NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3689-12T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEITH T. DALTON, a/k/a MCARY STEVEN, a/k/a DAULTON KEITH, a/k/a PATTON KIETH, a/k/a DALTON CLIMB,

Defendant-Appellant.

Submitted March 25, 2015 – Decided July 27, 2015

Before Judges Fuentes, Ashrafi and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Indictment Nos. 11-09-0585 and 10-12-0856.

Joseph E. Krakora, Public Defender, attorney for appellant (Alyssa Aiello, Assistant Deputy Public Defender, of counsel and on the brief).

Robert L. Taylor, Cape May County Prosecutor, attorney for respondent (Gretchen A. Pickering, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Keith Dalton appeals the denial of a suppression motion arising out of one indictment and the convictions and sentence arising out of another. We affirm the denial of the suppression motion and the convictions, but remand for re-sentencing.

I

Indictment 11-09-0585

On January 11, 2013, defendant was convicted by a jury of four counts of third degree distribution of a controlled dangerous substance (cocaine), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (counts one, two, three, and four), and two counts of second degree distribution of a controlled dangerous substance (cocaine) within five hundred feet of public property, N.J.S.A. 2C:35-7.1 and N.J.S.A. 2C:35-5(a)(1) (counts five and six).

On February 8, 2013, the trial court sentenced defendant to a discretionary extended term of thirteen years, with a six-and-a-half year period of parole ineligibility, on one of the counts for second degree distribution of cocaine within five hundred feet of public property (count five). On the other count for this offense (count six), he was sentenced to a five-year term, with an eighteen-month period of parole ineligibility, to run consecutively to count five. After merging count one with count

five, and count two with count six, the court sentenced defendant to a mandatory extended five-year term on each count for third degree distribution of cocaine (counts three and four), with a three-year period of parole ineligibility. The sentences imposed on counts three and four are to run concurrently to each other and to the sentence imposed on count five.

Indictment 10-12-0856

On February 8, 2013, defendant pled guilty to third degree possession of a controlled dangerous substance (cocaine) with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2) (count two), but preserved the right to appeal the court's denial of his suppression motion. On this date, the court sentenced defendant to an extended term of eight years, with a four-year period of parole ineligibility, to run concurrently with count five in Indictment 11-09-0585. The other count was dismissed.

II

A

We first address the issues that arose during the trial. Although not imparted to the jury, detectives from the Atlantic County Prosecutor's Office received information from a confidential informant that defendant was selling drugs. The

confidential informant agreed to arrange a meeting between defendant and one of the detectives, Denise Manino, so that she could purchase drugs from defendant. During the trial the detectives testified about Manino's drug transactions with defendant. One of defendant's principal arguments is that the State violated the holding in State v. Bankston, 63 N.J. 263 (1973), because the detectives indicated during their testimony that he was the target of an investigation and, further, evinced an awareness that he had sold drugs, which suggested they were communicating with a confidential informant. The pertinent testimony was as follows.

Detective Manino testified that in June 2010, she was involved in an "investigation targeting" defendant. She stated her role in the investigation was to purchase crack cocaine from defendant as an undercover agent, which she achieved on four occasions.

Specifically, on June 16, 2010, a call was placed to defendant to arrange a meeting between him and Manino.[1] Because she had never seen defendant, another detective showed Manino his picture and she then drove to the location he selected to conduct the transaction. After she parked, a man who looked

[1] There was no testimony the confidential informant set up that meeting. The jury merely heard that "a call was placed" to defendant.

like the person in the photograph got into her car. He sold her crack cocaine and left; he was in her car for about five minutes. After the transaction, Manino viewed defendant's photograph and confirmed he was the person who sold her the drugs.

On June 18, 2010, July 1, 2010, and July 30, 2010, Manino called defendant and made arrangements to meet him to purchase more drugs. These three subsequent transactions followed the same sequence of events as the first one. Manino drove to the location defendant selected; defendant entered her car and sold her crack cocaine. Manino identified defendant in court as the person from whom she purchased drugs on all four occasions.

Detective Miguel Escoto of the Cape May County Prosecutor's Office testified that he also was involved in an "investigation targeting" defendant, with whom he was familiar and had seen on "prior occasions." During the June 16, 2010 narcotics sale, he surveilled Manino's car and was able to see that it was defendant who entered her car.

Escoto also surveilled Manino's car during the June 18 and July 30, 2010 transactions. Escoto testified he did not see the face of the person who entered Manino's car on June 18, 2010; however, he did see defendant exit her car on July 30, 2010.

Escoto identified defendant in court as the person he saw enter Manino's car on June 16 and exit on July 30, 2010.

Detective Brian Lloyd of the Cape May County Prosecutor's Office testified that he also was involved in the "investigation targeting" defendant, who Lloyd had seen on "prior occasions." Lloyd surveilled Manino's car during the July 1, 2010 transaction, and testified he saw defendant emerge from Manino's car. Lloyd identified defendant in court as the person he observed exiting Marino's car.

Detective Joseph Landis of the Cape May County Prosecutor's Office testified that typically a Narcotics Task Force investigation commences after the Task Force has "receive[d] information" that has been "corroborated." Landis further stated that if

> the person supplying my undercover with drugs isn't capable of supplying them with enough drugs to bring it to a second degree or a first degree, it's pointless to keep spending money because the degree of the crime is never gonna -- we're not trying to like get someone at a higher degree of crime just to get them to that point. If they can't do it, we can tell right from the beginning when they are in negotiations on how much they can supply the undercover with.

B

The specific argument points defendant asserts in connection with this indictment are as follows:

> POINT I: THE INFESTATION OF INADMISSIBLE AND HIGHLY PREJUDICIAL HEARSAY AT DALTON'S TRIAL VIOLATED DALTON'S RIGHT TO CONFRONTATION, AND RENDERED IT IMPOSSIBLE FOR THE JURY TO FAIRLY CONSIDER HIS MISIDENTIFICATION DEFENSE. THEREFORE, DALTON'S CONVICTIONS UNDER INDICTMENT NO. 11-09-0585 MUST BE REVERSED.
>
> A. The Hearsay Evidence Elicited By The Prosecutor During Her Direct Examinations of Manino, Escoto and Lloyd.
>
> B. The Hearsay Evidence Elicited By The Prosecutor During Her Direct Examination of Landis.
>
> C. The Hearsay Evidence Elicited By The Prosecutor During Her Redirect Examinations of Manino and Escoto.
>
> D. The Highly Prejudicial Hearsay Elicited By The Prosecutor From The State's Witnesses Was Patently Inadmissible and Demands Reversal.
>
> . . . .
>
> POINT III: THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING AN EXTENDED-TERM SENTENCE OF TWELVE YEARS WITH A 78-MONTH PAROLE DISQUALIFIER ON COUNT FIVE OF INDICTMENT NO 11-08-0585.

As previously mentioned, defendant contends the State failed to adhere to the holding in Bankston because it elicited testimony from the detectives suggesting they received

information from a third party indicating he was selling drugs. Defendant also complains the jury could have surmised that, because he was the target of Narcotics Task Force investigation, the State had determined he was selling drugs and in sufficient quantities to warrant being charged with a first or second degree crime.

First, we note defendant failed to object to the testimony about which he complains. When a defendant fails to raise an issue at trial, appellate review is governed by the plain error standard. R. 2:10-2. "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ." Ibid.

Second, in Bankston, our Supreme Court acknowledged that "the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so 'upon information received.' Such testimony has been held to be admissible to show that the officer was not acting in an arbitrary manner or to explain his subsequent conduct." Bankston, supra, 63 N.J. at 268 (internal citations omitted). However, the hearsay rule and the right of confrontation are violated if a witness repeats what some other person told the witness about a defendant's criminal conduct.

Id. at 268-69. The Court reasoned, "[w]hen the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." Id. at 271.

Here, we do not view the testimony that defendant was the target of an investigation or the testimony suggesting the detectives believed he sold drugs was capable of producing an unjust result. Clearly the jury could have concluded that the detectives knew something about defendant that made him a suspect. Further, the fact the detectives chose to investigate defendant or believed he might be selling drugs did not necessarily mean that a non-testifying witness — let alone a confidential informant — provided evidence that he was engaged in criminal activity. Certainly there was no mention of the confidential informant. Although the Bankston Court cautioned that both the hearsay rule and a defendant's Sixth Amendment right to confront witnesses against him are violated if an officer's testimony is specific and repeats what a non-testifying witness told the officer linking the defendant to a crime, Bankston, supra, 63 N.J. at 268-69, that did not occur here.

Second, and more important, even if Landis's testimony suggested the Narcotics Task Force determined defendant was selling drugs and in amounts worthy of an investigation, the admission of Landis's and the other detectives' testimony was harmless. There was evidence Escoto and Lloyd had previous contact with defendant and that they were familiar with his appearance. Escoto identified defendant as the individual who was in Manino's car on June 16 and July 30, 2010. Lloyd provided evidence defendant was in Manino's car on July 1, 2010. Manino testified that the person who sold her drugs on June 18, 2010, was the same person who sold her drugs on the other three occasions. Thus, even if the testimony about which defendant complains had not been admitted, there existed conclusive evidence defendant sold Manino drugs during all four narcotics transactions.

Defendant contends other testimony was improperly admitted; these contentions lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

The trial court granted the State's motion to impose a discretionary extended term, see N.J.S.A. 2C:44-3(a), on one of the counts for second degree distribution of cocaine within five hundred feet of public property (count five). Specifically, the court imposed a term of thirteen years, with a six-and-a-half

year parole ineligibility period, on such count. The court also granted the State's motion to impose a mandatory extended term, see N.J.S.A. 2C:43-6(f), for the two counts of third degree distribution of cocaine (counts three and four), and imposed extended terms of five years, with a three-year period of parole ineligibility, for each count. The sentences ordered for counts three and four are to run concurrently to each other and to the sentence imposed on count five.

In our Supreme Court's recent decision in State v. Robinson, 217 N.J. 594 (2014), the Court held that "N.J.S.A. 2C:44-5(a)(2) bars the imposition of a discretionary extended term and a mandatory extended term in the same sentencing proceeding." Id. at 610. Because that is what occurred here, we are compelled to vacate the sentence the trial court imposed related to defendant's conviction at trial and remand the matter for resentencing.

III

Turning to Indictment Number 10-12-0856, before pleading guilty defendant filed a motion to suppress the cocaine that formed the basis of this indictment. The court denied defendant's motion following a suppression hearing. The material evidence adduced at the hearing was as follows.

On July 31, 2010, police officer Geoffrey Chiumento of the Wildwood Police Department was on patrol in a marked car when the dispatcher announced there had been an armed robbery in the area of the second ward. The suspect was described as a six foot tall, African-American male wearing a white T-shirt and black shorts.

Thirty minutes later Chiumento saw a person riding a bicycle, later identified as defendant, who fit the description of the suspect. Chiumento followed defendant and then positioned his car at an angle to cause defendant to move closer to the curb. The officer then got out of the patrol car, identified himself as a police officer, and told defendant to stop so that he could speak to him. Defendant replied that he had "not done anything" and was not going to stop. The officer then grabbed and forced defendant off of the bicycle, and advised he was going to be placed under arrest for obstruction of justice. See N.J.S.A. 2C:29-1(a).

Another officer then arrived to provide backup assistance. As Chiumento attempted to remove defendant's hands from his pockets to handcuff him, defendant made a "flicking movement." The other officer saw something fall to defendant's feet that appeared to be "possible CDS." Chiumento retrieved what fell to the ground, which was later determined to be cocaine, and placed

defendant under arrest. A search incident to his arrest revealed a bag containing between $700 and $800 in cash, a digital scale, various compact discs, and three cell phones.

On appeal, defendant argues:

> THE TRIAL COURT ERRED IN DENYING DALTON'S MOTION TO SUPPRESS EVIDENCE FILED UNDER INDICTMENT NO. 10-12-0856.
>
> > A. Under The Totality Of Circumstances, the Vague Clothing Description Did Not Furnish Officer Chiumento With Reasonable Suspicion To Stop Dalton.
> >
> > B. The Taint Of The Unconstitutional Stop Was Not Purged By Dalton's Failure To Bring His Bicycle To An Immediate Stop When Ordered To Do So.

Defendant contends Officer Chiumento lacked reasonable suspicion to stop him, but contends that even if the police had probable cause to arrest him for obstruction of justice after he refused to stop, his actions were not sufficiently attenuated to purge the taint of the alleged illegal stop. We disagree with both premises.

In reviewing a motion to suppress evidence, an appellate court "must uphold the factual findings underlying the trial court's decision so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Elders, 192 N.J. 224, 243 (2007) (citations omitted). However, an appellate court need not defer to the trial court's legal

conclusions reached from the established facts. See State v. Brown, 118 N.J. 595, 604 (1990).

An investigatory stop, also known as a Terry[2] stop, permits a police officer to detain an individual for a brief period if the stop is "based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." State v. Rodriguez, 172 N.J. 117, 126-27 (2002) (quoting Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)). Here, Chiumento was justified in trying to effectuate an investigatory stop. The officer possessed the requisite suspicion that defendant may have engaged in criminal activity because his appearance matched the description of the armed robbery suspect.

Defendant defied the officer's demand to stop and the situation immediately evolved into defendant's apprehension and arrest for obstruction of justice.[3] In the course of placing defendant under arrest, defendant removed and dropped something from his pocket. As part of their search incident to that

[2] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[3] Defendant was never indicted for this offense.

arrest, the police were authorized to retrieve and retain what defendant removed from his pocket and dropped to his feet.

A police officer may search not only a person under arrest but also the area within his reach for the officer's protection and the preservation of evidence. Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969); State v. Oyenusi, 387 N.J. Super. 146, 154 (App. Div. 2006), certif. denied, 189 N.J. 426 (2007). Even if the request to stop were questionable — and we do not suggest that it was — defendant's flight from the police made any alleged taint from the stop significantly attenuated by defendant's criminal flight, which led to the search and seizure of the controlled dangerous substances. See State v. Williams, 192 N.J. 1, 10-11 (2007).

Finally, under the plain view doctrine, the police lawfully seized what appeared to be illicit drugs defendant had removed from his pocket and dropped to his feet. See generally State v. Mann, 203 N.J. 328, 340-41 (2010). The police were lawfully in the viewing area; the evidence was inadvertently discovered; and the police had probable cause to associate the item with criminal activity. See id. at 341.

We conclude the trial court correctly found that there were no grounds to suppress the controlled dangerous substances.

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