SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4600-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALTEREEK R. BOYD, a/k/a AL-TAREEK BOYD, ALTEREE BOYD, ALTEREEK BOD, ALTEREEK BOYD, ALTEREEK RASHEED BOYD, ALTEREREE R. BOYD, ALTREEK BOYD, SHAMEEK THOMPSON, and TAHWAA BOYD,

Defendant-Appellant.

Argued December 7, 2022 – Decided March 8, 2023

Before Judges Currier and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 18-04-0197 and 18-04-0198.

Thomas P. Belsky, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora,

Public Defender, attorney; Rachel A. Neckes, Legal Fellow, of counsel and on the briefs).

Michele C. Buckley, Assistant Prosecutor, argued the cause for respondent (James O. Tansey, First Assistant Prosecutor, Designated Union County Prosecutor for purpose of this appeal, attorney; Michele C. Buckley, of counsel and on the brief).

PER CURIAM

Defendant appeals from his convictions and sentence after pleading guilty to first-degree unlawful possession of a weapon by a No Early Release Act (NERA) offender, N.J.S.A. 2C:39-5(j), and second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1). He challenges the denial of the motion to suppress evidence. He also contends the court erred in not merging the convictions for sentencing. We affirm the convictions but remand for a new sentencing with a merger of the convictions.

I.

We discern the following facts from the evidence derived during the suppression hearing. On January 19, 2018 at approximately 1:35 a.m., Plainfield police officer Andre Johnson was dispatched to Plainfield Avenue and West 4th Street in response to a report of a "loud dispute." Johnson and other officers canvassed the area but they did not observe anyone outside. Thereafter, one of the officers asked central communications to contact the person who reported

the complaint and request more information. The caller said there was "a group walking eastbound on . . . West 4th Street."

Johnson headed toward the Liberty Village housing complex on West 4th Street, which he called "[a] high crime area." Johnson testified he grew up near the neighborhood and the police department receives "numerous calls" for disorderly conduct, shootings, and narcotics from the area.

As Johnson drove through the parking lot, he observed a group of four individuals walking southbound through the complex's courtyard. When the group exited the courtyard, Johnson got out of the patrol car and called out to them. He testified he "just made a yo sound, like yerp. . . . [t]o get their attention." He said he just wanted to speak to the group and "[a]sk anybody if they live[d] in the area . . . were they outside arguing? Did they observe anybody outside arguing?"

Immediately after Johnson called to the group, three of the individuals fled northbound through the housing complex and one, defendant, ran southbound across West 4th Street. According to Johnson, as defendant separated from the group, he "immediately grabbed his waistband" and fled. Johnson stated these observations caused him to believe that defendant "possibly had contraband or a weapon." Johnson then began to chase after defendant to

"stop him and detain him. Just to see why he grabbed his waistband and ran from [Johnson]."

As Johnson was pursuing defendant, he saw defendant "rummaging through his waistband . . . messing with something in his waistband." Johnson yelled for defendant to show his hands. Then Johnson saw defendant pull out two objects and throw them over a fence into a backyard of a residence. Johnson recognized one of the items as a handgun.

Johnson caught up to defendant and restrained him with the help of another officer. He then found a handgun and a loaded magazine in the yard. Thereafter, the officers arrested defendant.

During the suppression hearing, the judge watched the footage from Johnson's body camera. The actions of defendant grabbing his waistband and throwing the gun over the fence were not captured on the body camera because it was shaking from Johnson running.

On December 10, 2018, the court denied defendant's motion in an oral decision. The judge found Johnson credible and the initial encounter with defendant was a field inquiry. However, the court concluded when Johnson spoke to the group, defendant's actions of immediately running away and

reaching into his waistband area "heighten[ed] the officer's suspicion" and "the field inquiry escalated into an attempted investigative stop."

In considering the totality of the circumstances, the judge found Johnson had reasonable suspicion of a crime when defendant fled, reached into his waistband, and threw a handgun over the fence. Thereafter, Johnson had the right to stop defendant, and probable cause to arrest him after the gun was retrieved. The motion to suppress was denied in a December 13, 2018 order.

Defendant subsequently pleaded guilty to both charges. During the sentencing hearing, the court found aggravating factors three, the risk defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3); six, the extent of defendant's prior criminal record and the seriousness of the past convictions, N.J.S.A. 2C:44-1(a)(6); and nine, the need to deter defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9); and no mitigating factors.

Defendant was sentenced to ten years' imprisonment with a five-year period of parole ineligibility for the first-degree conviction and five years' imprisonment with a five-year period of parole ineligibility for the second-degree conviction, to run concurrently. Defendant did not raise the issue of merger during the hearing.

II.

On appeal, defendant raises the following points:

> POINT I
> BECAUSE THE POLICE OFFICER LACKED REASONABLE SUSPICION TO CONDUCT AN INVESTIGATORY STOP, THE HEARING COURT'S DECISION MUST BE REVERSED AND THE PHYSICAL EVIDENCE SEIZED MUST BE SUPPRESSED. U.S. CONST. AMEND. IV; N.J. CONST. ART. I, PARA. 7.
>
> POINT II
> THE CASE MUST BE REMANDED BECAUSE THE GUN POSSESSION COUNTS SHOULD HAVE MERGED. U.S. CONST. AMENDS. V, XIV; N.J. CONST. ART. I, PARA. 1.

A.

Defendant argues Johnson lacked the requisite reasonable and articulable suspicion that defendant was about to commit a crime to justify an investigatory stop. Therefore, the court erred in denying the motion to suppress the evidence seized prior to the arrest.

We defer to a trial court's factual findings in a suppression hearing "when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). The trial judge has the "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy.'" State v.

Reece, 222 N.J. 154, 166 (2015) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). We will not disturb the trial court's factual findings unless they are "so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Goldsmith, 251 N.J. 384, 398 (2022) (quoting State v. Gamble, 218 N.J. 412, 425 (2014)).

"[U]nder both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of our State Constitution, searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." State v. Elders, 192 N.J. 224, 246 (2007). "Because our constitutional jurisprudence evinces a strong preference for judicially issued warrants, the State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure 'falls within one of the few well-delineated exceptions to the warrant requirement.'" Ibid. (quoting State v. Pineiro, 181 N.J. 13, 19 (2004)).

One exception to the warrant requirement is the investigative stop or "Terry stop."[1] Such a stop "occurs during a police encounter when 'an objectively reasonable person' would feel 'that his or her right to move has been

[1] Terry v. Ohio, 392 U.S. 1 (1968).

restricted.'" State v. Rosario, 229 N.J. 263, 272 (2017) (quoting State v. Rodriguez, 172 N.J. 117, 126 (2002)).

"Because an investigative detention is a temporary seizure that restricts a person's movement," a police officer must have a reasonable suspicion that the defendant just engaged in or was about to engage in criminal conduct. Ibid. (quoting State v. Stovall, 170 N.J. 346, 356 (2002)). Reasonable suspicion is "a less demanding standard than probable cause." Goldsmith, 251 N.J. at 399. However, "[n]either 'inarticulate hunches' nor an arresting officer's subjective good faith can justify infringement of a citizen's constitutionally guaranteed rights." Ibid. (alteration in original) (quoting Stovall, 170 N.J. at 372). Rather, reasonable suspicion must arise from the totality of the circumstances "in view of [the] officer's experience and knowledge, taken together with rational inferences drawn from [the] facts." State v. Davis, 104 N.J. 490, 504 (1986).

In contrast to a Terry stop, a field inquiry "is not considered a seizure 'in the constitutional sense so long as the officer does not deny the individual the right to move.'" Rodriguez, 172 N.J. at 126 (quoting State v. Sheffield, 62 N.J. 441, 447 (1973)). "A field inquiry is essentially a voluntary encounter between the police and a member of the public in which the police ask questions and do not compel an individual to answer." Rosario, 229 N.J. at 271. Whether an

encounter between an officer and an individual is a field inquiry turns on whether the individual "reasonably believed he could walk away without answering any of [the officer's] questions." Id. at 272 (alteration in original) (quoting State v. Maryland, 167 N.J. 471, 483 (2001)). An officer need not have reasonable suspicion of criminal activity to conduct a field inquiry. Ibid.

The trial court properly concluded Johnson initially attempted to conduct a field inquiry when he first responded to the scene and exited his vehicle to speak with defendant and his companions. Johnson did not suspect any criminal activity by the group of four individuals and he did not restrict their ability to walk away. Johnson testified, which the judge found credible, that when he approached defendant and the other individuals, his intention was to inquire whether they had any information regarding the loud dispute that was reported to police.

The trial court also properly concluded the field inquiry rapidly escalated into an investigative stop after Johnson got out of the patrol car, yelled "yerp," and defendant immediately ran away from him and the other individuals, reaching for his waistband area. Under the circumstances present here, it was reasonable for Johnson to believe defendant was engaging in illegal activity. See State v. Privott, 203 N.J. 16, 28-29 (2010) (finding a reasonable and

articulable suspicion for an officer to conduct a warrantless investigative stop when, among other factors such as reaching toward his waistband, the defendant seemed nervous and began to walk away from the officer when approached).

Here, defendant both ran away and reached toward his waistband once Johnson got out of his car and yelled toward the group of individuals. Both actions contributed to Johnson's reasonable suspicion of criminal activity. Under the totality of the circumstances, Johnson had a reasonable articulable suspicion to conduct a warrantless investigatory stop of defendant.

Defendant also contends we should decline to consider in our analysis Johnson's testimony that these events occurred in a "high crime area." See Goldsmith, 251 N.J. at 403. However, we need not comment on the applicability of Goldsmith as the trial court did not mention the testimony in its factual findings nor as a factor in its reasonable suspicion analysis. And as we have stated, defendant's actions in reaching toward his waistband and running away were sufficient to create a reasonable suspicion of criminal activity.

For these reasons and based on Johnson's knowledge and experience as a police officer in these circumstances, we agree with the trial court that the officer had a reasonable articulable suspicion to conduct a warrantless investigatory stop of defendant.

B.

Defendant also argues his two convictions should merge because both offenses were based on the same weapon possession allegation and the same prior conviction—aggravated assault. Defendant contends that because the unlawful possession of a handgun statute, N.J.S.A. 2C:39-5(j), and the certain persons not to have a weapon statute, N.J.S.A. 2C:39-7(b)(1), both aim to criminalize possession for those with prior convictions, his convictions of both charges impermissibly punish him twice for the same conduct. We agree.

Our review of a sentence is deferential unless there is a clear "showing of an abuse of discretion." State v. Trinidad, 241 N.J. 425, 448 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)).

We note initially that defendant did not raise the issue of merger to the sentencing judge. However, because "[t]he failure to merge convictions results in an illegal sentence for which there is no procedural time limit for correction," State v. Romero, 191 N.J. 59, 80 (2007) (citing Rule 3:22-2(c)), we will address the issue.

The merger of convictions "implicates a defendant's substantive constitutional rights." State v. Cole, 120 N.J. 321, 326 (1990). "At its core, merger's substantial purpose 'is to avoid double punishment for a single

wrongdoing.'" Romero, 191 N.J. at 80 (quoting State v. Diaz, 144 N.J. 628, 637 (1996)).

Our Court has adopted a flexible standard for merger issues that "requires us to focus on 'the elements of crime and the Legislature's intent in creating them,' and on 'the specific facts of each case.'" Cole, 120 N.J. at 327 (quoting State v. Miller, 108 N.J. 112, 116-17 (1987)). "Convictions for . . . offenses that merely offer an alternative basis for punishing the same criminal conduct will merge." State v. Brown, 138 N.J. 481, 561 (1994).

In State v. Wright, we determined the defendant's possession of a firearm by a convicted felon charge under N.J.S.A. 2A:151-8, the predecessor to N.J.S.A. 2C:39-7(b), and possession of the same firearm without a permit charge under N.J.S.A. 2A:151-41(a), the predecessor to N.J.S.A. 2C:39-5(b), should not merge. 155 N.J. Super. 549, 553-55 (App. Div. 1978). We reasoned the "strong legislative policy in this State with respect to gun control, designed to protect the public, which places restrictions on those who may carry such weapons . . . is intended to prevent criminal and other unfit elements from acquiring and possessing them." Id. at 553. Thus, "to deter a person convicted of a crime covered by N.J.S.A. 2A:151-8, who should not be allowed to possess guns at any time or any place, and who in no event may obtain the permit to

carry required by N.J.S.A. 2A:151-41(a)," it is clear "the Legislature provided for a separate conviction and enhanced penalty if he is found guilty of possession of any such weapon." Id. at 554-55.

In light of our decision in Wright, we have reiterated that "in the event [a] defendant is . . . convicted of [a] certain persons offense, that conviction will not merge with [a] weapons possession conviction." State v. Lopez, 417 N.J. Super. 34, 37 n.2 (App. Div. 2010) (citing Wright, 155 N.J. Super. at 553-55), certif. denied, 205 N.J. 520 (2011).

The issue here is distinguishable from Wright and Lopez. Both of defendant's convictions, first-degree unlawful possession of a handgun by a person previously convicted of an offense under NERA and second-degree certain persons not to possess a weapon, punish him for possessing a weapon as a person convicted of a prior offense. N.J.S.A. 2C:39-5(j) punishes "[a] violation of subsection (a), (b), (c), or (f) of this section by a person who has a prior conviction of [a NERA offense] [as] a first degree crime." Thus, this subsection adds a certain-persons element to the statute that is otherwise a weapons possession statute. It is a separate statute identifying a separate crime subject to indictment and trial by jury. The second charge—N.J.S.A. 2C:39-

7(b), a second-degree crime, also requires a prior conviction of an enumerated offense.

Defendant's prior conviction of aggravated assault serves as the predicate offense required for both charges. Because defendant was charged with two certain-persons offenses, rather than one certain-persons offense and one possession offense, this case differs from Wright and Lopez. The counts should be merged.

We affirm defendant's convictions and remand for a resentencing for the merger of the convictions.

Affirmed in part and remanded for proceedings in accordance with this opinion. We do not retain jurisdiction.