SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3771-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IBN M. JONES, a/k/a
EVAN JONES, IBEN JONES,
and JAMES JONES,

Defendant-Appellant.

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Argued January 19, 2023 – Decided March 21, 2023

Before Judges Mayer, Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 16-04-0067.

John Vincent Saykanic, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; John Vincent Saykanic, on the briefs).

Amanda Frankel, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Amanda Frankel, of counsel and on the briefs).

Appellant filed pro se supplemental briefs.

PER CURIAM

Defendant Ibn M. Jones appeals from a February 5, 2019 judgment of conviction after pleading guilty to one count of first-degree racketeering. On appeal, defendant challenges the denial of his motions seeking the following relief: suppression of evidence, dismissal of the indictment, and recusal of the trial judge.[1] We affirm.

We recite the facts from the hearings on defendant's pretrial motions, the documents accompanying those motions, and the transcripts of the grand jury proceedings.

The grand jury indicted defendant and twenty-two other individuals on charges stemming from an extensive investigation by the New Jersey State Police (NJSP) into an automobile theft and trafficking enterprise operating along Route 17 in Bergen County and in Rockland County, New York. In June 2014, the NJSP began investigating a suspected car theft ring working in New Jersey

[1] During the plea colloquy on January 7, 2019, counsel and the judge discussed defendant's preservation of the right to appeal certain issues. Although the signed plea form indicated defendant's right to appeal was limited to the pretrial motions to suppress evidence, the State agreed that defendant could appeal from the denial of his motion to dismiss the indictment. The judge placed that modification to the plea agreement on the record.

and New York. The investigation spanned approximately eighteen months and involved several law enforcement agencies, including United States Customs and Border Protection (CBP).

During the investigation, the NJSP amassed evidence using confidential witnesses (CWs), consensual phone interceptions, in-person surveillance, and pole-mounted camera surveillance. The NJSP also obtained court-authorized wiretaps and communication data warrants (CDWs) to intercept communications among the suspected members of the car theft ring. The wiretaps and CDWs captured hundreds of incriminating communications to and from participants in the car theft operation, including defendant and codefendants Kenneth Daniels, Terrence Wilson, Derrick Moore, Khalil Culbreath, Eric Aikens, Frazier Gibson, and Eddie Craig.

Evidence obtained through wiretaps, CDWs, and GPS devices

An initial wiretap, signed on July 24, 2015, authorized the interception of communications involving Daniels and other individuals related to the cellular telephone number ending in 2895 (Daniels wiretap). In a separate order entered the same day, the wiretap judge authorized the interception of communications involving Aikens and other individuals related to the cellular telephone number ending in 8381 (Aikens wiretap). Subsequently, other wiretap orders were

issued, including two orders authorizing the interception of communications involving Gibson and other individuals related to the cellular telephone numbers ending in 5984 (Gibson wiretap 1) and 6401 (Gibson wiretap 2).

On September 10, 2015, relying upon intercepted conversations from Gibson wiretap 1 and Gibson wiretap 2, the wiretap judge entered an order authorizing the interception of communications associated with the cellular telephone number ending in 9894 for wire and electronic communications associated with "an unidentified male referred to as 'Mole'" (Mole wiretap). A few days after the issuance of the Mole wiretap, the NJSP identified defendant as Mole. The Mole wiretap captured a number of incriminating conversations involving defendant related to the car theft ring.

The NJSP also obtained a series of CDWs throughout the investigation, authorizing the installation and monitoring of global positioning satellite (GPS) devices on stolen vehicles which tracked the movement of the cars. Additionally, the NJSP obtained permission to track the location of cellular telephones associated with members of the car theft ring.

Consistent with N.J.S.A. 2A:156A-12(h), the Office of the Attorney General (AG) provided progress reports to the judges issuing the various

warrants. The progress reports provided warrant information related to the NJSP car theft investigation.

According to the NJSP, the car theft ring stole luxury vehicles, ranging in value from $25,000 to more than $100,000. The ring would sell the stolen cars at prices between $4,000 and $15,000. The organization used a hierarchy comprised of "theft crews" who stole the vehicles using other stolen but less noticeable "move-maker" cars, "fences" who purchased the stolen vehicles for resale to domestic or international buyers or to other higher-level fences, and shippers who facilitated the overseas transportation of the cars to foreign countries, including countries in Africa.

The NJSP learned that "wheel men" drove the stolen vehicles to "safe zones," typically short-term airport parking lots, hotel parking lots, gated residential parking lots, and home driveways. The stolen cars would be left at the "safe zones" to "cool off" and be inspected for tracking or GPS devices. The wheel men also moved the stolen cars, which were to be sent overseas, to secondary storage and shipping locations where shippers would place the stolen cars in cargo containers with false bills of lading and then transport those containers to seaports.

Through GPS monitoring, the NJSP tracked many of the stolen cars to seaports in New York and New Jersey. The NJSP provided information to CBP agents regarding stolen vehicles at seaports which were under CBP's jurisdiction. The CBP agents opened thirteen shipping containers at various seaports and recovered twenty-seven stolen cars.

Defendant's arrest

On October 27, 2015, the NJSP arrested defendant at a friend's home in New York City pursuant to an arrest warrant. During the arrest, officers seized defendant's cell phone.[2]

Grand Jury Proceedings

The State presented its case to the grand jury on April 7, 14, 21, and 28, 2016. Detective Sergeant Aaron Auclair with the NJSP testified using an organizational chart prepared by the State. The chart depicted individuals allegedly involved in the car theft ring and their interrelationships. In conjunction with the chart, Auclair described the roles assigned to various individuals within the ring: (1) Culbreath stole cars in New York, brought the

[2] Defendant joined a motion filed by codefendant Daniels to suppress evidence from his cell phone. The judge denied Daniels' motion and he appealed. We affirmed the judge's denial of Daniels' motion to suppress his cell phone evidence. See State v. Daniels, No. A-2672-18 (App. Div. March 21, 2023) (slip op. at 23).

stolen cars to New Jersey, and interacted with defendant; (2) Wilson worked with a theft crew "orchestrated" by defendant; (3) Gibson stole cars and operated as a street fence; (4) Aikens spotted vehicles for theft crews and acted as a fence to move stolen cars; (5) Levell Burnett was a thief; (6) Nasir Turner was a thief, mid-level fence, and carjacker who gave voluntary statements to the NJSP, including that he offered a stolen Jaguar to Daniels; (7) Moore was a thief working with defendant's theft crew; and (8) Tyja Evans was a high-level fence who sold stolen cars for export to foreign countries.

Auclair told the grand jury that defendant

> was involved in the theft of vehicles, he established himself as a leader because he gave out a lot of orders and demands to the people in the theft crew. He orchestrated a lot of thefts, he told people . . . what they had to do, what tools they needed. He tried to recruit people, and we learned that through the court authorized wiretap.

Auclair further testified regarding a pertinent telephone call from Culbreath to defendant regarding the enterprise, and Culbreath's exchanging thirty-one relevant text messages with defendant related to the car theft ring.

Before the grand jury, Auclair also explained the general operation of the car theft ring, starting with the theft of high-end cars, concealing the stolen cars, fencing the vehicles, and the eventual selling of the cars.

Detective Cory Rodriguez of the NJSP testified that police intercepted twenty-two pertinent telephone calls related to the car theft ring exchanged between Gibson and defendant from August 6 through August 25, 2015. The telephone conversations pertained to stealing cars, moving cars, pricing cars, and locating GPS devices attached to the stolen cars. Rodriguez provided detailed testimony regarding the wiretaps and other evidence linking members of the car theft ring to each other and to the stolen vehicles. Specifically, Rodriguez told the grand jury that the police were able to identify defendant by dialing a cell phone number while defendant was in an airport and then seeing him answer that telephone call.

Indictment

On April 28, 2016, a Morris County grand jury returned Indictment No. 16-04-00067 against twenty-two individuals, including defendant, charging: (1) first-degree racketeering, N.J.S.A. 2C:41-2(c) and -2(d) (count one)[3]; (2) first-degree conspiracy to commit money laundering, N.J.S.A. 2C:5-2 (count two); (3) first-degree money laundering, N.J.S.A. 2C:21-25(a) and (b)(1) (count

[3] The enhanced first-degree racketeering charge in count one of the indictment was predicated upon first-degree money laundering in count three of the indictment.

three); (4) second-degree fencing, N.J.S.A. 2C:20-2 and N.J.S.A. 2C:20-7.1(b) (count fourteen); (5) second-degree receiving stolen property, N.J.S.A. 2C:20-2 and N.J.S.A. 2C:20-8(a) (count fifteen); (6) second-degree theft, N.J.S.A. 2C:20-2 and N.J.S.A. 2C:20-3(a) (count sixteen); and (7) third-degree burglary, N.J.S.A. 2C:18-2(a)(1) (count seventeen). Additionally, defendant was charged with second-degree eluding, N.J.S.A. 2C:29-2(b). The eluding charge stemmed from defendant's actions on June 28, 2015, when he led police on a high-speed chase while driving a stolen vehicle.

Defendant's pretrial motions

On March 3, 2017, defendant's original court-appointed defense counsel, Roy Greenman, filed a motion to dismiss the indictment. About a month later, defendant retained private counsel, Wanda Akin. She filed a substitution of attorney and a supplemental motion to dismiss the indictment. Akin argued the motion to dismiss the indictment but informed the judge that defendant was dissatisfied with her handling of his case, and she intended to file a motion to be relieved as counsel.

On July 22, 2017, Akin filed a motion to suppress the wiretap evidence. On August 17, 2017, Akin moved to be relieved as counsel, but was unsuccessful because there was no pool attorney from the Office of the Public Defender

available to represent defendant. A month later, Akin argued the motion to suppress the wiretap evidence.

In October 2017, another attorney agreed to represent defendant but shortly thereafter realized she had a conflict of interest and was excused from representing defendant. Edward Hesketh was then court-assigned to represent defendant. He filed a motion to suppress the evidence seized from the shipping containers at the seaport and a motion to suppress the cell phone seized at the time of defendant's arrest. Three months after being appointed to represent defendant, Hesketh filed a motion to be relieved as counsel.

On July 17, 2018, defendant retained private counsel, Rasheeda Terry, to represent him. Before the scheduled date for argument on the suppression motions, Terry requested an adjournment. She explained defendant only retained her about a month earlier and she did not have sufficient time to review all of the discovery in the case or meet with defendant. The judge denied the adjournment request, ruling that: (1) defendant retained Terry after the case had been pending for more than two years; (2) Terry knew the case status when she was retained; (3) the legal issues raised in the pending motions were limited and did not require Terry to be familiar with the entire case; and (4) Terry could file a supplemental brief regarding suppression of the seized cell phone if necessary.

On February 28, 2018, the judge issued a forty-four-page written decision denying defendant's motion to dismiss the indictment.

In addition to the foregoing motions, defendant moved to recuse the trial judge. On September 5, 2018, the judge denied the recusal motion in an oral decision.

On September 24, 2018, in a separate seventy-five-page written decision, the judge denied defendant's motions to suppress the wiretap and container evidence. Two months later, the judge denied defendant's reconsideration motion on these issues.

Guilty plea and sentence

On the scheduled trial date, January 7, 2019, defendant pleaded guilty to first-degree racketeering. Under the terms of the negotiated plea, the State agreed to dismiss all remaining counts and recommended a sentence of no more than twelve years in prison, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2(a).

During the plea colloquy, defendant admitted that between June 1, 2014 and October 28, 2015, he associated with individuals who were part of a car theft ring. Under oath, defendant testified that he engaged in criminal activity

with some of the codefendants and explained that the purpose of the ring was to steal and sell luxury cars totaling more than $500,000.

On February 1, 2019, the judge sentenced defendant to twelve years in prison subject to NERA.

On appeal, defendant's assigned counsel argues the following:

POINT I

> THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS ALL EVIDENCE FOUND AS A RESULT OF THE WARRANTLESS SEARCH OF THE SEAPORT CARGO CONTAINERS AS THE STATE POLICE SPECIFICALLY DIRECTED FEDERAL CUSTOMS AND BORDER PROTECTION OFFICIALS TO OPEN THE CONTAINERS WITH THE SPECIFIC INTENT OF CIRCUMVENTING BOTH FEDERAL AND STATE LAW; AT THE VERY LEAST, THE MATTER MUST BE REMANDED FOR AN EVIDENTIARY HEARING PURSUANT TO [N.J.R.E.] 104.

POINT II

> THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS THE INDICTMENT WITH PREJUDICE DUE TO THE EGREGIOUS AND RAMPANT PROSECUTORIAL MISCONDUCT THROUGHOUT THE GRAND JURY PROCEEDINGS IN VIOLATION OF ARTICLE 1, PARAGRAPH 8 OF THE NEW JERSEY CONSTITUTION.

SUBPOINT A

THE STATE FAILED TO CHARGE SECOND-DEGREE RACKETEERING THOUGH SPECIFICALLY REQUESTED BY A GRAND JUROR.

SUBPOINT B

THE STATE DID NOT PROPERLY INSTRUCT THE GRAND JURY AS TO THE LEGAL REQUIREMENT OF A HIERARCHY TO ESTABLISH A CRIMINAL ENTERPRISE UNDER THE RICO[4] STATUTE.

SUBPOINT C

THE STATE FAILED TO CHARGE THE GRAND JURY THAT THERE MUST BE A NEXUS BETWEEN THE CRIMES COMMITTED AND THE ENTERPRISE.

SUBPOINT D

COUNT ONE SHOULD HAVE BEEN DISMISSED AS THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF AN "ENTERPRISE."

SUBPOINT E

THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF A CONSPIRACY.

[4] RICO is the acronym for the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.C.S. § 1961-1968, governing federal racketeering crimes.

SUBPOINT F

THE STATE IMPROPERLY UTILIZED THE "ENTERPRISE" CHART WHICH INCORRECTLY AND PREJUDICIALLY PORTRAYED DEFENDANT AS ONE OF THREE "LEADERS" OF THE ENTERPRISE.

SUBPOINT G

THE STATE IMPROPERLY UTILIZED A "RACKETEERING CHART" WHICH SEVERELY PREJUDICED DEFENDANT.

SUBPOINT H

THE STATE IMPROPERLY UTILIZED FALSE AND MISLEADING TESTIMONY LINKING DEFENDANT TO A "MOVE-MAKER" STOLEN VEHICLE ALLEGEDLY USED IN THE CARJACKING OF A BENTLEY AND A MERCEDES, ALONG WITH FALSE AND MISLEADING TESTIMONY ABOUT DEFENDANT BEING PRESENT WHEN THE BENTLEY WAS OFFERED TO A BUYER, THEREBY IMPERMISSIBLY ELEVATING SECOND-DEGREE RACKETEERING TO FIRST-DEGREE RACKETEERING.

SUBPOINT I

THE STATE UTILIZED FALSE AND MISLEADING TESTIMONY AS TO A TEXT MESSAGE; SPECIFICALLY, AUCLAIR'S RECITATION OF A PURPORTED TEXT FROM DEFENDANT TO KHALIL CULBREATH THAT STATED, "OK GIVE ME CASH" WHEN THE ACTUAL MESSAGE READ "OK GIVE ME HALF."

SUBPOINT J

THE STATE UTILIZED FALSE TESTIMONY REGARDING THE IDENTITIES OF INDIVIDUALS INVOLVED IN THE SALE OF A STOLEN LAND ROVER.

SUBPOINT K

THE STATE UTILIZED FALSE TESTIMONY REGARDING DEFENDANT'S IDENTIFICATION AT NEWARK AIRPORT.

SUBPOINT L

THE STATE UTILIZED FALSE AND GROSSLY MISLEADING TESTIMONY REGARDING DEFENDANT AND KHALIL CULBREATH REFERRING TO NEWARK AIRPORT AS A "SAFE ZONE."

SUBPOINT M

THE STATE UTILIZED FALSE TESTIMONY REGARDING A STOLEN CAR DEAL BETWEEN CO-DEFENDANTS NASIR TURNER AND DAMION MIKELL, AND FAILED TO ADVISE THE GRAND JURY THAT TURNER HAD PROVIDED TWO INCONSISTENT STATEMENTS.

SUBPOINT N

THE STATE UTILIZED FALSE TESTIMONY WHEN IT INCORRECTLY ALLEGED THAT FRAZIER GIBSON OFFERED DEFENDANT A MERCEDES C300 WHEN, IN FACT, GIBSON OFFERED IT TO TYJA EVANS.

SUBPOINT O

THE STATE MADE EGREGIOUS ERRORS REGARDING KHALIL CULBREATH'S TESTIMONY ABOUT DEFENDANT.

SUBPOINT P

THE INDICTMENT IS UNCONSTITUTIONALLY VAGUE.

SUBPOINT Q

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT THE LEADER CHARGE.

POINT III

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS ALL INTERCEPTED WIRE COMMUNICATIONS AND ALL EVIDENCE DERIVED THEREFROM AS "FRUIT OF THE POISONOUS TREE" AS THESE COMMUNICATIONS WERE GATHERED IN VIOLATION OF THE NEW JERSEY WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT AND IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 7 OF THE NEW JERSEY CONSTITUTION.

SUBPOINT A

THE STATE IN ITS SEPTEMBER 10, 2015 WIRETAP AFFIDAVIT DID NOT DISCLOSE THAT IT HAD BEEN AWARE OF DEFENDANT'S IDENTITY AND FAILED TO NAME HIM IN VIOLATION OF THE NEW JERSEY WIRETAPPING

AND ELECTRONIC SURVEILLANCE CONTROL ACT, N.J.S.A. 2A:156A-12.

SUBPOINT B

INTERCEPTION OF WIRELESS TELEPHONE FACILITY 424-245-9894 ON SEPTEMBER 9, 2015 WAS WITHOUT COURT AUTHORIZATION MANDATING THE SUPPRESSION OF WIRETAPPED CALL SESSION 02159 AND ALL SUBSEQUENT WIRETAP EVIDENCE AS "FRUIT OF THE POISONOUS TREE"; AT THE VERY LEAST, AN EVIDENTIARY HEARING MUST BE CONDUCTED IN ORDER FOR THE STATE TO EXPLAIN THE "SURVEILLANCE ACTIVITY LOG" ENTRY OF "SESSION 02159 (JS & NR)."

SUBPOINT C

THE STATE VIOLATED THE INVENTORY REQUIREMENTS IMPOSED BY THE NEW JERSEY WIRETAPPING AND ELECTRONIC SURVEILLANCE CONTROL ACT, N.J.S.A. 2A:156A-16.

SUBPOINT D

THE STATE'S INITIAL APPLICATION DID NOT SUFFICIENTLY ESTABLISH THAT OTHER NORMAL INVESTIGATIVE PROCEDURES HAD FAILED OR WOULD LIKELY FAIL AND THE STATE FALSE[L]Y ATTESTED AS TO CW3'S ROLE.

SUBPOINT E

THE FALSE AND MISLEADING INFORMATION CONTAINED IN BOTH THE WIRETAP

AFFIDAVITS AND AFFIDAVITS FOR THE COMMUNICATION DATA WARRANTS (CDWs) MANDATE SUPPRESSION; AT THE VERY LEAST, THE TRIAL COURT ERRED IN DENYING THE REQUEST FOR A FRANKS[5] HEARING.

SUBPOINT F

A MATERIAL MISREPRESENTATION WAS MADE TO THE AUTHORIZING WIRETAP JUDGE IN AFFIDAVIT SJT-MOR-10-WT-15/SJT-MOR-135-CDW-15 (DATED OCTOBER 7, 2015) MANDATING SUPPRESSION OF THE STATEMENTS OBTAINED.

SUBPOINT G

THE FAILURE TO LIST AN INITIAL CDW OUT OF ESSEX COUNTY ISSUED BY JUDGE GARDNER (ESX-329-CDW-14) IN SUBSEQUENT CDW APPLICATIONS MANDATES SUPPRESSION OF ALL WIRETAP EVIDENCE.

SUBPOINT H

WIRETAP WARRANTS 6, 7 AND 8 SHOULD HAVE BEEN SUPPRESSED AS THE APPLICATION IN SUPPORT OF SAID WARRANTS DOES NOT CONTAIN THE SIGNATURE OF THE APPROVING ATTORNEY GENERAL AS REQUIRED BY THE WIRETAP ACT AND THEY ARE FACIALLY DEFICIENT.

[5] Franks v. Delaware, 438 U.S. 154 (1978).

SUBPOINT I

THE TRIAL COURT ERRED IN NOT SUPPRESSING THE JULY 13, 2014 CONSENSUAL COMMUNICATION AS THE STATE FAILED TO OBTAIN THE PRIOR CONSENT AND APPROVAL OF THE SUPERVISING ATTORNEY GENERAL.

SUBPOINT J

THE TRIAL COURT ERRED IN NOT SUPPRESSING THE AUGUST 29, 2014 WARRANT AND ALL SUBSEQUENT WARRANTS DUE TO THE WARRANT APPLICATION'S LACKING INFORMATION ABOUT THE PRIOR AUGUST 5, 2014 WARRANT.

SUBPOINT K

THE UNLAWFUL INTERCEPTION OF THE COMMUNICATIONS ON THE DANIELS WIRETAP MANDATES SUPPRESSION OF ALL WIRETAP EVIDENCE.

SUBPOINT L

THE TRIAL COURT ERRED IN DENYING THE SUPPRESSION MOTION DUE TO THE UNLAWFUL INTERCEPTION OF THE COMMUNICATIONS ON THE CRAIG WIRETAP.

POINT IV

THE TRIAL COURT . . . ABUSED ITS DISCRETION BY DENYING THE RECUSAL MOTION (AND BY NOT HAVING A THREE-PERSON PANEL DECIDE THE RECUSAL MOTION) BASED UPON: I) IMPROPER AND INCOMPLETE PRETRIAL

RULINGS (INCLUDING THE FAILURE TO PROPERLY DECIDE A DOUBLE JEOPARDY ISSUE); II) THE WARRANT APPLICATIONS BEING MOVED FROM ESSEX TO MORRIS COUNTY; III) BIAS BY THE TRIAL JUDGE DUE TO HIS DEEP TIES TO THE OFFICE OF ATTORNEY GENERAL; IV) THE FAILURE TO GRANT REASONABLE ADJOURNMENT REQUESTS; V) DEFENDANT'S ETHICS COMPLAINT AGAINST THE JUDGE; AND VI) THE TRIAL JUDGE'S ACCEPTANCE OF THE STATE'S FALSE CLAIM THAT THE STATE HAD NOT OBTAINED A CDW ON DEFENDANT'S PHONE PRIOR TO THE WIRETAP ORDER; ALL IN VIOLATION OF DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL (U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, PARA. 10).

In his pro se brief, defendant raises the following arguments:

POINT ONE

DEFENDANT'S GUILTY PLEA TO FIRST DEGREE RACKETEERING IS LEGALLY INVALID AS ITS RELIANCE UPON A PREDICATE ACT OF FIRST[-] DEGREE MONEY LAUNDERING WAS IMPROPERLY GROUNDED UPON THEFTS COMMITTED OUTSIDE THE COURT'S TERRITORIAL JURISDICTION WHICH WAS NEVER ESTABLISHED. [NOT RAISED BELOW]

POINT TWO

THE STATE VIOLATED DEFENDANT'S RIGHT TO INDICTMENT BY GRAND JURY IN FAILING TO INSTRUCT ITS MEMBERS ON THE MONEY LAUNDERING STATUTE'S REQUIREMENT OF

"AGGREGATION OF TRANSACTIONS" PROVISION AS DEFINED AT N.J.S.A. 2C:21-27. [NOT RAISED [BELOW]]

(A) The Law As To Grand Jury Proceedings.

(B) The Prosecutor has a Duty To Instruct The Grand Jury As To The Specific Offense To Be Considered.

POINT THREE

THE TRIAL COURT (A) FAILED TO MAKE FINDINGS AS REQUIRED BY LAW AS TO THE AGGREGATE VALUE OF THEFT OFFENSES FOR WHICH DEFENDANT WAS LEGALLY RESPONSIBLE PURSUANT TO STATE V. BURKS, 188 N.J. SUPER. 55 (APP. DIV. 1983); (B) FAILED TO DETERMINE WHEN DEFENDANT ALLEGEDLY JOINED THE RACKETEERING ENTERPRISE; (C) FAILED TO DETERMINE WHETHER THE THEFTS WERE PART OF ONE SCHEME OR COURSE OF CONDUCT; AND (D) FAILED TO DETERMINE THE VALUE OF THE PROPERTY STOLEN OR LAUNDERED IN LIGHT OF THE SUPREME COURT'S RULING IN APPRENDI V. NEW JERSEY.[6] [NOT RAISED BELOW]

(A) The Sentencing Court Did Not Make Factual Determinations Required By Law as to the Aggregate Value of the [] Thefts for Which Defendant Was Legally Responsible Pursuant To State v. Burks, 188 N.J. Super. 55 (App. Div. 1983).

(B) The Trial Court Failed To Make A Determination As to Precisely When Defendant Allegedly Joined The

[6] 530 U.S. 466 (2000).

Racketeering Enterprise, And As A Result He Was Held Liable For Conduct Occurring Prior To His Alleged Membership Being Established.

(C) The Sentencing Court Was Required to Determine For the Purposes of Aggregation Which Thefts Were Part Of One Scheme or Course of Conduct Pursuant to State v. Childs, 242 N.J. Super. 121 (App. Div. 1990).

(D) It Was Improper For The Trial Court to Have Determined The Value of Property Stolen or Laundered In Light of The Supreme Court's Ruling In Apprendi v. New Jersey.

POINT FOUR

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN COUNSEL FAILING TO COMMUNICATE TO HIM A MORE FAVORABLE PLEA OFFER FROM THE STATE THAN THE ONE ULTIMATELY ACCEPTED. [NOT RAISED BELOW]

POINT FIVE

THE INDICTMENT SHOULD HAVE BEEN DISMISSED ON THE GROUND THAT THE PROSECUTOR PROVIDED GRAND JURORS WITH GROSSLY MISLEADING INSTRUCTIONS AND BY FAILING TO PRESENT EVIDENCE THAT WAS CLEARLY EXCULPATORY AND NEGATED DEFENDANT'S GUILT. [NOT RAISED BELOW]

POINT SIX

THE AFFIDAVIT SUBMITTED IN APPLICATION FOR RHG-ESS-283-CDW-lSX, RHG-ESS-348-CDW-15, AND RHG-ESS-349-CDW-15 CONTAINED

KNOWINGLY FALSE STATEMENTS THAT WERE MATERIAL TO THE FINDING OF PROBABLE CAUSE AS TO DEFENDANT. [NOT RAISED BELOW]

POINT SEVEN

THE DEPUTY ATTORNEY GENERAL COMMITTED REMEDIAL MISCONDUCT IN FAILING TO DISCLOSE TO THE DEFENSE VIDEO SURVEILLANCE OF A JUNE 26, 2015 ALLEGED THEFT OF A NISSAN 370Z IN VIOLATION OF THE SUPREME COURT'S HOLDING IN BRADY v. MARYLAND.[7] [NOT RAISED BELOW]

POINT EIGHT

THE DISCOVERY BY INVESTIGATORS OF A WHITE 2015 BMW 535XI ON JULY 13, 2015 BEARING NJ TEMPORARY REGISTRATION J582320 CONSTITUTED A WARRANTLESS SEARCH, AND AS SUCH SHOULD BE SUPPRESSED. [NOT RAISED BELOW]

(A) The warrantless installation of a GPS tracking device on the BMW 535XI was illegal and requires suppression of any evidence derived therefrom.

(B) The Relevant Law As To The Unconstitutional GPS Tracking Device on the 2015 BMWXI.

POINT NINE

THE WARRANTLESS INSTALLATION OF A GPS TRACKING DEVICE ON A 2015 MERCEDES BENZ C300 ON AUGUST 25, 2015 WAS

[7] 373 U.S. 83 (1963).

UNCONSTITUTIONAL AND REQUIRES SUPPRESSION OF ANY CELL-SITE LOCATION EVIDENCE DERIVED THEREFROM. [NOT RAISED BELOW]

POINT TEN

THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT BY SUPPRESSING FROM THE DEFENSE THE FACT OF WIRELESS FACILITY 9894 HAVING BEEN INTERCEPTED ON 09/09/2015, WARRANTING DISMISSAL OF THE INDICTMENT. [NOT RAISED BELOW]

(A) NONDISCLOSURE OF EVIDENCE WAS AN ACT OF MISCONDUCT.

(B) THE OMISSION IN THE ARREST AFFIDAVIT OF THE FACT OF WIRELESS TELEPHONE FACILITY 424-245-9894 HAVING BEEN MONITORED AND RECORDED PRIOR TO THE COURT'S GRANTING OF THE WIRETAP ORDER WAS MATERIAL TO THE VERACITY OF THE AFFIDAVIT AS A WHOLE.

(C) OMISSION.

(D) MATERIALITY.

(E) THE STATE'S LOSS OR DESTRUCTION, OF WIRETAPPED CALL SESSION 02159 WAS DONE SO IN BAD FAITH WARRANTING DISMISSAL OF THE INDICTMENT WITH PREJUDICE. [NOT RAISED BELOW]

POINT ELEVEN

THE OUT-OF-COURT IDENTIFICATION OF DEFENDANT ON JUNE 28, 2015 BY FAIRFIELD POLICE OFFICER PULUSE DID NOT FOLLOW ESTABLISHED PROCEDURES AND SHOULD HAVE BEEN SUPPRESSED. [NOT RAISED BELOW]

In the reply brief filed by assigned counsel, defendant repeats many of the arguments in his moving brief and raises additional arguments. For the sake of completeness, we recite verbatim the arguments in defense counsel's reply brief:

POINT I

THE JUDGE IMPROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS; CONTRARY TO THE STATE'S ARGUMENT THAT THE BORDER EXCEPTION TO THE FOURTH AMENDMENT DOES NOT APPLY TO THE CARGO CONTAINERS AT THE VARIOUS PORTS.

POINT II

THE JUDGE IMPROPERLY DENIED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AS RAMPANT POSECUTORIAL MISCONDUCT OCCURRED AND THE ERRORS WERE NOT HARMLESS NOR IMMATERIAL.

SUBPOINT A

STANDARD OF REVIEW.

SUBPOINT B

THE STATE DID NOT PROPERLY CHARGE THE GRAND JURY WITH SECOND-DEGREE RACKETEERING.

SUBPOINT C

THE STATE WAS REQUIRED TO CHARGE THE GRAND JURY ON HIERARC[H]Y AND NEXUS.

SUBPOINT D

THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE OF AN ENTERPRISE, OF A CONSPIRACY AND TO SUPPORT THE LEADER CHARGE.

SUBPOINT E

THE STATE DID PRESENT MISLEADING AND FALSE TESTIMONY TO WARRANT DISMISSAL OF THE INDICTMENT.

SUBPOINT F

THE INDICTMENT WAS CONSTITUTIONALLY VAGUE.

POINT III

THE JUDGE IMPROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS AS THE WIRETAP EVIDENCE WAS ILLEGALLY OBTAINED AND NOT ALL OF THE ERRORS WERE "INCONSEQUENTIAL" TYPOGRAPHICAL ERRORS.

SUBPOINT A

DEFENDANT WAS NOT PUT ON NOTICE THAT HE WAS BEING INTERCEPTED AND WAS NOT PROVIDED WITH INVENTORIES AS REQUIRED UNDER THE WIRETAP ACT.

SUBPOINT B

THE WIRETAPS WERE NOT PROPERLY ORDERED IN ORDER TO FURTHER THE INVESTIGATION INTO THE ENTERPRISE.

SUBPOINT C

DEFENDANT IS ENTITLED TO A FRANKS HEARING AND THE ERRORS IN THE AFFIDAVITS MANDATE SUPPRESSION.

SUBPOINT D

THE FAILURE TO LIST THE 2014 CDW AUTHORIZED BY JUDGE GARDNER WARRANTS SUPPRESSION.

SUBPOINT E

DEFENDANT HAS MERITORIOUS ARGUMENTS REGARDING THE ATTORNEY GENERAL AUTHORIZATION (WARRANTS 6, 7 AND 8 SHOULD HAVE BEEN SUPPRESSED DUE TO LACK OF APPROVING ATTORNEY GENERAL SIGNATURE).

POINT IV

THE JUDGE IMPROPERLY DENIED DEFENDANT'S MOTION FOR RECUSAL AND

REQUEST FOR A STAY AS DEFENDANT MET THE OBJECTIVE STANDARD NECESSARY FOR RELIEF.

In his pro se letter reply brief, defendant repeats his prior arguments and raises additional arguments. For the sake of completeness, we recite verbatim the arguments in defendant's pro se letter reply brief:

POINT I

NEW JERSEY DOES NOT HAVE TERRITORIAL JURISDICTION.

POINT II

DEFENDANT WAS DENIED RAISING ALL OTHER CLAIMS BEFORE THE TRIAL COURT AND HE IS ENTITLED TO RELIEF.

A. Defendant's Guilty Plea.

B. Defendant's Evidentiary Arguments Warrant Relief.

C. Defendant's Challenge to Any Identification Is Not Moot.

D. The Grand Jury Proceedings Were Not[] Properly Conducted and the Indictment Is Not Valid.

E. Defendant's Plea Was Not Legally Sound and Should Not Be Affirmed.

POINT III

DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM CAN BE CONSIDERED BY THIS COURT.

POINT IV

DEFENDANT WAS DENIED EFFECTIVE COUNSEL DUE TO THE FAILURE TO COMMUNICATE A MORE FAVORABLE PLEA.

POINT V

THE INDICTMENT SHOULD BE DISMISSED AS THE PROSECUTOR PROVIDED GRAND JURORS WITH GROSSLY MISLEADING INSTRUCTIONS [AND] FAILED TO PRESENT EXCULPATORY EVIDENCE.

POINT VI

THE AFFIDAVIT SUBMITTED IN APPLICATION FOR REG-ESS-283-CDW-lSX, RHG-ESS-348-CDW-15, AND REG-ESS-349-CDW-15 CONTAINED KNOWINGLY FALSE STATEMENTS.

POINT VII

THE DAG COMMITTED PROSECUTORIAL MISCONDUCT IN FAILING TO DISCLOSE VIDEO SURVEILLANCE OF A JUNE 26, 2015 ALLEGED THEFT OF A NISSAN 370Z IN VIOLATION OF BRADY.

POINT VIII

THE DISCOVERY BY INVESTIGATORS OF A WHITE 2015 BMW 535XI ON JULY 13, 2015 BEARING NJ TEMPORARY REGISTRATION J582320 CONSTITUTED A WARRANTLESS SEARCH, AS SUCH SHOULD HAVE BEEN SUPPRESSED.

POINT IX

THE WARRANTLESS INSTALLATION OF A GPS TRACKING DEVICE ON A 2015 MERCEDES BENZ C300 ON AUGUST 25, 2015 WAS UNCONSTITUTIONAL.

POINT X

PROSECUTORIAL MISCONDUCT BY SUPPRESSING THAT WIRELESS FACILITY 9894 WAS INTERCEPTED ON SEPTEMBER 9, 2015.

POINT XI

THE OUT-OF-COURT IDENTIFICATION OF DEFENDANT ON JUNE 28, 2015 SHOULD HAVE BEEN SUPPRESSED.

I.

We first address defendant's argument that the judge erred in denying his motion to dismiss the indictment. Defendant contends the State failed to properly charge the grand jury and failed to present sufficient evidence in support of an indictment. He also alleges prosecutorial misconduct during the

grand jury proceedings warranting dismissal of the indictment. We reject these arguments.

We review a trial court's decision on a motion "to dismiss an indictment under the deferential abuse of discretion standard." State v. Campione, 462 N.J. Super. 466, 492 (App. Div. 2020) (citations omitted). Where a decision on a motion to dismiss an indictment involves a purely legal question, our review is de novo. State v. Twigg, 233 N.J. 513, 532 (2018).

The grand jury is charged with determining whether the State established a prima facie case that a crime was committed and that the accused committed the crime. State v. Hogan, 144 N.J. 216, 227 (1996). The grand jury only decides whether criminal proceedings should be commenced. Id. at 235. It does not consider a full adversarial presentation, weigh the evidence presented by each party, render credibility determinations, or resolve factual disputes. Ibid.

In seeking an indictment, the prosecutor's "sole evidential obligation" is to present an adequate prima facie case. Id. at 236. The prosecutor is not required to present enough evidence to sustain a conviction; rather, the prosecutor need only present some evidence establishing each element of a crime. Campione, 462 N.J. Super. at 492. The "quantum of such evidence 'need

not be great.'" State v. Fleischman, 383 N.J. Super. 396, 399 (App. Div. 2006) (quoting State v. Schenkolewski, 301 N.J. Super. 115, 137 (App. Div. 1997)).

Additionally, the prosecutor's presentation to the grand jury must be "fundamentally fair." State v. Shaw, 455 N.J. Super. 471, 481 (App. Div. 2018) (quoting State v. Grant, 361 N.J. Super. 349, 356 (App. Div. 2003)). Generally, the prosecutor is not required to provide the grand jury with evidence on behalf of the accused. Hogan, 144 N.J. at 235. However, when a prosecutor's file contains credible exculpatory evidence that squarely refutes an element of a crime, i.e., negates guilt, that evidence must be provided to the grand jury. Id. at 237. A prosecutor need not search for exculpatory evidence or construct a case for the accused; however, the prosecutor must not knowingly deceive or present half-truths to the grand jury. Id. at 236.

An indictment should not be dismissed because of prosecutorial error unless the error was clearly capable of producing an unjust result, i.e., that but for the error, the grand jury would have reached a different result. State v. Majewski, 450 N.J. Super. 353, 365-66 (App. Div. 2017). It is only when a prosecutor's misconduct is "extreme and clearly infringes upon the [grand] jury's decision-making function" that an indictment should be dismissed. State v. Murphy, 110 N.J. 20, 35 (1988) (alterations in original).

An indictment should be dismissed only on the clearest of grounds—that is, when it is shown to be "manifestly deficient or palpably defective." Twiggs, 233 N.J. at 531-32 (quoting Hogan, 144 N.J. at 229). If there is some evidence establishing each element of a crime sufficient to establish a prima facie case, the indictment should not be disturbed. State v. Saavedra, 222 N.J. 39, 57 (2015) (citing State v. Morrison, 188 N.J. 2, 12 (2006)). We view the evidence and the rational inferences drawn from that evidence in the light most favorable to the State in assessing whether a grand jury could reasonably believe that a crime occurred and was committed by the accused. Campione, 462 N.J. Super. at 492. The decision whether to dismiss an indictment lies within the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Saavedra, 222 N.J. at 55-56.

A. Alleged Errors in the Grand Jury Instructions

1. Racketeering

Defendant contends the State failed to properly instruct the grand jury on second-degree racketeering. In addition, he argues the State failed to provide expert evidence as to the value of the stolen vehicles.

The racketeering statute provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in/or activities

> of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity. . . .
>
> [N.J.S.A. 2C:41-2(c).]

Racketeering is a second-degree crime but may become a first-degree crime if the pattern of racketeering activity involves a crime of violence, a first-degree crime, or the use of a firearm. N.J.S.A. 2C:41-3(a). Here, the predicate crime asserted in count three of the indictment was first-degree money laundering, also known as financial facilitation. Financial facilitation is a crime of the first degree "if the amount involved is $500,000.00 or more." N.J.S.A. 2C:21-27(a).

The judge found the State instructed the grand jury that racketeering could be a first- or second-degree crime depending on whether certain other crimes were involved. According to the transcript of the grand jury proceeding, the State gave the following instruction to the grand jury:

> [State]: Now, in regards to the grading of racketeering, racketeering can be graded as a first or second degree, and under 2C:41-2 it can be graded in connection with a pattern of racketeering activity if it involves the crime of violence or a crime where the amount is greater than $500,000, that could be a first degree. And it can be a first degree if there's use of a firearm, and that's found under N.J.S.A. 2C:41-2. And we're going to be proposing a count of racketeering towards you in the

end, and it may [make] more sense as you hear some of the facts in this case.

Now—

[A Grand Juror]: That was first degree. Can you read second degree?

[State]: We're going to consider in regards to some of the underlying predicate acts – let me read some of the underlying predicate acts of the racketeering, and then you will understand in regards to what you may be applying the facts to. Okay?

Now, in regards, with respect to racketeering activity, it can mean any of the following crimes, . . . robbery, burglary, theft, any crimes in chapter 20, which is the theft statute of 2C, forgery, fraudulent practices, which is under chapter 21 of 2C, alteration of a motor vehicle identification number. So you may be considering those.

Now, in regards to section 21 you may be considering financial facilitation which is also a predicate act for the racketeering crime. And financial facilitation, that is something that you can consider the degree of that crime, and that's found under N.J.S.A. 2C:21-25. A person is guilty of financial facilitation – and that's another word, sometimes people call it money laundering, its interchangeable, financial facilitation for money laundering. So a person is guilty of this crime if you transport or possess property known or which a reasonable person would believe to be derived from criminal activity, or [sic]

Engages in transactions involving property known, or which a reasonable person . . . would believe to be derived from criminal activity, or

> (1) with the intent to facilitate or promote the criminal activity; or
>
> (2) knowing that the transaction was designed in whole or in part:
>
> To conceal or disguise the nature, the location, the source, the ownership or control of the property derived from criminal activity; or
>
> To avoid a transaction reporting requirement under the laws of this State or any other state or of the United States.
>
> With respect to the grading of the offense of financial facilitation, it is a crime of the first degree if the amount involved is greater than $500,000 or more. And it is a crime of the second degree if the amount involved is . . . greater than $75,000 but less than $500,000.
>
> So in the end of this case we may ask you to consider financial facilitation in our proposed indictment.

Based on these instructions, the judge concluded the State advised the grand jury that racketeering ordinarily was a second-degree crime unless other offenses elevated the charge to a crime of the first degree, including the offense of first-degree money laundering. Here, the predicate act for elevating the racketeering charge to a first-degree crime was asserted in count three of the indictment, charging first-degree money laundering in excess of $500,000.

Regarding defendant's challenge to the value of the stolen cars, Detective Rodriguez told the grand jury that the value of the vehicles recovered just from the thirteen cargo shipping containers was "approximately 1.44 million dollars." Additionally, Detective Auclair informed the grand jury that additional stolen cars were recovered aside from those discovered in the cargo containers. According to Auclair, the stolen cars ranged in value from $25,000 to $100,000 and one specific car, a Bentley, was valued at over $100,000.

Even applying the lowest dollar amount to the twenty-seven stolen cars recovered from the thirteen cargo shipping containers, the value of the stolen cars seized from the cargo containers alone exceeded the $500,000 threshold to satisfy the first-degree money laundering charge. We are satisfied the judge properly determined the grand jury testimony supported the first-degree money laundering charge because the value of the stolen cars was "far in excess of the amount necessary for a first-degree financial facilitation count." Based on our review of the grand jury transcripts, the State presented sufficient evidence to establish a prima facie case of first-degree money laundering in an amount in excess of $500,000 and the grand jury was free to reject or modify the racketeering charge as a crime of the first- or second-degree based on the evidence presented.

Nor was the State required to present expert evidence to support the dollar value of the stolen cars during the grand jury proceeding. If defendant elected to go to trial rather than enter a guilty plea, he would have had the opportunity to rebut the value of the stolen cars as being less than $500,000 to render the money laundering charge a crime of the second-degree rather than a first-degree crime. Defendant was free to proceed to trial and present expert testimony if he believed the State inaccurately valued the stolen cars. However, defendant chose to plead guilty.

2. Hierarchy and Nexus

Defendant also argues the State erred by failing to instruct the grand jury that there must be: (1) a hierarchy to establish a criminal enterprise under the racketeering statute; and (2) a nexus between the crimes committed and the criminal enterprise. After reviewing the case law, the judge held the State was "not required to present proof as to the hierarchical structure of an enterprise" and the term "nexus" was not contained in New Jersey's racketeering statute.

The racketeering statute provides that:

> c. It shall be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

> d. It shall be unlawful for any person to conspire . . . to violate any of the provisions of this section.
>
> [N.J.S.A. 2C:41-2(c) and (d).]

In prosecuting a racketeering charge, the State must prove the following elements:

> 1. That there was an enterprise;
>
> 2. That the enterprise was engaged in trade or commerce or that its activities affected trade or commerce;
>
> 3. That the defendant was employed or associated with the enterprise;
>
> 4. That the defendant participated directly or indirectly in the conduct of the enterprise's affairs;
>
> 5. That the defendant did so through a pattern of racketeering.
>
> [Model Jury Charges (Criminal), "Racketeering (N.J.S.A. 2C:41-2(c))" (approved Feb. 14, 2011).]

"The gravamen of a RICO violation, frequently referred to as 'racketeering,' is the involvement in the affairs of an enterprise through a pattern of racketeering activity." State v. Ball, 141 N.J. 142, 155 (1995). "[U]nder the RICO Act 'enterprise' is an element separate from 'the pattern of racketeering activity,' and . . . the State must prove the existence of both in order to establish

a RICO violation." Id. at 161-62. Additionally, "evidence that serves to establish such an enterprise need not be distinct or different from the proof that establishes the pattern of racketeering activity." Id. at 162.

Because the enterprise is separate from the incidents comprising the pattern of activity, an organization is required. Ibid. "The hallmark of an enterprise's organization consists rather in those kinds of interactions that become necessary when a group, to accomplish its goal, divides among its members the tasks that are necessary to achieve a common purpose." Ibid. Evidence of a structure within the enterprise "support[s] the inference that the group engaged in carefully planned and highly coordinated criminal activity." Ibid. In general, evidence presented in support of proof of an enterprise includes the number of persons involved, their knowledge of the organization's objectives, the manner in which they interacted, their individual roles, the level of planning, the decision-making process, implementation of decisions, the frequency of criminal activity, and the amount of time between each incident. Id. at 162-63.

Here, defendant's claim that the State failed to instruct the grand jury that there must be a hierarchy to establish a criminal enterprise under the statute is contrary to the language in the racketeering statute. Through the use of wiretaps,

CDWs, confidential informants, and other surveillance methods, the State provided sufficient evidence to the grand jury regarding the number of people involved in the car theft ring, their knowledge of the objectives of the ring, their roles within the ring, the decision-making within the ring, the planning involved in the ring, and the frequency of the racketeering activities of the ring. Consistent with the case law, the State was not required to present evidence that the car theft ring had a hierarchal structure, a structure with any particular configuration, or a distinct chain of command. Id. at 162.

Moreover, defendant's claim the State failed to instruct the grand jury that there had to be a nexus between the crimes committed and the criminal enterprise is not supported by the language of the New Jersey racketeering statute. Nowhere in that statute, N.J.S.A. 2C:41-2, nor the New Jersey Model Jury charge governing racketeering does the word "nexus" appear. The State need only prove defendant's participation in the affairs of an enterprise, such as the car theft ring, "through a pattern of racketeering." N.J.S.A. 2C:41-2(c).

A "pattern of racketeering" is defined as:

> (1) Engaging in at least two incidents of racketeering conduct one of which shall have occurred after the effective date of this act and the last of which shall have occurred within 10 years . . . after a prior incident of racketeering activity; and

> (2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.
>
> [N.J.S.A. 2C:41-1(d).]

Here, the State charged the grand jurors on the need to find that defendant participated in the car theft enterprise through a pattern of racketeering activity consistent with the statute. "[A] prosecutor's decision on how to instruct a grand jury will constitute grounds for challenging an indictment only in exceptional cases." State v. Triestman, 416 N.J. Super. 195, 202 (App. Div. 2010) (citing Hogan, 336 N.J. Super. at 344). "Incomplete or imprecise grand jury instructions do not necessarily warrant dismissal of an indictment; rather, the instructions must be 'blatantly wrong.'" Id. at 205 (quoting Hogan, 336 N.J. at 344). Only where a prosecutor's instructions to a grand jury are misleading or incorrect should an indictment be dismissed. See State v. Ball, 268 N.J. Super. 72, 119-20 (App. Div. 1993).

Having reviewed the grand jury transcripts, we are satisfied the prosecutor's charge to the grand jury was not incorrect, misleading, or blatantly wrong. Therefore, the judge correctly concluded that dismissal of the indictment for failure to properly instruct the grand jury was not warranted.

B. Sufficiency of the evidence

1. Enterprise

Defendant also contends the State failed to present sufficient evidence of an enterprise to the grand jury to support count one of the indictment. He argues the State failed to present evidence of the following: (1) a single enterprise; (2) an agreement between a distinct set of defendants; (3) interaction between defendant and the co-defendants to accomplish a goal; (4) a shared purpose with co-defendants; and (5) defendant's participation in the affairs of the enterprise.

Because the State dismissed the charge against defendant related to the existence of an enterprise based on defendant's guilty plea to first-degree racketeering, we could consider the issue moot. However, for the sake of completeness, we elect to address the merits of defendant's pro se argument on this issue.

An enterprise is defined as "any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises . . . ." N.J.S.A. 2C:41-1(c) (emphasis added). Here, there was ample evidence presented to the grand jury in support of an illicit enterprise.

The judge found the State presented overwhelming evidence of the enterprise based on the testimony of Detectives Auclair and Rodriguez. Both detectives identified the individuals involved in the car theft ring, including defendant. The detectives also explained the roles played by the participants in the car theft ring and their knowledge of the objectives of that ring–to steal luxury cars and sell them through fences to domestic and overseas buyers.

The State also played portions of the intercepted telephone calls obtained through numerous wiretaps and produced text messages between the participants in the car theft ring, demonstrating "the decision-making of the group, the level of planning and coordination, and the frequency of the thefts and sale of the stolen vehicles." The evidence detailed the roles each participant played–from car thieves to fencers and shippers of the stolen cars to buyers of the stolen vehicles. The judge found the State presented evidence to the grand jury that "a large group of people, all with differing roles and responsibilities, were responsible for the theft, carjacking or attempted theft of approximately [forty to fifty] high-end vehicles in New Jersey and New York, over a time-period of approximately [sixteen] months." Accordingly, the judge concluded the "enterprise" evidence presented to the grand jury "delineated the division of labor among the group, and the degree of cooperation and coordination

necessary to steal the vehicles, thwart law enforcement and engage buyers for the stolen vehicles."

Based on the wiretap evidence, Detective Auclair testified the communications supported defendant's role in the car theft ring. Relying on the wiretap evidence, Auclair explained to the grand jury that defendant "established himself as a leader because he gave out a lot of orders and demands to the people in the theft crew. He orchestrated a lot of thefts, he told people . . . what they had to do, what tools they needed. He tried to recruit people . . . ."

In detailing other communications obtained through wiretapped calls, the grand jury heard that defendant and Gibson discussed a stolen Mercedes, moving that car to a "safe zone," and other topics concerning the car theft ring. The Mercedes was subsequently discovered in a parking lot at Newark Airport, one of the designated "safe zones" for "cooling off" stolen cars prior to sale. The grand jury also heard testimony that the police discovered two stolen Land Rovers near the stolen Mercedes, and one of those stolen Land Rovers had Culbreath's fingerprints. Additionally, the grand jury learned the police used a GPS device to track the Mercedes at Newark Airport to a cargo container awaiting shipment to Africa.

The State also provided evidence regarding intercepted telephone calls between defendant and Wilson, a car thief, who worked with defendant and others as part of the car theft ring. During the telephone calls, defendant and Wilson discussed the tools needed to steal cars. They also discussed Gibson's role in the enterprise. Additionally, the wiretap evidence included conversations between defendant and Moore regarding stolen cars, pricing for the stolen cars, and the profits derived from the sale of the stolen vehicles.

After reviewing the grand jury transcripts, we are satisfied that the State presented more than sufficient evidence to establish a prima facie case demonstrating the existence of an enterprise and defendant's role in that enterprise.

2. Conspiracy

Defendant also claims that the State failed to present sufficient evidence of a conspiracy. Because the State dismissed the conspiracy charge in connection with defendant's guilty plea, we could consider the issue moot. However, for the sake of completeness, we again elect to address the merits of defendant's pro se arguments on the issue.

N.J.S.A. 2C:5-2 defines the elements of a conspiracy. See also State v. Samuels, 189 N.J. 236, 245 (2007). To establish the crime of conspiracy, there

must be evidence that the defendant: "agrees with [another] person or persons that they or one or more of them would engage in conduct which constitutes a crime or an attempt or solicitation to commit such crime"; "the defendant's purpose was to promote or facilitate the commission of" the intended crimes; and "the defendant or person with whom [defendant] conspired did an overt act in pursuance of the conspiracy." Model Jury Charges (Criminal), "Conspiracy (N.J.S.A. 2C:5-2)" (rev. Apr. 12, 2010).

Based on the same testimony relied upon by the judge in finding sufficient evidence presented to the grand jury to establish an enterprise, he also found sufficient evidence to support the conspiracy charge.

Even if the conspiracy charge against defendant had not been dismissed, there was ample evidence offered to the grand jury to support the State's contention that defendant had a purpose to engage in criminal activity with other persons, constituting a conspiracy. The grand jury heard evidence that defendant stole and sold high-end luxury cars constituting a conspiracy under N.J.S.A. 2C:5-2(a). The wiretap-intercepted telephone calls demonstrated defendant agreed to steal cars with the participation of Culbreath, Gibson, Moore, and Wilson. Defendant and codefendants shared a common goal intending to profit from stealing, fencing, and shipping luxury cars to domestic

and overseas buyers. On this record, we are satisfied there was sufficient evidence of a conspiracy presented to the grand jury.

3. Leader Charge

Defendant further claims the State failed to present sufficient evidence in support of his role as the leader of the car-theft ring. The State also dismissed this charge in return for defendant's guilty plea to first-degree racketeering and, therefore, we could consider the argument moot. Again, for the sake of completeness, we elect to address defendant's pro se argument on this point.

N.J.S.A. 2C:20-18 provides:

> A person is a leader of an auto theft trafficking network if he conspires with others as an organizer, supervisor, financier or manager to engage for profit in a scheme or course of conduct to unlawfully take, dispose of, distribute, bring into or transport in this State automobiles as stolen property.

As we noted earlier, there was more than sufficient evidence in the record before the grand jury to establish a prima facie case in support of the leader charge. Detective Auclair described defendant's leadership role in issuing orders to participants in the car theft enterprise, including what each participant should do and what tools were needed to steal the cars. The grand jurors were free to reject the State's evidence regarding defendant's leader role in the car theft ring.

We are satisfied that the judge's findings in support of the sufficiency of the evidence on the charges in the indictment were supported by the record and dismissal of the indictment based on insufficiency of the evidence was not warranted.

C. Prosecutorial misconduct

1. Enterprise and racketeering charts

Because we are satisfied the judge correctly concluded there was more than sufficient evidence presented to the grand jury regarding defendant's role as a leader in a racketeering enterprise, there is no merit to the argument that the State's presentation of the charts to the grand jury constituted prosecutorial misconduct.

Moreover, if defendant had elected to proceed to trial, he would have been able to challenge the accuracy of the charts. Because defendant decided to plead guilty to racketeering, he relinquished the right to challenge the information contained in these charts. See State v. Gregory, 220 N.J. 413, 418 (2015) ("A defendant who pleads guilty . . . relinquishes the right to require that the State prove to the jury every element of the offense beyond a reasonable doubt.").

2. False and misleading testimony

Defendant asserts the following instances of prosecutorial misconduct through the State's presentation of false and misleading evidence to the grand jury: statements linking defendant to a stolen Bentley; mischaracterization of Culbreath's inculpatory statement regarding defendant; misleading the grand jurors regarding the text messages among the participants in the car theft ring; and false testimony related to the identification of defendant.

Regarding the purported misleading and false testimony by the prosecutor during the grand jury presentation related to codefendants' statements to the police, defendant could have proceeded to trial where he could have cross-examined and tested the credibility of the witnesses making those statements. However, defendant chose to enter a guilty plea and thus waived any challenge to the statements as false, misleading, or lacking credibility.

Similarly, defendant would have had the same opportunity to challenge the text messages presented to the grand jury if he went to trial rather than enter a guilty plea. Defendant cites as false or misleading the testimony from Detective Auclair that one text message from defendant to Culbreath read: "okay, give me cash, meet me where we do [it] at" when the message actually read: "okay give me a half meet me where we do [it] at." Despite his

misstatement of the text message, Auclair explained to the grand jury the text message meant defendant would meet Culbreath in a half-hour. Thus, the detective's testimony was neither misleading nor false.

Additionally, because the grand jurors had a written copy of the text messages presented by the State, the judge concluded Auclair's misstatement during his grand jury testimony did not mislead the members of the panel and therefore resulted in no prejudice to defendant. We concur with the judge's finding based on the record.

Defendant also claims the State's misidentification of the airport for defendant's return trip from Miami constituted prosecutorial misconduct warranting dismissal of the indictment. Detective Rodriguez told the grand jury that defendant returned to Newark Airport rather than LaGuardia Airport. However, the name and location of the airport where defendant landed had no bearing on the evidence connecting defendant to the stolen car ring. The significance of the detective's testimony was the identification of defendant as a participant in the car theft ring as a result of the police placing a call to the cell phone number belonging to the target suspect, known as Mole, and observing defendant answer that call while at the airport.

In sum, we reject defendant's arguments regarding prosecutorial misconduct in the presentation of evidence to the grand jury because that evidence could have been rebutted and challenged if defendant chose to proceed to trial. Moreover, defendant has not demonstrated the prosecutor's alleged misconduct was so extreme as to infringe on the grand jury's decision-making function to warrant dismissal of the indictment. Nothing in our review of the record before the grand jury warrants dismissal of the indictment based on unsubstantiated assertions of prosecutorial misconduct.

II.

We next address defendant's motion to suppress the evidence seized from cargo containers at various seaports. Defendant argues the seizure of twenty-seven stolen cars from thirteen shipping containers at various seaports was unconstitutional. Defendant asserts the NJSP improperly circumvented the warrant requirement under the Fourth Amendment by directing CBP agents to inspect the cargo container. Additionally, because the NJSP provided information to CBP leading to its search of the containers, defendant claims the "border search exception" does not apply. He also contends CBP's search was not routine and would not have happened absent the tip from the NJSP.

In a September 21, 2018 written decision, the judge denied defendant's motion to suppress the evidence seized from the cargo containers without an evidentiary hearing. The judge found the search of the shipping containers by CBP was a routine border search. Because CBP's search was a routine border search, the judge explained that Fourth Amendment protections did not apply.

Additionally, the judge rejected defendant's reliance on State v. Mollica, 114 N.J. 329 (1989). Rather, the judge relied on the persuasive reasoning in a Sixth Circuit decision, United States v. Boumelhem, 339 F.3d 414, 423-25 (6th Cir. 2003), finding the search in that case to be nearly identical to the search in this case. In fact, the judge noted there was even less involvement between CBP and the NJSP in this case as compared to the facts in Boumelhem. Because the Sixth Circuit court upheld CBP's search in Boumelhem, the judge concluded CBP had jurisdiction and the authority under federal law to search shipping containers at the seaports. The judge found the information provided by the NJSP did not "transform the searches of the shipping containers into something other than border searches authorized by federal law."

We will uphold a trial court's findings on a suppression motion if the findings are supported by "sufficient credible evidence in the record." State v. Lamb, 218 N.J. 300, 313 (2014). We apply this deferential standard regardless

of whether there was a testimonial hearing or whether the court based its findings solely on its review of documentary evidence. See State v. Johnson, 42 N.J. 146, 161 (1964). However, if a trial court's factual findings are clearly mistaken, the interests of justice require our intervention. State v. S.S., 229 N.J. 360, 381 (2017).

"Both the United States Constitution and the New Jersey Constitution guarantee an individual's right to be secure against unreasonable searches or seizures." State v. Minitee, 210 N.J. 307, 318 (2012). A warrantless search is presumptively unreasonable unless it falls within a recognized exception to the warrant requirement, which the State must demonstrate by a preponderance of the evidence. State v. Edmonds, 211 N.J. 117, 128-130 (2012); State v. Williams, 461 N.J. Super. 1, 10 (App. Div. 2019).

One such exception, known as the "border search exception," provides:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

[19 U.S.C. § 1581(a).]

"Border searches are one of those 'limited situations [in which] the government's interest in conducting a search without a warrant outweighs the individual's privacy interest.'" United States v. Baxter, 951 F.3d 128, 132 (3d Cir. 2020) (alteration in original) (quoting United States v. Hyde, 37 F.3d 116, 117 (3d Cir. 1994)). Under the border search exception, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause or warrant . . . ." United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985); see also Boumelhem, 339 F.3d at 420. Searches at the United States border are justified under "the long standing right of the sovereign to protect itself by stopping and examining persons and property crossing into [the] country. . . . " United States v. Ramsey, 431 U.S. 606, 616 (1977). The United States has inherent sovereign authority to regulate the collection of duties, to prevent the introduction of contraband into the country, and to protect its territorial integrity. See Montoya de Hernandez, 473 U.S. at 537-38.

Two conditions must be satisfied for the border search exception to apply. First, the search or seizure must occur at the "physical boundaries of the nation" or its "functional equivalent." United States v. Caminos, 770 F.2d 361, 364 (3d

Cir. 1985) (citing Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973)). The definition of border includes "the port where a ship docks after arriving from a foreign country." United States v. Cardenas, 9 F.3d 1139, 1147 (5th Cir. 1993). The border search exception also applies to incoming and outgoing vessels, vehicles, and persons. See United States v. Ezeiruaku, 936 F.2d 136, 143 (3d Cir. 1995). Here, the search of the cargo containers occurred at CBP checkpoints at several seaports. Thus, the first condition is satisfied.

The second condition requires the search or seizure to be routine. United States v. Whitted, 541 F.3d 480, 485 (3d Cir. 2008) ("Provided that a border search is routine, it may be conducted, not just without a warrant, but without probable cause, reasonable suspicion, or any suspicion of wrongdoing.") (citing Montoya de Hernandez, 473 U.S. at 538).

Whether a border search is routine or non-routine depends on the facts of each case. United States v. Braks, 842 F.2d 509, 512-13 (1st Cir. 1988). Courts have articulated various tests to determine whether a CBP search is or is not routine, which typically relate to the degree of intrusiveness associated with the search. Id. at 511. See also State v. Green, 346 N.J. Super. 87, 95 (App. Div. 2001).

In Braks, the First Circuit considered the following factors in assessing the degree of intrusiveness associated with a search:

> (i) whether the search results in the exposure of intimate body parts or requires the suspect to disrobe;
>
> (ii) whether physical contact between Customs officials and the suspect occurs during the search;
>
> (iii) whether force is used to effect the search;
>
> (iv) whether the type of search exposes the suspect to pain or danger;
>
> (v) the overall manner in which the search is conducted; and
>
> (vi) whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search[.]
>
> [842 F.2d at 512.]

The following searches have been deemed routine: requesting a woman at the border to lift her skirt, and revealing only her undergarments, id. at 513; searching luggage inside an aircraft's cargo hold, United States v. Uricoechea-Casallas, 946 F.2d 162, 165 (1st Cir. 1991); searching an individual's personal effects, including the contents of a purse, wallet, or pockets, United States v. Himmelwright, 551 F.2d 991, 994 (5th Cir. 1977); searching a passenger's box and opening bottles of liquor and testing the contents at an immigration checkpoint, United States v. Barrow, 448 F.3d 37, 41 (1st Cir. 2006); manually

reviewing electronic files contained on a computer and disks found in a van crossing a border, United States v. Ickes, 393 F.3d 501, 505–06 (4th Cir. 2005); removing, disassembling, and reassembling a fuel tank without causing damage, United States v. Flores-Montano, 541 U.S. 149, 154–55 (2004); and requesting passengers remove shoes to be searched, Green, 346 N.J. Super. at 99.

On the other hand, the following searches have been deemed to be non-routine: customs agents drilling into a metal cylinder shipped to the States, United States v. Robles, 45 F.3d 1, 5 (1st Cir. 1995); and strip, body cavity, or involuntary x-ray searches, Montoya de Hernandez, 473 U.S. at 541 n.4.

Because the judge found the facts here were similar to those presented in Boumelhem, we summarize the facts in that case. In Boumelhem, a joint task force, consisting of the FBI, CBP, the Michigan State Police, and other law enforcement agencies, investigated the defendant's involvement in the illegal transporting of weapons overseas. 339 F.3d at 417. The task force tracked a shipping container with a false bill of lading to a railroad yard where it was scheduled to be shipped to Lebanon. Id. at 417-18. The CBP agents seized the container without a warrant and the FBI helped CBP search the container. Id. at 418.

The Sixth Circuit found that the warrantless search was authorized under 19 U.S.C. § 1581(a). Id. at 419-20. Under the border-search exception, the court held routine searches of persons and effects about to leave or enter the country were not subject to any requirement of reasonable suspicion, probable cause, or warrant. Id. at 420-22.

The Boumelhem court rejected the defendant's claim that the FBI circumvented the Fourth Amendment requirement to obtain a search warrant by having CBP search the container. Id. at 423. The Sixth Circuit found: (1) while CBP acted in conjunction with the FBI, it also pursued its own law enforcement objectives; (2) CBP had its own interest in stopping the illegal export of weapons; (3) CBP's jurisdiction was triggered when the container arrived at the railyard to be shipped to another country; and (4) CBP acted in good faith and within its authority in searching the shipping container. Id. at 423-24.

In reaching its holding in Boumelhem, the Sixth Circuit relied on United States v. Villamonte-Marquez, 462 U.S. 579 (1983). In that case, the United States Supreme Court found the boarding of a vessel by a CBP agent and state police based upon an informant's tip was constitutional under the border search exception. Id. at 584 n.3. The Sixth Circuit stated it would "serve no underlying interest of the Fourth Amendment to permit one arm of the government to search

for no reason, while forbidding another arm of the government from searching under suspicious circumstances." Boumelhem, 339 F.3d at 423. Thus, the Boumelhem court found the "cooperation between the FBI and Customs . . . did not render the warrantless search of the cargo container unconstitutional." Id. at 425.

Similarly, in United States v. Levy, 803 F.3d 120, 123-24 (2d Cir. 2015), the court found a border search conducted by CBP agents based upon information provided by a DEA task force to be constitutional, finding:

> Official interagency collaboration, even (and perhaps especially) at the border, is to be commended, not condemned. Whether a Customs official's reasonable suspicion arises entirely from her own investigation or is prompted by another federal agency is irrelevant to the validity of a border search, which we have held "does not depend on whether it is prompted by a criminal investigative motive." United States v. Irving, 452 F.3d 110, 123 (2d Cir. 2006); see United States v. Schoor, 597 F.2d 1303, 1306 (9th Cir. 1979) (Kennedy, J.) ("That the search was made at the request of the DEA officers does not detract from its legitimacy. Suspicion of customs officials is alone sufficient justification for a border search."). We note, for example, that DEA or Federal Bureau of Investigation agents "frequently assist customs officials in the execution of border searches." Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 232 (2008) (Kennedy, J., dissenting) (citing United States v. Burr, 471 F.3d 144, 147-49 (D.C. Cir. 2006)). We see no constitutional reason to prevent these and other federal law enforcement agents from also supplying information to

> Customs officials in aid of a border search. Nor are Customs officials prevented by the Fourth Amendment from conducting such a search merely because it furthers another federal agency's criminal investigation.

Defendant, relying on Mollica, 114 N.J. at 345, argues the border search exception did not apply and the NJSP should have obtained a warrant to search the cargo containers. However, the facts in Mollica are distinguishable from the facts here.

In Mollica, the FBI, as part of an independent investigation into an illegal bookmaking enterprise at a hotel and casino in Atlantic City, obtained telephone billing records for the room telephone of a defendant-hotel guest without a warrant. Id. at 335. The FBI provided the records to the NJSP which then obtained search warrants based on the FBI provided records. The NJSP searched the hotel rooms of both the original defendant-hotel guest and a second defendant-hotel guest the next time both defendants occupied the hotel and seized evidence of the illegal gambling enterprise. Id. at 335-36.

The Mollica defendants sought to suppress the seized evidence, arguing that: (1) their state constitutional rights were violated when the FBI seized the hotel phone records without a warrant and provided those records to the NJSP; and (2) the search warrants subsequently obtained by the NJSP were based on

illegally seized evidence. Id. at 334-35. The trial court granted the defendants' suppression motion and we affirmed; however, the New Jersey Supreme Court stayed the suppression order and remanded the matter for a hearing. Id. at 358.

After reviewing the case law regarding evidence acquired and supplied by officers who were subject to differing legal standards—a state law enforcement officer and a federal law enforcement officer—the Mollica Court held that "federal officers acting lawfully and in conformity to federal authority are unconstrained by the State Constitution, and may turn over to state law enforcement officers incriminating evidence, the seizure of which would have violated state constitutional standards." Id. at 355.

However, the Mollica Court cautioned that, "[w]hen such evidence is sought to be used in the state, it is essential that the federal action deemed lawful under federal standards not be alloyed by any state action or responsibility" such that the federal officials were actually acting under color of state law. Id. at 355, 358. While assistance from state law enforcement officers could dilute the legitimacy of a federal law enforcement agency action, the Court held "[m]ere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency." Id. at 355.

We are satisfied the circumstances presented in this appeal are not akin to the facts in Mollica. This case involved a routine search at the border. The CBP had jurisdiction to search the shipping containers for any reason or no reason under 19 U.S.C. § 1581(a). Additionally, defendant had no privacy interest in the contents of the cargo containers being shipped out of the United States. Under these facts, CBP did not require any suspicion prior to conducting a routine search of the containers.

Nor was an evidentiary hearing required to determine the existence, if any, of an agency relationship between CBP and the NJSP. Defendant relies on reports authored by CBP agents, indicating CBP "assisted" the NJSP in seizing the stolen cars. In the thousands of pages of discovery produced to defendant, there are only eight reports from CBP related to the stolen cars. There is no evidence of any cooperation, communication, or state action between CBP and the NJSP based on the eight CBP reports over the course of the extensive eighteen-month investigation into the car theft ring.

Under the circumstances, we agree with the judge that CBP did not act as a state agent. Rather, CBP properly acted on a matter wholly within its jurisdiction and authority and pursued its own valid law enforcement objective. Nothing about CBP's receipt of information from the NJSP rendered the search

invalid because CBP did not require a tip to search the contents of the containers at the seaport in accordance with 19 U.S.C. § 1581(a).

III.

We next address defendant's argument that the judge erred in denying his motion to suppress the wiretap evidence. The New Jersey Wiretap and Electronic Surveillance Control Act (Wiretap Act), N.J.S.A. 2A:156A-1 to -37, in part, provides:

> Upon consideration of an application, the judge may enter an ex parte order . . . authorizing the interception of a wire, electronic or oral communication, if the court determines on the basis of the facts submitted by the applicant that there is or was probable cause for belief that:
>
> a. The person whose communication is to be intercepted is engaging or was engaged over a period of time as a part of a continuing criminal activity or is committing, has or had committed or is about to commit an [enumerated][8] offense . . . .
>
> b. Particular communications concerning such offense may be obtained through such interception instructions; [and]
>
> c. Normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ[.]

[8] Racketeering is an enumerated offense under the Wiretap Act. N.J.S.A. 2A:156A-8.

[N.J.S.A. 2A:156A-10.]

An application under the Wiretap Act requires "[a] particular statement of the facts relied upon by the applicant," including "[t]he identity of the particular person, if known, committing the offense and whose communications are to be intercepted." N.J.S.A. 2A:156A-9(c). Additionally, the application for a wiretap requires a complete statement of the facts concerning all previous applications made to any court for authorization to intercept a wire, electronic or oral communication "involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each such application." N.J.S.A. 2A:156A-9(e).

Further, a person named in a wiretap order or application must be served with an "inventory" of certain information specified in the order or application, including notice of the entry of the order and whether communications were intercepted during the authorized period. N.J.S.A. 2A:156A-16.

An "aggrieved person" may seek

> to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that:
>
> a. The communication was unlawfully intercepted;

> b. The order of authorization is insufficient on its face;
>
> c. The interception was not made in conformity with the order of authorization or in accordance with the requirements of [N.J.S.A. 2A:156A-12].
>
> [N.J.S.A. 2A:156A-21.]

A showing of bad faith or an intentional violation or evasion of the requirements of the Wiretap Act by law enforcement personnel is not necessary for suppression of evidence. State v. Worthy, 141 N.J. 368, 385 (1995).

"The Wiretap Act must be strictly construed to safeguard an individual's right to privacy." State v. Ates, 217 N.J. 253, 268 (2014). However, "[n]ot every failure to comply fully with the procedural requirements of the [Wiretap] Act" mandates suppression. State v. Sullivan, 244 N.J. Super. 357, 363 (1990). Rather, "[v]iolation of a procedural requirement of the [Wiretap] Act triggers the statutory suppression remedy only where the procedure 'is a critical part of the protections surrounding a court-authorized electronic surveillance.'" Ibid. (quoting State v. Cerbo, 78 N.J. 595, 603 (1979)).

Wiretap applications and resulting orders authorizing wiretaps are presumed to be valid. See State v. Kasabucki, 52 N.J. 110, 117-18 (1968). A defendant in a criminal case bears a heavy legal burden when challenging the validity of a warrant application based on this presumption even where the

adequacy of the supporting facts appears to be marginal. See State v. Valencia, 93 N.J. 126, 133 (1983). In assessing the validity of a warrant, we accord substantial deference to the judge's discretionary issuance of a warrant and any doubt surrounding the issuance of a warrant should be resolved by sustaining the warrant. State v. Jones, 179 N.J. 377, 388-89 (2004).

Contrary to defendant's arguments challenging the validity of the wiretap authorizations, we are satisfied that the State complied with the requirements under the Wiretap Act and the judge properly denied his motion to suppress the wiretap evidence.

A.

Here, defendant was on notice that he was being intercepted even though the affidavit supporting the wiretap request identified the target as "Mole" rather than defendant's proper name. Law enforcement only tentatively identified defendant the day before the wiretap order was signed. The judge found "it would have been imprudent for the State to update an already pending affidavit based on [the] tentative identification prior to full corroboration and verification."

The judge also determined that the State sent inventories to defendant's home address and also produced the inventories to counsel during discovery.

The judge, relying on State v. Murphy, 148 N.J. Super. 542, 548 (App. Div. 1997), concluded suppression of evidence based on errors of a procedural nature, such as naming defendant by his proper name in the wiretap order or serving the inventories on the defendant, was not mandatory in the absence of prejudice. Absent "bad faith or insolence" on the part of law enforcement, suppression of the wiretap evidence was not warranted where defendant was unable to demonstrate any lost advantage as a result of the procedural error. See State v. Luciano, 148 N.J. Super. 551, 557 (App. Div. 1977).

On this record, defendant failed to demonstrate that the failure to include his proper name in the initial wiretap affidavit or provide the inventories resulted in any prejudice. Nor did defendant show the omission of his name in the affidavit or absence of the inventories amounted to bad faith or insolence by the NJSP. Additionally, defendant never demonstrated any lost advantage due to the procedural error. In fact, defendant was identified by his proper name in subsequent affidavits seeking wiretap authorizations. Further, defendant received copies of the inventories through discovery provided by the State in addition to the inventories mailed to his home address.

B.

Defendant also argues the State failed to exhaust normal investigative techniques prior to obtaining the wiretap orders. Defendant suggests there were alternative investigative procedures available without the need to obtain wiretap orders, such as subpoenaing bank records, using existing CWs to identify the members of the car theft ring, or employing additional physical surveillance methods.

While the Wiretap Act reflects a requirement that the State's normal investigative procedures be considered prior to requesting a wiretap, the State need only demonstrate such procedures were tried without success, reasonably unlikely to succeed if tried, or dangerous to attempt. N.J.S.A. 2A:156-10(c).

Here, the judge found the State established the other investigative procedures used to obtain information linking defendant to the car theft ring were tried but failed, were unlikely to succeed if attempted, or were too dangerous to attempt. Detective Rodriguez testified that the available alternative investigative techniques would have alerted the participants in the car theft ring to the investigation, would have compromised the integrity and effectiveness of the investigation, or were simply too dangerous. The State employed the use of pen registers, physical surveillance, GPS tracking devices,

and CWs to learn more about the participants in the car theft operation. Despite the partial success of these investigative techniques, absent the wiretaps, the State was unable to establish the individuals who were at the top of the operation and the full scope of participants in the car theft ring.

We are satisfied the information provided in the affidavits for the State's wiretap applications was sufficient. The State made reasonable and good faith efforts, using standard investigative techniques, prior to seeking wiretap orders. Continued use of the normal investigative tools employed by the NJSP was insufficient to uncover the full scope of the car theft operation and had the potential to compromise the entire investigation. Under the circumstances, it is clear that the wiretap orders were a necessary part of the investigation due to the extensive nature of the car theft ring and the large number of participants involved. Therefore, the judge properly denied defendant's motion to suppress the wiretap evidence on this basis.

C.

Regarding defendant's argument that knowingly false statements were made in the affidavits seeking wiretap orders, the judge found defendant failed to make the required showing that the affidavits contained "deliberate

falsehood[s] or [a] reckless disregard for the truth." State v. Howery, 80 N.J. 563, 567 (1979).

Here, defendant's falsity claim relates to the omission of a fact. Specifically, defendant contends the State failed to include the inability of a specific CW to converse with Gibson in the affidavits for wiretap orders. However, defendant failed to demonstrate that the omission of the CW's ability to speak with Gibson was knowing or intentional. Moreover, defendant proffered no evidence that the NJSP identified Gibson as a member of the enterprise when they filed the affidavits in support of the Daniels wiretap or the Aikens wiretap. In fact, the NJSP only learned about Gibson after obtaining evidence from these wiretaps. Under these circumstances, we agree with the judge there was no need for a Franks hearing because the information in the affidavit in support of the wiretap applications was not deliberately false or made with a reckless disregard for the truth. See State v. Howery, 80 N.J. 563, 583 n.4 (1979) (holding a Franks "hearing is required only if the defendant can make a substantial preliminary showing of perjury."). Defendant did not meet his burden on this record.

D.

Defendant also argues the NJSP made knowingly false statements in the affidavits in support of the CDWs based on incorrect telephone numbers for various targeted telephones and erroneous attribution of defendant as a participant in a specific telephone call. The judge concluded these were typographical errors rather than knowingly false statements in the affidavits for the CDWs.

Again, defendant offered no proof that the technical or typographical errors in the affidavits misled the court as to probable cause related to the issuance of the CDWs. Contrary to defendant's claim, not every error constitutes a falsehood justifying a Franks hearing to test the validity of the CDWs.

E.

We also reject defendant's argument that the State failed to provide complete progress reports under N.J.S.A. 2A:156A-12(h). Here, the State submitted written reports to the judge issuing the wiretap order sufficient to advise the court regarding the progress of the car theft ring investigation and the need for continued interception.

Having reviewed the progress reports, we are satisfied the judge correctly concluded there was sufficient information to determine whether to discontinue

the wiretap orders or authorize continued interception. Additionally, when the State provided the progress reports, the trial judge was reviewing new and related wiretap applications which provided additional information to the trial court on the progress of the NJSP investigation.

F.

Nor was the failure to list a CDW out of Essex County in a subsequent CDW application sufficient grounds for suppression of the wiretap evidence. As the judge aptly held, an accounting of previously authorized CDWs in subsequent affidavits is not required under the Wiretap Act. Even if such a disclosure was required, the failure to include one CDW in an affidavit would not warrant suppression of all subsequent affidavits.

G.

Additionally, the AG's failure to sign three of the wiretap applications did not warrant suppression of the wiretap evidence as argued by defendant. Defense counsel confirmed during a court proceeding on August 7, 2018, that she received copies of the signed authorizations for these wiretaps.

Similarly, defendant's argument that the State purportedly failed to obtain the prior approval of the supervising AG for the consensual recording of a conversation between a CW and a person named "Ali" lacks merit. The judge

correctly found defendant's argument was factually incorrect. Even if defendant had been correct, he lacked standing to object because he was not a party to the recorded call. Additionally, defendant never demonstrated that the information obtained through the consensual call was used in any of the affidavits.

The warrants for the electronic and wire communications were presumptively valid and none of defendant's arguments overcame that presumption. Additionally, defendant failed to establish the wire or electronic communications were unlawfully intercepted in violation of the Wiretap Act or failed to comply with the requirements of that statute. Further, defendant failed to demonstrate that the statements in the affidavits used to obtain the electronic and wire evidence were knowingly false or made with reckless disregard for the truth, as opposed to mere typographical errors, to support dismissal of the wiretap and CDW evidence. Typographical errors or minor mistakes unrelated to a finding of probable cause, as the judge noted in this case, do not warrant a Franks hearing. The judge painstakingly reviewed all of defendant's arguments for suppression of the State's wiretap and CDW evidence and we discern no error in his determinations.

IV.

We also reject defendant's argument that the judge abused his discretion by denying his recusal motion. We note this argument was not preserved as part of defendant's conditional plea. Because defendant filed a pro se brief, we address this argument for the sake of completeness.

Motions for recusal "are entrusted to the sound discretion of the judge and are subject to review for abuse of discretion." State v. McCabe, 201 N.J. 34, 45 (2010) (citing Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001)). The grounds for disqualification of a judge are set forth in Rule 1:12-1. Under Rule 1:12-1(g), a judge can be disqualified "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."

Under the Rule, "it is not necessary to prove actual prejudice on the part of the court[;]" rather, "the mere appearance of bias may require disqualification." State v. Marshall, 148 N.J. 89, 279 (1997). "However, before the [judge] may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." Ibid. "[B]ias is not established by the fact that a litigant is disappointed in a court's ruling on an issue." Id. at 186.

In seeking recusal, defendant argues that the judge lacked the ability to act fairly and impartially in this case because: (1) the judge made arbitrary rulings in deciding the various pretrial motions; (2) between 2010 and 2013, the judge served as Director of Criminal Justice in the AG's Office; (3) the deputy attorney general prosecuting this case was also in the AG's office during that period; (4) wiretap applications made by the police in this investigation were transferred to the court after having been previously handled by a judge in Essex County and thus suggested partiality; (5) defendant filed a verified petition against the judge before the Advisory Committee on Judicial Conduct (ACJC); (6) the judge disregarded valid complaints leveled by defendant against his previous attorneys; and (7) the judge was a named defendant, along with the AG's office, in a civil suit brought by a disgruntled former employee of the Hunterdon County Prosecutor's Office.

The judge denied the recusal motion for the reasons placed on the record on September 5, 2018. First, the judge noted the motion was not filed until almost three years into the prosecution of the case. Additionally, the judge explained defendant was improperly attempting to re-litigate previously denied pretrial motions by asserting that the judge's decisions were arbitrary, despite the judge's issuance of several written decisions thoroughly addressing all of

defendant's arguments. The judge found that even if his decisions were overturned on appeal, a reversal by an appellate court did not demonstrate judicial bias to warrant recusal. Moreover, the judge found defendant's ACJC complaint and reliance on a civil suit involving the prosecutor in Hunterdon County had no bearing on the issues in defendant's criminal case. Further, the judge noted his statements regarding defendant's behavior were based on his observation as a matter of record that defendant was "overbearing" and "obstreperous" towards his various counsel, behavior which resulted in several attorneys filing motions to withdraw from representing defendant. Lastly, the judge emphasized he had no involvement in the prosecution of the car theft ring because that investigation and prosecution commenced after he left the AG's office.

On appeal, defendant renews the same arguments that he raised before the trial judge in support of the recusal motion. Additionally, defendant asserts the judge improperly denied a request by his attorney, Rasheeda Terry, to adjourn the pending motions because she had just been retained to represent defendant's interests.

We find no merit in defendant's argument that the judge abused his discretion in denying the recusal motion. While defendant may be dissatisfied

with the judge's decisions, the judge's rulings failed to evidence any bias or prejudice. For the reasons previously stated, the judge's motion decisions were legally correct.

Additionally, we are satisfied the judge's denial of counsel's request for an adjournment of pending pretrial motions was not a basis for recusal. As the judge noted, defendant elected to retain Terry nearly three years after his indictment and after extensive motion practice. Terry knew the case had been pending for three years when she agreed to represent defendant. The motions to be argued by Terry were limited in nature and the judge allowed her to submit a supplemental brief if necessary. Given these undisputed facts, the judge did not abuse his discretion in denying the recusal motion.

V.

Defendant raises several arguments for the first time in his pro se briefs. Because defendant pleaded guilty, the issues related to the denial of his suppression motions were automatically preserved under Rule 3:5-7(d). Defendant also expressly preserved the right to appeal from the denial of his motion to dismiss the indictment as part of his negotiated plea.

However, many issues raised in defendant's pro se briefs were not preserved as part of defendant's guilty plea and we could decline to address

them. See R. 3:9-3(f) (requiring defendant to preserve the right to appeal from adverse determinations of any specified pretrial motions as part of a conditional guilty plea). A self-represented litigant is not relieved from the obligation to comply with the court rules. Venner v. Allstate, 306 N.J. Super. 106, 110 (App. Div. 1997). Nevertheless, we address defendant's newly raised issues for the sake of completeness, recognizing that defendant's assigned appellate counsel likely knew such issues were not appealable based on the terms of defendant's conditional plea.

Defendant contends that New Jersey did not have jurisdiction in this matter because Culbreath stole cars in New York. This argument lacks merit based on the broad nature of N.J.S.A. 2C:1-3(a), addressing territorial applicability. Under the statute, "New Jersey has territorial jurisdiction if '[e]ither the conduct which is an element of the offense or the result which is such an element occurs within this State.'" State v. Sanders, 230 N.J. Super. 233, 236 (App. Div. 1989) (citations omitted).

Defendant was prosecuted for crimes he committed in New Jersey, not for crimes committed in New York. Defendant's plea was expressly limited to defendant's own criminal activities in New Jersey. Further, the uncontroverted evidence demonstrated that the car thefts in New York were linked to the New

Jersey car theft ring. Additionally, Culbreath, who operated mostly in New York, admitted that he did business with defendant in New Jersey. Therefore, defendant's challenge to New Jersey's jurisdiction for prosecution is without merit.

Defendant also contends for the first time on appeal that the judge was required to hold a hearing and make factual findings prior to sentencing to establish the following: (1) the date defendant joined the racketeering enterprise; (2) whether the thefts were part of one scheme or course of conduct; and (3) the aggregate value of the cars. These contentions lack merit because defendant admitted to the facts supporting the racketeering charge when he pleaded guilty. No further fact findings by the judge were required under the circumstances.

Defendant also contends he was denied effective assistance of counsel when his attorney failed to advise him of a more favorable plea offer than the offer defendant ultimately accepted. Because defendant's arguments on this issue necessitates a review of the evidence beyond the record before us, we defer further consideration without prejudice to defendant's right to file a petition for post-conviction relief (PCR). See State v. Preciose, 129 N.J. 451, 460 (1992) (ineffective assistance of counsel claims which require examination of evidence

outside of the record generally should not be heard on direct appeal). We take no position on the merits of any future PCR application.

To the extent we have not specifically addressed any remaining arguments, it is because we find them to be without 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.

CLERK OF THE APPELLATE DIVISION