possibly could be needed in my possession. I might not be as well-versed in the law as attorneys that are certified under a bar, but I feel like no one knows my case better than I do and it's my Sixth Amendment right to be able to challenge the evidence in the case, and I feel like I'm the best one to do it thus far. And I would appreciate standby counsel to help me, you know, be able to assist me in anything that I might lack, but I feel like I know where I'm going with my defense. I'm not saying that I will be effective, but I feel like I have the best opportunity to do it if I'm the one doing it and not anyone else.

The court concluded that it disagreed with defendant's request to proceed pro se, but the court found he understood the elements of the charges pending against him, "how [he] would handle his role," and "pursue" his defenses. The court stated defendant "understands the punishment." Before rendering its decision, the court asked defendant if he was sure he wanted to represent himself. Defendant answered, "Yes, I'm a thousand percent positive" In addition, the court found that defendant knowingly and voluntarily waived his right to counsel. The court granted defendant's motion to proceed as a self-

represented litigant and appointed standby counsel as he requested. A memorializing order was entered.

Subsequently, in addition to a series of motions seeking additional discovery materials from the State, defendant filed a motion to dismiss the initial complaint against him "because there was no memorialization of the application for the telephonic arrest warrant, the complaint warrant procedures required by the rules were not complied with, and no record warrant existed at the time of his arrest." The court determined the application for the search warrant had indeed been recorded; the date of the application corresponded to the date of the events underlying the charges; and probable cause was established to issue the search warrant. With respect to defendant's contention Belluscio committed perjury, the court ruled none of Belluscio's statements, even if inaccurate, were sufficiently knowing or material to defeat the finding of probable cause for the search warrant or require a Franks hearing.

Defendant also filed two motions related to the GPS evidence. He argued the State needed to present expert testimony to verify the accuracy and reliability of any GPS evidence it wished to introduce, both generally and with respect to the particular tracking device at issue in his case. The State countered that lay testimony would be sufficient. Oral argument and a hearing were conducted on

defendant's motion. The State presented testimony of its proffered witnesses. After considering the arguments, evidence, and testimony, the court denied defendant's motion, highlighting the evidence corroborated the data produced by the GPS tracking device.

Defendant also filed motions relating to plea negotiations, a motion to recuse the judge, and for additional discovery requests. The motions were denied. Subsequently, the court heard additional argument on GPS issues and considered oral argument from defendant about his concerns with his standby counsel. The State offered a plea agreement to defendant with concurrent sentences of ten years' imprisonment for robbery and false public alarm, which he rejected.

Defendant later negotiated a new plea agreement with the State. At the plea hearing, with standby counsel present, defendant testified that he reviewed and understood the new plea agreement and signed it. Defendant pointed out to the court that the false public alarm charge is a third-degree offense under the statute, N.J.S.A. 2C:33-3(b) or (a), listed in the indictment, and not a second-degree offense as alleged in the indictment. Defendant argued the indictment was therefore inaccurate. Defendant explained to the court he did not want to plead guilty to a crime he did not commit.

The assistant prosecutor agreed the indictment contained a "scrivener's error" by listing the false public alarm charge as a second-degree crime under N.J.S.A. 2C:33-3(b) or (a), and the correct citation to the second-degree offense is N.J.S.A. 2C:33-3(a)(1)(b). To avoid any confusion with the request by the assistant prosecutor to amend the charge based on what was presented to the grand jury, the court instructed defendant to review the correct subsection, N.J.S.A. 2C:33-3(a)(1)(b), to avoid any confusion.

The court then asked defendant if he was "all right with proceeding with that understanding" and indicated that "the charge would be amended to be more specific." Defendant consented to the amendment of the indictment to change the citation to the statute charging the second-degree offense and told the court "because obviously you're reading from the 2C itself." The record shows defendant was given the opportunity to examine the statute himself but declined. Defendant stated he understood the charge as amended based on the court's clarification, and he understood why it was a second-degree offense and not a third-degree offense.

Again, the court reread the charge, informing defendant that under section 2C:33-3(a)(1)(b), "[a] person is guilty of a crime of the second degree if the false alarm involved a report or warning of an impending bombing . . . any other

incident that elicits an immediate or heightened response by law enforcement or emergency services." The court then asked defendant if he understood the subject language, to which he responded affirmatively. Defendant added he did not have any issue pleading guilty to that charge and ultimately did so. A factual basis for the plea was elicited. The court found there was an adequate factual basis for the guilty plea and defendant was not under the influence of any substance that would affect his ability to understand the proceedings. The court accepted defendant's guilty plea and the terms of the plea agreement.

Thereafter, defendant was sentenced to a term of seven years' imprisonment for second-degree false public alarm and a concurrent seven-year term subject to NERA, and three years of parole supervision on a single robbery charge. The remaining charges were dismissed. Defendant raises one point for our consideration on appeal:

THE TRIAL COURT ERRED BY CONCLUDING [DEFENDANT] KNOWINGLY WAIVED HIS RIGHT TO COUNSEL BECAUSE IT FAILED TO INFORM HIM OF THE RANGE OF PUNISHMENT, EXPLAIN STATUTORY DEFENSES, AND WARN HIM THAT PROCEEDING PRO SE WOULD BE UNWISE. N.J. CONST. ART. I, ¶ 10; U.S. CONST. AMEND. VI.

A. The Court Did Not Tell [Defendant] [T]he Range [O]f Punishment He Could Face.

B. The Court Did Not Tell [Defendant] [A]bout Statutory Defenses He Could Raise.

C. The Court Did Not Tell [Defendant] [T]hat Proceeding Pro Se Would Be Unwise.

D. Because The Court Could Not Ensure [T]hat [Defendant] Knowingly Waived His Right [T]o Counsel, Reversal [O]f His Convictions [I]s Required.

II.

We review a trial judge's decision regarding self-representation for an abuse of discretion. State v. Outland, 245 N.J. 494, 507 (2021). Our Supreme Court has held "the United States Constitution and our New Jersey Constitution grant defendants charged with a criminal offense the right to have the assistance of counsel." State v. King, 210 N.J. 2, 16 (2012) (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). "The corollary to the right of a criminal defendant to be represented by an attorney is the defendant's right to represent himself." Ibid. (citing Faretta v. California, 422 U.S. 806, 814 (1975)). "The right [of self-representation] is either respected or denied; its deprivation cannot be harmless." Id. at 22 (alteration in original) (quoting McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)). "A [d]efendant may have been represented by a skilled attorney, the evidence against [the defendant] may have been substantial, and

the verdict may find strong support in the record; that matters not." Ibid. See State v. Thomas, 362 N.J. Super. 229, 244 (App. Div. 2003).

Our Supreme Court recently reiterated that a trial court must address a series of topics with a defendant seeking to represent themselves. Outland, 245 N.J. at 506. Trial courts must inform defendants seeking to proceed as self-represented litigants about:

(1) the nature of the charges, statutory defenses, and possible range of punishment; (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful; (3) the necessity that defendant comply with the rules of criminal procedure and the rules of evidence; (4) the fact that the lack of knowledge of the law may impair defendant's ability to defend [themselves]; (5) the impact that the dual role of counsel and defendant may have; (6) the reality that it would be unwise not to accept the assistance of counsel; (7) the need for an open-ended discussion so that the defendant may express an understanding in [their] own words; (8) the fact that, if defendant proceeds pro se, [they] will be unable to assert an ineffective assistance of counsel claim; and (9) the ramifications that self-representation will have on the right to remain silent and the privilege against self-incrimination.

[Ibid. (quoting State v. DuBois, 189 N.J. 454, 468-69 (2007)).]

The purpose of providing this information is not for the trial court to determine whether a defendant has "technical legal knowledge[;]" it is to inform

the defendant "of the dangers and disadvantages of self-representation, so that the record will establish that [they] know[] what [they are] doing and [their] choice is made with eyes open." Ibid. (quoting Faretta, 422 U.S. at 835). However, a defendant's right to self-representation "is about respecting a defendant's capacity to make choices for [themselves], whether to [their] benefit or to [their] detriment." State v. Reddish, 181 N.J. 553, 585 (2004); see also State v. Rose, 458 N.J. Super. 610, 627 (App. Div. 2019). Even if the decision is "fraught with risk[.]" a defendant should not be denied the choice to proceed self-represented. King, 210 N.J. at 17.

Defendant contends he is entitled to a reversal of his conviction because the trial court erred by failing to inform him of the range of punishment if convicted, explain statutory defenses, and warn him that proceeding as a self-represented litigant was unwise. We disagree.

In State v. Crisafi, our Supreme Court found the trial court's failure to inform defendant of the charges against him for aggravated sexual assault, armed robbery, aggravated assault, possession of a weapon and possession of a weapon for an unlawful purpose, the sentencing alternatives, and "specific pitfalls" of proceeding pro se did not prevent him from knowingly and intelligently waiving counsel. 128 N.J. 499, 512 (1992). The Court noted

Crisafi had "extensive experience with the criminal justice system[,]" including having previously obtained, as a self-represented litigant, an acquittal from a jury "on a rape charge." Id. at 513-14. In Crisafi, our Court directed trial courts to inform pro se defendants "of the possible range of punishment" amongst the other risks of proceeding without counsel. But, the court emphasized the pivotal focus is "on the defendant's actual understanding of the waiver of counsel." Id. at 512.

Here, the trial court engaged in a colloquy with defendant to determine whether his waiver of counsel was knowing and intelligent. While the court never explained to defendant on the record in "colloquial terms" the sentencing guidelines, it is apparent from the October 2, 2017 voir dire that defendant was fully aware of the charges against him and his sentencing exposure. In fact, he was astute enough to explain NERA, extended term eligibility, and the sentencing range for second-degree robbery. Defendant testified that he thought about self-representation extensively and due to the magnitude of the conflict with his attorney, he wanted to proceed pro se. Defendant stated he was "well aware of the downsides to it[,]" but "no one knows the case better than [he]," and it was his "Sixth Amendment right to be able to challenge the evidence in the case."

The court informed defendant of the risks involved if he chose to represent himself. In particular, the court stressed the gravity of the sentencing exposure defendant faced if he was convicted on all charges. We note defendant had experience with the criminal justice system as an adult. In addition, the court told defendant that he would be expected to follow the applicable court rules and rules of evidence. The court ensured defendant was informed that, in the event of a conviction, he cannot seek PCR claiming ineffective assistance of counsel. Reddish, 181 N.J. at 594. Defendant indicated twice that he was waiving such a PCR claim. A trial court is not required to confirm that the defendant understands "technical legal knowledge," but rather must "ascertain whether [the defendant] actually understands the nature and consequences of [their] waiver." Id. at 594-95.

Based upon our careful review of the record, we are satisfied that the trial court's questions of defendant were geared towards ascertaining whether he understood the "perils of self-representation." Outland, 245 N.J. at 508. The court fully apprised defendant of the risks and consequences of pro se representation and meticulously reviewed fundamental information about the offenses charged. See Reddish, 181 N.J. at 553. And, the court questioned defendant not only about the charges against him but the sentencing exposure—

including consecutive sentencing, NERA, and extended-term consequences, which he understood as evidenced by his colloquy with the court. Defendant acknowledged his limited understanding of the law and process and how it could impair his ability to try his case. He also indicated he had legal resources available to him and requested standby counsel to assist him in his defense.

Finally, like the defendant in Outland, defendant "did not waver in his desire to represent himself." 245 N.J. at 509. We discern no abuse of discretion with the trial court's decision to allow defendant to appear pro se in these proceedings. To the extent we have not addressed defendant's remaining arguments, we find they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



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