SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2277-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THADIUS W. OSWALD,

Defendant-Appellant.

Submitted April 28, 2022 – Decided May 11, 2022

Before Judges Mawla and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment Nos. 18-06-0511 and 19-04-0220.

Joseph E. Krakora, Public Defender, attorney for appellant (Candace Caruthers and John P. Flynn, Assistant Deputy Public Defenders, of counsel and on the briefs).

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for respondent (Jonathan I. Amira, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Thadius W. Oswald appeals from a February 15, 2019 order denying his motion to suppress evidence and subsequent convictions and sentence under separate indictments for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1), and first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1). We vacate defendant's weapons conviction and remand the aggravated manslaughter sentence for reconsideration.

On December 9, 2017, Patrolman John Haase of the Paulsboro Police Department responded to a trespassing complaint at an apartment building. According to Haase's December 14, 2017 affidavit of probable cause, describing the building as "possibl[y] vacant[,]" when he arrived, he saw "defendant and a female fleeing from the rear of the . . . building. When both subjects saw [him] exiting [his] patrol vehicle the[y] climbed a fence at the rear of the property and fled . . . ." Haase "lost sight of both subjects as they fled through several adjacent properties . . . ." He recognized defendant "from numerous dealing[s], most recently during an eluding incident . . . where he was in possession of a stolen dirt bike." Haase did not arrest defendant on December 9.

On December 14, Paulsboro Patrolman Gary R. Lowell Jr. was patrolling a high-crime area when he observed defendant walking down the street. Lowell

recalled Haase advised him he wanted to process defendant on charges. Lowell contacted Haase, who confirmed the charges were still outstanding. He exited his patrol car and asked defendant to stop. According to Lowell, defendant looked very nervous. Lowell escorted defendant to his patrol car and observed him "moving his right hand near his pockets" and "start[] to sweat on what was a cold evening." Defendant's tone of voice also changed.

Lowell placed defendant under arrest. As he patted down defendant, he "felt a bulge on the right side of [defendant's] person in his hoodie pocket" which "felt like a grip to a pistol" and removed a fully loaded revolver. Five more rounds of ammunition were recovered from defendant's left hoodie pocket. At police headquarters, officers searched defendant and found "two small green [Z]iplock bags containing marijuana in his outside layer jacket." Lowell charged defendant with several offenses, including: second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1); and third-degree defacement of a firearm, N.J.S.A. 2C:39-9(e).

The same day, Haase filed a complaint charging defendant with: resisting arrest, N.J.S.A. 2C:29-2(a)(1); obstruction of justice, N.J.S.A. 2C:29-1(a); and defiant trespass, N.J.S.A. 2C:18-3(b). A judge found probable cause for the

charges after Lowell arrested defendant. A grand jury indicted defendant, Indictment No. 18-06-0511, on second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1), and fourth-degree defacement of a firearm, N.J.S.A. 2C:39-9(e).

On August 11, 2018, Woodbury City Police officers were dispatched to investigate a shooting. Pursuant to eyewitness interviews, police identified defendant as the shooter. One witness identified defendant through a photo array and police obtained surveillance footage of the scene of the incident depicting defendant fleeing. Police concluded defendant and another individual forced their way into the victim's home, robbed three people, and when one of the victims followed defendant out of the residence, defendant fatally shot him in the head at point blank range.

In a second indictment, Indictment No. 19-04-0220, a grand jury charged defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(1), later amended to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1). Defendant and his accomplice were also charged with: first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); three counts of first-degree robbery, N.J.S.A. 2C:15-1(a)(2); second-degree burglary, N.J.S.A. 2C:18-2(a)(1); third-degree theft, N.J.S.A. 2C:20-3(a); second-degree possession of a weapon for unlawful purposes,

N.J.S.A. 2C:39-4(a)(1); second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1); and second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and 2C:15-1(a)(2).

Defendant moved to suppress the handgun Lowell found. The State had Lowell testify as its sole witness and introduced footage of the interaction from Lowell's body camera at the suppression hearing. Lowell explained Haase told him on December 13, 2017, "he was seeking [defendant] on charges that he had to be processed on for an earlier case that he had dealt with him." He confirmed the outstanding charges with Haase before beginning his shift that day and prior to initiating contact with defendant. When Lowell encountered defendant, he was under the impression the trespassing-related charges were pending and arrested him based on those charges. He searched defendant because "he was known to run on police, . . . carry weapons, [and] . . . use drugs."

Lowell testified he did not perform a Terry[1] stop and "[t]he basis for [the] stop was because [Haase] . . . told [him] he had to process [defendant] on charges." Cross-examination established a judge did not sign Haase's complaint-warrant for defendant's arrest until approximately an hour-and-a-half after Lowell arrested defendant; Lowell agreed probable cause did not exist until

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

then. He explained he arrested defendant on the "good faith" belief there were outstanding charges pending.

The defense argued there was no probable cause to arrest defendant and the body-camera footage showed Lowell did not conduct a Terry stop because he arrested defendant first and told him he was arresting him based on charges filed by Haase. The State argued Lowell had probable cause to arrest defendant because "[t]here had been a crime committed in the presence of . . . Haas[e] wherein he could not effectuate the arrest because [defendant] ran. That arrest was then effectuated by . . . Lowell when he came in contact with [defendant] . . . ."

The judge denied the motion to suppress and in her written opinion found Lowell's testimony credible. Referencing the body-camera recording, she concluded Lowell had "a reasonable suspicion, grounded in specific and articulable facts, that [d]efendant was involved in or is wanted in connection with a completed felony" based on defendant's nervous demeanor, the fact that he was in a high-crime area and was known to carry guns and used drugs. She concluded the Terry stop "was valid to investigate that suspicion with a pat down for officer safety." Further, Lowell did not need a warrant as he had probable cause to arrest defendant because he "received and relied on information that

had been relayed to him by his supervisor, . . . Haase." She concluded Lowell's reliance on Haase's information was "reasonable" and the discovery of the handgun was a valid search incident to arrest.

Defendant pled guilty to unlawful possession of a handgun in the first indictment. In addition to other terms, the State agreed to recommend five years' incarceration with three-and-one-half years of parole ineligibility and the sentence would run concurrent with the sentence in the second indictment. The State also agreed to dismiss the remaining count of the first indictment.

Subsequently, defendant also pled guilty to aggravated manslaughter under the second indictment. In exchange, the State agreed to dismiss the remaining charges of the second indictment and recommend a sentence range of twenty to twenty-six years' incarceration, with an eighty-five percent parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

At sentencing, the judge found aggravating factor N.J.S.A. 2C:44-1(a)(1), the nature and circumstances of the crime, and gave it substantial weight. She noted defendant cruelly shot the victim at point blank range and left him to die in the street, and the victim "was particularly vulnerable due to [his] immigration status and fear and reluctance in involving law enforcement."

The judge also found aggravating factor N.J.S.A. 2C:44-1(a)(3), risk the defendant will commit another offense, noting defendant committed the shooting while on pretrial release for the December 14 incident and defendant had four prior probation violations. She gave the factor moderate weight.

Citing defendant's criminal record, including the December gun charge, the judge found aggravating factor N.J.S.A. 2C:44-1(a)(6) and gave it moderate weight. She found aggravating factor N.J.S.A. 2C:44-1(a)(9), need to deter, noting the gun Lowell found and the weapon defendant used to shoot the victim approximately eight months later, which police also confiscated. She gave this factor significant weight.

Defendant requested the judge find mitigating factor nine, N.J.S.A. 2C:44-1(b)(9), that his character and attitude indicate he is unlikely to reoffend. However, she declined to find the factor due to defendant's "extensive criminal juvenile record."

Defendant requested and the judge found mitigating factor N.J.S.A. 2C:44-1(b)(11), because his imprisonment would entail excessive hardship to his newborn daughter. She afforded this factor slight weight, reasoning "there is always a hardship whenever there are families that are separated, there's someone that suffers from any separation."

The judge also found mitigating factor N.J.S.A. 2C:44-1(b)(12), willingness to cooperate with law enforcement, giving it moderate weight. Defendant cooperated with law enforcement by identifying his accomplice and the location of the weapon used to commit the shooting.

Although defendant accepted responsibility for his actions, the judge found he did not overcome the presumption of incarceration and the aggravating factors substantially outweighed the mitigating. She sentenced defendant on Indictment No. 18-06-0511 to five years' incarceration with forty-two months of parole ineligibility along with fines and fees. On Indictment No. 19-04-0220, she sentenced him to a twenty-five-year period of incarceration, subject to NERA, with a five-year term of parole supervision plus fines and fees and penalties.

Defendant raises the following points on appeal:

> POINT I. THE SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED BECAUSE POLICE LACKED PROBABLE CAUSE. ALTERNATIVELY, BECAUSE THE ALLEGED DISORDERLY PERSONS OFFENSES DID NOT OCCUR IN THE ARRESTING OFFICER'S PRESENCE AND OFFICERS ARE NOT AUTHORIZED TO MAKE A CUSTODIAL ARREST FOR SUCH MINOR OFFENSES, DEFENDANT'S ARREST AND SEARCH INCIDENT TO THAT ARREST WERE IMPROPER.

A. Because . . . Haas[e] Lacked Probable Cause to Arrest Defendant, There Was No Lawful Basis for . . . Lowell to Arrest Defendant.

B. Even If . . . Haas[e] Had Probable Cause to Arrest Defendant, Because the Offenses Alleged Were Mere Disorderly and Petty Disorderly Persons Offenses That Were Not Committed in . . . Lowell's Presence, Lowell Could Not Conduct a Warrantless Arrest.

C. Even If . . . Haas[e] Had Probable Cause to Believe that Defendant Had Committed Disorderly and Petty Disorderly Persons Offenses, Defendant Should Have Only Been Issued a Summons and Released. Thus, the Custodial Arrest and Search Incident to that Arrest Were Illegal.

POINT II. DEFENDANT'S SENTENCE OF [TWENTY-FIVE] YEARS WITH [TWENTY-ONE] YEARS AND THREE MONTHS OF PAROLE INELIGIBILITY IS EXCESSIVE BECAUSE THE TRIAL COURT ERRED IN ITS FINDING AND WEIGHING OF AGGRAVATING AND MITIGATING FACTORS.

I.

Our review of a decision on a motion to suppress is limited. State v. Robinson, 200 N.J. 1, 15 (2009). We "give deference to those findings of the trial judge which are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v.

Johnson, 42 N.J. 146, 161 (1964)). Deference is appropriate "so long as [the trial court's factual] findings are supported by sufficient credible evidence in the record." State v. Ahmad, 246 N.J. 592, 609 (2021) (quoting Elders, 192 N.J. at 243). On the other hand, the trial court's legal conclusions derived from those facts are reviewed de novo. State v. Smith, 212 N.J. 365, 387 (2012).

A.

A Terry stop requires that police have "'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." State v. Nyema, 249 N.J. 509, 527 (2022) (quoting State v. Rodriguez, 172 N.J. 117, 126 (2002)). An officer's observation of a nervous or furtive individual in a high-crime area, taken together with an officer's prior knowledge of the individual's criminal history, may form the basis of a Terry stop and subsequent pat down search. See State v. Valentine, 134 N.J. 536, 553-54 (1994).

The motion judge's finding that Lowell conducted a Terry stop is unsupported by the credible evidence in the record. Although Lowell stated: defendant was known to carry weapons and use drugs; he encountered him in "a zero[-]tolerance high[-]crime area[;]" and observed defendant sweating on a cold night, change the tone of his voice, and appear nervous overall, he clearly

testified he did not perform a Terry stop. Lowell stated he stopped and arrested defendant because Haase wanted him to. Therefore, the search conducted was incident to an arrest.

B.

We conclude the search was unlawful because Haase lacked probable cause to charge defendant with defiant trespass, obstruction, or resisting arrest. Moreover, Lowell could not rely upon a good faith belief probable cause existed to effectuate the arrest and search where there was no valid warrant.

N.J.S.A. 2C:18-3(b) defines a defiant trespasser as one who

> knowing that [they are] not licensed or privileged to do so, . . . enters or remains in any place as to which notice against trespass is given by:
>
> > (1) Actual communication to the actor; or
> >
> > (2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
> >
> > (3) Fencing or other enclosure manifestly designed to exclude intruders.

It is an affirmative defense if the structure was abandoned or open to the public, or if the defendant reasonably believed the owner or a person licensed to grant permission would license him to enter the premises. N.J.S.A. 2C:18-3(d).

In State v. Gibson, 218 N.J. 277, 281 (2014), an officer observed the defendant leaning against a building's porch, which was private property, near a "no loitering" sign. The defendant then walked away from the building. Ibid. The officer stopped and questioned the defendant a block away, and observed he was nervous. Ibid. The officer arrested the defendant for defiant trespass. Ibid. In a subsequent search at the police station, officers found drugs on the defendant. Ibid.

The Gibson Court held the officer lacked probable cause to arrest the defendant for defiant trespass and suppressed the fruits of the subsequent search. Id. at 296-98. The Court found notice was at the "heart" of the statute and where there is sufficient notice against trespass provided, "even a brief willful entry onto another's property may constitute a violation of N.J.S.A. 2C:18-3(b)." Id. at 288-89. Although the officer could conduct a field inquiry and speak to the defendant, he did not have probable cause for an arrest because he did not observe the defendant engaging in criminal activity and "[e]ven flight, standing alone, will not support a well-grounded suspicion for a defiant trespass arrest." Id. at 292, 298. Further, although the building was in a high-crime area, "[t]he constitutional right to be free from arbitrary arrest is not suspended in high-

crime neighborhoods where ordinary citizens live and walk at all hours of the day and night." Id. at 297.

In State v. Dangerfield, the defendant was sitting on a bicycle in a housing complex and began to ride away as police approached. 171 N.J. 446, 451 (2002). Police chased, stopped, and questioned him after he traveled approximately fifteen to twenty feet. Ibid. The defendant claimed to be "doing nothing," and police arrested him for defiant trespass. Ibid. A subsequent search at the scene produced drugs from the defendant's pockets. Ibid.

The Court held police lacked probable cause to arrest the defendant for defiant trespass and suppressed the subsequent search. Id. at 450. There was no evidence defendant was trespassing because defendant was lawfully on the premises during previous contacts with officers. Id. at 457. More importantly, after making an initial inquiry, police "arrested [the] defendant without following established police procedures for determining whether [the] defendant was lawfully on the premises." Ibid. Police did not point out a "no trespassing" sign which may have elicited a response from the defendant or ask him if he was visiting someone on the premises. Ibid. Although defendant began to ride away as officers approached him, the Court concluded "flight alone does not create reasonable suspicion for a stop, let alone probable cause." Ibid.

In State ex rel. J.M., 339 N.J. Super. 244, 246-48 (App. Div. 2001), we suppressed a search incident to an arrest for defiant trespass. There, the defendant was standing on a porch along with two other individuals when two officers on patrol passed by the home and stopped to investigate because they received complaints of narcotics activity and trespassers at that location. Id. at 246-47. The officers spoke to the home's tenant, who identified two of the individuals on the porch but did not recognize the defendant. Id. at 247. The tenant did not request the defendant's removal from the premises, but nonetheless police arrested the defendant for defiant trespass, noting there was a "no trespassing" sign posted. Id. at 247. A subsequent search at the police station produced drugs, which the defendant then moved to suppress. Id. at 247.

We held police lacked probable cause to arrest the defendant because they did not ask the tenant whether she wanted the defendant removed and did not ask the other two individuals, who were permitted on the property, whether they knew the defendant or permitted him to be there. Id. at 248-49. We reasoned police were not required "to conduct a mini-trial but simply to make a good faith evaluation of the circumstances presented, including appropriate inquiries of witnesses, before effectuating an arrest." Id. at 249.

Here, the evidence purportedly supporting the charges filed by Haase was much less than the evidence in Gibson, Dangerfield, and J.M. Haase based probable cause on the fact he was responding to a call of trespassing complaint at a "possible" vacant building and that defendant and a female companion "fled" upon seeing him exit his vehicle. The record is devoid of whether the building posted a no trespassing sign and whether the report of trespass identified the potential trespasser in any way.[2] Moreover, Haase's limited affidavit does not state whether: the building was vacant or if he investigated to confirm it was vacant; he identified himself to defendant or spoke to or directed defendant to stop; or that defendant was asked to leave. The record does not explain how Haase deduced defendant was the trespasser.

For these reasons, we also conclude there was no probable cause for the resisting arrest charge because the statute requires a defendant to "prevent . . . [an] officer from effecting an arrest[,]" N.J.S.A. 2C:29-2(a), and Haase never told defendant he was under arrest. The absence of evidence showing Haase commanded defendant to stop also does not support the obstruction charge because there is no evidence defendant's alleged flight was from an investigatory

[2] See State v. Shaw, 213 N.J. 398, 401-02, 422 (2012) (suppressing evidence seized from the defendant after he was arrested at an apartment complex on a parole warrant containing a generic description of the target as a black male).

detention. See State v. Crawley, 187 N.J. 440, 460-61 (2006). The record contains no evidence Haase communicated with defendant at all.

We also reject the argument the State could rely on Lowell's good faith belief Haase had probable cause. Hearsay evidence and information received from fellow officers may constitute the basis for probable cause. See Draper v. United States, 358 U.S. 307, 311-13 (1959); Crawley, 187 N.J. at 457. However, our law does not recognize a good faith exception to the exclusionary rule. See State v. Novembrino, 105 N.J. 95, 157-58 (1987); see also State v. Handy, 206 N.J. 39, 54 (2011) (granting suppression where a police dispatcher erroneously told the arresting officer the defendant had an outstanding warrant and finding the exclusionary rule analysis is not "limited to the conduct of the arresting officer" and law enforcement officers are not "free to act heedlessly and unreasonably, so long as the last man in the chain does not do so"). If the underlying information provided to the arresting officer does not support an independent finding of probable cause, the "otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." Whiteley v. Warden, 401 U.S. 560, 568 (1971); see also State v. Shannon, 222 N.J. 576, 591 (2015) (3-3 decision) (LaVecchia, J., concurring) (holding an "officer's belief, even in good faith, that

a valid warrant for defendant's arrest was outstanding cannot render an arrest made absent a valid warrant or probable cause constitutionally compliant").

The evidence seized from defendant incident to the December 14, 2017 arrest should have been suppressed as "fruit of the poisonous tree." See Shaw, 213 N.J. at 412-13. Defendant's conviction for unlawful possession of a handgun is vacated.

II.

Our review of a sentence is limited and subject to an abuse of discretion standard. State v. Jones, 232 N.J. 308, 318 (2018). However, deference applies "only if the trial judge follows the Code[3] and the basic precepts that channel sentencing discretion." State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting State v. Case, 220 N.J. 49, 65 (2014)). Therefore, we must affirm a sentence "unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65

3 New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 to 104-9.

(1984)). This standard applies to sentences that result from guilty pleas. State v. Sainz, 107 N.J. 283, 292 (1987).

Challenging the aggravated manslaughter sentence, defendant argues the judge: 1) incorrectly found N.J.S.A. 2C:44-1(a)(1) based on the fact that he allegedly robbed the victim and burglarized the home, even though he was not being sentenced for those offenses, and based on the assumption that he targeted the victims because they were immigrants, which had no evidentiary support; 2) improperly found N.J.S.A. 2C:44-1(a)(3) and (6) by relying on his juvenile arrest record; 3) should have considered his remorse as a non-statutory mitigating factor instead of relying on whether he "accepted responsibility" because "a defendant's 'failure' to express guilt is not a legitimate ground for determining a sentence[;]" and 4) should have considered his youth as a non-statutory mitigating factor, or applied N.J.S.A. 2C:44-1(b)(4), or retroactively applied N.J.S.A. 2C:44-1(b)(14) to his case.

Because the judge relied on the now-vacated weapons offense under Indictment No. 18-06-0511 to find N.J.S.A. 2C:44-1(a)(3), (6), and (9), we must remand the sentence in Indictment No. 19-04-0220 for reconsideration. However, the bulk of defendant's sentencing-related arguments lack sufficient

merit to warrant discussion in a written opinion, save for the argument regarding N.J.S.A. 2C:44-1(b)(14). R. 2:11-3(e)(2).

"When an appellate court orders a resentencing, a defendant is ordinarily entitled to a full rehearing." State v. Bellamy, 468 N.J. Super. 29, 39 (App. Div. 2021) (citing Case, 220 N.J. at 70). Because the judge who will resentence defendant will view him "as he stands before the court on that day[,]" the judge may consider defendant's arguments concerning his age at the time he committed the aggravated manslaughter and apply N.J.S.A. 2C:44-1(b)(14). Ibid. (quoting State v. Randolph, 210 N.J. 330, 354 (2012)).

The judgment of conviction in Indictment No. 18-06-0511 is vacated. The sentence in Indictment No. 19-04-0220 is remanded for reconsideration. We do not retain jurisdiction.