SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0816-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEF W. CARIAS,

Defendant-Defendant.

Submitted January 9, 2018 – Decided February 28, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 14-10-1772.

Joseph E. Krakora, Public Defender, attorney for defendant (Cody T. Mason, Assistant Deputy Public Defender, of counsel and on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Frances Tapia Mateo, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Kef W. Carias pled guilty to second-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-

4(b)(4), and he was sentenced to a five-year prison term. Defendant appeals from the judgment of conviction (JOC) dated October 5, 2016. On appeal, defendant challenges the denial of his motions to suppress the statement he provided to the investigating detectives and photographs recovered from his cell phone. He also challenges certain monetary penalties imposed by the court.

For the reasons that follow, we affirm defendant's conviction, but reverse in part and remand in part for reconsideration of some of the monetary penalties that the court imposed at sentencing.

I.

In March 2014, officers from the Jersey City Police Department responded to allegations that defendant had engaged in inappropriate sexual behavior with A.S., the fourteen-year-old daughter of the woman with whom defendant was living. A.S. alleged that defendant had on more than one occasion used his cell phone to take pictures of her naked buttocks and vagina. The police referred the matter to the Special Victims Unit in the Hudson County Prosecutor's Office (HCPO).

Defendant agreed to meet the detectives at the HCPO. After the detectives informed defendant of his Miranda rights,[1] he signed

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

a form waiving those rights. Initially, defendant denied the allegations. However, after defendant consented to a search of his cell phone, he admitted he pulled down A.S.'s panties and took photographs of her. Defendant told the detectives he had erased the photos. The detectives later found twelve deleted photos of the buttocks and bare pubic area of a female in blue underwear.

On October 29, 2014, a Hudson County Grand Jury returned Indictment No. 14-10-1772 charging defendant with third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a) (count one); second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1) (count two); fourth-degree child abuse, N.J.S.A. 9:6-1 and N.J.S.A. 9:6-3 (count three); first-degree endangering the welfare of a child by permitting a child to engage in pornography, N.J.S.A. 2C:24-4(b)(3) (count four); and second-degree endangering the welfare of a child by photographing a child in a prohibited sexual act, N.J.S.A. 2C:24-4(b)(4) (count five).

Thereafter, defendant filed a motion to suppress his statement and the photographs recovered in the search of his cell phone. On June 24, 2015, the trial court conducted an evidentiary hearing on the motion. The State introduced the Miranda rights and waiver form, the consent-to-search form, the video recording of defendant's interview, and the transcript of the interview.

The State presented testimony from Detective Carla Espinel, one of the detectives who interviewed defendant. The video recording of the interview was played in court, and Espinel identified the voice on the recording as her voice. An interpreter translated into English the portions of the video during which Espinel and defendant spoke in Spanish.

On June 30, 2015, the judge placed her decision on the record. The judge found that defendant "clearly, intelligently and unambiguously" waived his Miranda rights and "freely, intelligently, and knowingly" consented to the search of his cell phone. The judge denied defendant's motions to suppress.

On March 10, 2016, pursuant to an agreement with the State, defendant pled guilty to count four of the indictment, which charged first-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(b)(3). Among other things, the State agreed to dismiss the other charges and recommend a five-year custodial sentence. Defendant provided a factual basis for the plea.

On June 10, 2016, the judge sentenced defendant in accordance with the plea agreement. However, on October 3, 2016, the judge vacated the plea. The State and defendant entered a new agreement, and defendant pled guilty to count five of the indictment, which charged second-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4(b)(4). Defendant reserved the right to appeal

the denial of his suppression motions. The judge sentenced defendant to a five-year prison term; required him to register as a sex offender pursuant to Megan's Law, N.J.S.A. 2C:7-2(b)(2); and ordered that he have no contact with the victim.

The judge also imposed a $100 penalty for compensation of victims of crime, N.J.S.A. 2C:43-3.1; a $30 monthly fee for sex offender supervision, N.J.S.A. 30:4-123.97; a $30 penalty for the Law Enforcement Officers Training and Equipment Fund, N.J.S.A. 2C:43-3.3; an assessment of $75 for the Safe Neighborhood Services Fund, N.J.S.A. 2C:43-3.2; an $800 penalty for the Statewide Sexual Assault Nurse Examiner Program, N.J.S.A. 2C:43-3.6; a sex offenders surcharge of $100, N.J.S.A. 2C:43-3.7; and a $1000 penalty for the Sex Crime Victim Treatment Fund (SCVTF), N.J.S.A. 2C:14-10. The judge filed a JOC dated October 5, 2016.

Defendant appeals and raises the following arguments:

> POINT I
>
> THE MOTION TO SUPPRESS STATEMENTS SHOULD HAVE BEEN GRANTED BECAUSE [DETECTIVE] ESPINEL FAILED TO ADEQUATELY ADVISE [DEFENDANT] OF HIS MIRANDA RIGHTS AND THAT HE WAS WAIVING THOSE RIGHTS. . . .
>
> POINT II
>
> THE MOTION TO SUPPRESS EVIDENCE SHOULD HAVE BEEN GRANTED BECAUSE THE RECORD DOES NOT SHOW THAT [DEFENDANT] PROVIDED KNOWING AND VOLUNTARY CONSENT TO HAVING HIS PHONE SEARCHED FOR DELETED PHOTOGRAPHS. . . .

A. The State Failed to Show that [Defendant's] Consent Was Knowing and Voluntary Because He Was Not Adequately Informed that He Was Consenting to a Search of His Phone and Deleted Files.

B. The State Failed to Show that [Defendant's] Consent Was Knowing and Voluntary Because He Was Not Adequately Informed that He Could Refuse Consent.

POINT III

IF THE CONVICTION IS NOT REVERSED, THE MATTER SHOULD BE REMANDED BECAUSE THE SENTENCING COURT ERRED IN IMPOSING CERTAIN FEES AND PENALTIES. . . .

A. The $100 Fee Under N.J.S.A. 2C:43-3.7 Was Inapplicable Because [Defendant] Was Not Convicted of Sexual Assault or Criminal Sexual Contact.

B. The Court Erred in Assessing $100 Rather than $50 Under N.J.S.A. 2C:43-3.1, Because [Defendant] Was Not Convicted of a Crime of Violence that Injured Another Person.

C. The Court Erred in Imposing a $30 Per Month Penalty, Pursuant to N.J.S.A. 30:4-123.97, Because It Did Not Determine [Defendant's] Income and Because the Plea Form Stated that the Penalty Would Not Be Imposed.

D. A Remand for Resentencing Is Required Because the Court Did Not Explain the $1000 Penalty Imposed Pursuant to N.J.S.A. 2C:14-10, and Did Not Make Any Findings Regarding [Defendant's] Ability to Pay.

II.

On appeal, defendant argues that the judge erred by denying his motion to suppress the statements he made during the interview with the detectives. We disagree.

It is well established that "[a] confession obtained during a custodial interrogation may not be admitted in evidence unless law enforcement officers first informed the defendant of his or her constitutional rights." State v. Hreha, 217 N.J. 368, 382 (2014) (citing Miranda, 384 U.S. at 444). Law enforcement officers must inform any person in custody "(1) of [his or her] right to remain silent; (2) that any statement made may be used against him or her; (3) that the person has a right to an attorney; and (4) that if the person cannot afford an attorney, one will be provided." State v. Knight, 183 N.J. 449, 462 (2005) (citing Miranda, 384 U.S. at 444).

A person may waive these rights, but the waiver must be made "voluntarily, knowingly, and intelligently." Miranda, 384 U.S. at 444. "[T]he New Jersey common law privilege against self-incrimination affords greater protection to an individual than that accorded under the federal privilege." State v. A.G.D., 178 N.J. 56, 67 (2003) (quoting In re Grand Jury Proceedings of Guarino, 104 N.J. 218, 229 (1986)). Thus, under the law of this State, the prosecution "must prove beyond a reasonable doubt that

the suspect's waiver [of the privilege against self-incrimination] was knowing, intelligent, and voluntary in light of all the circumstances." Ibid. (quoting State v. Presha, 163 N.J. 304, 313 (2000)).

In determining whether a statement is voluntary, courts consider the totality of the circumstances, including the characteristics of the accused and the details of the questions. Knight, 183 N.J. at 462-63 (citing State v. Galloway, 133 N.J. 631, 654 (1993)). "Relevant factors include the defendant's age, education, intelligence, advice concerning his [or her] constitutional rights, length of detention, and the nature of the questioning . . . ." State v. Bey, 112 N.J. 123, 135 (1988) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

When reviewing a trial court's decision on a motion to suppress, we are required to uphold the court's findings of fact if they are "supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007) (citing State v. Locurto, 157 N.J. 463, 474 (1999)). We must defer to the trial court's findings based on its review of video and documentary evidence. State v. S.S., 229 N.J. 360, 380 (2017). We may not disregard those findings unless they are so wide of the mark that intervention is required in the interests of justice. Id. at 381 (citing Elders, 192 N.J. at 245).

Here, the trial court found that defendant "clearly understood" his Miranda rights and "knowingly, voluntarily, and intelligently waived them." The judge noted that the detectives read and explained defendant's Miranda rights to him in his native language and paused several times to emphasize that defendant could stop the interrogation at any time. The judge pointed out that the detectives did not merely hand defendant the Miranda rights form. Instead, the detectives spent ten minutes ensuring that defendant understood his Miranda rights.

On appeal, defendant argues that Espinel read him his rights at the start of the interrogation but did not read him the portions of the form that focus on whether he actually understood those rights. He contends Espinel failed to provide an "additional explanation" or ask him whether he understood his rights. He asserts that while the recording and transcript show that he nodded or made statements like "ah-ha" and "okay" after each right was read to him, these words did not demonstrate, beyond a reasonable doubt, that he actually understood those rights.

Here, the judge noted that defendant never stated that he "understood" his rights and voluntarily waived them. However, defendant "clearly expressed [that] sentiment in the natural flow of conversation when he stated okay, okay, no problem, and okay perfect" after Espinel explained the rights to him in Spanish. The

judge noted that Espinel informed defendant of his rights by explaining the Miranda rights form to him.

The form indicates that defendant: (1) had the right to remain silent; (2) that anything he said could and would be used against him in a court of law; (3) he had the right to speak with a lawyer for advice before being asked any questions, and he had the right to have counsel with him during questioning; (4) if he could not afford a lawyer, one would be appointed to him before questioning if he wished; and (5) if he decided to answer questions without a lawyer, he had the right to stop answering at any time or until he spoke with a lawyer.

The form also includes a translation of each statement into Spanish. The transcript of the interview indicates that Espinel read each statement in Spanish to defendant and defendant responded to each statement by using expressions such as "ah-ha" and "okay." Espinel asked defendant if he wanted to read the form, but he said that was not necessary. As the judge determined, defendant indicated that he understood his rights. Indeed, when Espinel asked him whether he wanted to read the form, he said that was not necessary.

In addition, at the bottom of the form, the following statement appears under the heading "WAIVER OF RIGHTS/RENUNCIA DE DERECHOS":

> I HAVE READ THIS STATEMENT OF MY RIGHTS AND UNDERSTAND WHAT MY RIGHTS ARE. I AM WILLING TO MAKE A STATEMENT AND ANSWER QUESTIONS. I DO NOT WANT A LAWYER AT THIS TIME. I UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES OR THREATS HAVE BEEN MADE TO ME AND NO PRESSURE OR COERCION OF ANY KIND HAS BEEN USED AGAINST ME.

This statement was also translated into Spanish. Defendant signed the waiver. After defendant signed the form, he answered the detective's questions. At no point did he indicate that he wanted a lawyer or wanted the questioning to cease.

We note that in State v. A.M., ____ N.J. Super. __, __ (App. Div. 2018) (slip op. at 19-20), we reversed the denial of the defendant's motion to suppress his statement, finding that the State had not shown beyond a reasonable doubt that the defendant's waiver of his Miranda rights was knowing and intelligent. In that case, the defendant was questioned by a detective and a police officer. Id. at 5. The officer translated the detective's questions into Spanish and the defendant's answers from Spanish to English. Ibid.

In A.M., we noted that the officer: did not ask defendant about his level of education, failed to make efforts to determine if the defendant was literate in Spanish, did not ask the defendant to read the waiver provision out loud to create a video record of what defendant actually read, and did not mention the word "waiver"

or any other word with a similar meaning. Id. at 17. We concluded that the motion judge had improperly shifted the burden of proof to the defendant to alert the interrogating officers about any difficulty he had in understanding the waiver form. Id. at 18.

This case is substantially different. As we have explained, the record shows that defendant was fully informed of his Miranda rights, which were explained to him in Spanish, his native language. Defendant indicated that he understood each right. Furthermore, the detective asked defendant if he wanted to read the Miranda rights form, in which the rights are set forth in Spanish, and he said this was not necessary. The waiver of rights section also was explained to defendant in Spanish, and he signed the form. At no point did the motion judge indicate that defendant had the burden of alerting the officers that he did not understand his rights or the significance of the waiver form.

We conclude there is sufficient credible evidence in the record to support the judge's findings that defendant was fully informed of his Miranda rights, and he voluntarily, knowingly, and intelligently agreed to waive those rights.

III.

Defendant further argues that the judge erred by denying his motion to suppress the photographs recovered from his cell phone. Again, we disagree.

As noted previously, we must uphold the judge's findings of fact if supported by sufficient credible evidence in the record. Elders, 192 N.J. at 243 (citing Locurto, 157 N.J. at 474). We must defer to the trial court's findings based on its review of video and documentary evidence. S.S., 229 N.J. at 380.

The Fourth Amendment of the United States Constitution and Article I, paragraph seven of the New Jersey Constitution protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Our courts have expressed a "preference that police officers secure a warrant before they execute a search." State v. Witt, 223 N.J. 409, 422 (2015) (citing State v. Frankel, 179 N.J. 586, 597-98 (2004)). Warrantless searches may, however, be permitted if they fall within "one of the 'few specifically established and well-delineated exceptions' to the warrant requirement." Ibid. (quoting Frankel, 179 N.J. at 598).

"[A]ny consent given by an individual to a police officer to conduct a warrantless search must be given knowingly . . . ." State v. Carty, 170 N.J. 632, 639 (2002) (citing State v. Johnson, 68 N.J. 349, 354 (1975)). Furthermore, to justify a warrantless consent search, the State must prove that the person who provided consent did so voluntarily and that he knew of his right to refuse consent to the search. Johnson, 68 N.J. at 353-54.

"Voluntariness is a question of fact to be determined from all the circumstances . . . ." Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). Consent must also be "unequivocal and specific," and "freely and intelligently given." State v. King, 44 N.J. 346, 352 (1965). "[T]he existence of a written waiver points strongly to the fact that the waiver was specific and intelligently made." State v. Daley, 45 N.J. 68, 76 (1965).

Here, the judge found that defendant "freely, intelligently, and knowingly" consented to the search of his cell phone. The judge noted that Espinel had thoroughly explained to defendant the information that the detectives could recover from the phone, including data that he might have tried to delete. The judge pointed out that this disclosure was not required, but it demonstrated that defendant's consent to the search was not a product of any deception or coercion.

On appeal, defendant argues that he did not knowingly and voluntarily consent to the search of his phone for deleted files. He asserts Espinel did not inform him he had a right to refuse to consent to the search. However, the record does not support these arguments. As the judge found, Espinel specifically informed defendant the search of the phone would include an attempt to recover any data that defendant may have deleted.

The transcript of the interview also indicates that defendant was well aware that it had been alleged that he took inappropriate photos of A.S. Initially, defendant denied taking any such photos. In reviewing the consent-to-search form, Espinel specifically mentioned that the detectives would be seeking all of the information on the phone including photos, and the detectives had "a system" for retrieving deleted data.

The record also does not support defendant's contention that he was not informed of his right to refuse to consent to the search. When Espinel reviewed the form, she noted that it indicated defendant would be voluntarily giving permission to the officers to undertake the search, and he was informed he had the right to say no to the search. She asked defendant if he understood the statement, and he said, "Okay."

We are convinced there is sufficient credible evidence in the record to support the judge's finding that defendant consented to the search of his cell phone knowingly, intelligently, and voluntarily. The record shows defendant was fully informed that the investigators would be seeking any data deleted from the phone, including photos. The record also shows defendant was informed he had the right to refuse to consent to the search.

IV.

Defendant also argues that the judge erred by imposing certain monetary penalties.

First, defendant contends the judge erred by imposing a $100 surcharge upon certain sex offenders, pursuant to N.J.S.A. 2C:43-3.7, which requires the court to impose the surcharge on persons convicted of aggravated sexual assault or sexual assault under N.J.S.A. 2C:14-2, or aggravated criminal sexual contact or criminal sexual contact under N.J.S.A. 2C:14-3. The State concedes the judge should not have imposed the surcharge because defendant pled guilty to second-degree endangering the welfare of a child under N.J.S.A. 2C:24-4(b)(4), which is not a predicate offense for imposing the surcharge under N.J.S.A. 2C:43-3.7. We agree. Accordingly, we vacate the sex offender surcharge.

Next, defendant argues the judge erred by requiring him to pay a $100 monetary penalty to compensate victims of crime pursuant to N.J.S.A. 2C:43-3.1(a)(1). The statute provides in relevant part that the court shall impose a $100 penalty upon persons convicted of a "crime of violence," which "resulted in the injury or death of another person." Ibid.

We agree with defendant that the offense to which he pled guilty was not a "crime of violence" under N.J.S.A. 2C:43-3.1(a)(1), and the $100 penalty should not have been imposed.

Rather, the judge should have imposed a $50 penalty pursuant to N.J.S.A. 2C:43-3.1(a)(2)(a), which is assessed upon persons convicted of any crime that does not result "in the injury or death of any other person." Therefore, we vacate the $100 penalty and remand for imposition of the $50 penalty.

Defendant further argues that the judge erred by requiring him to pay a $30 monthly penalty for the supervision of sex offenders pursuant to N.J.S.A. 30:4-123.97(a). The statute states that this penalty shall be imposed upon "a person convicted of or adjudicated delinquent for a sex offense." Ibid. The statute provides, however, that "[a] person shall not be assessed the penalty . . . if the person's income does not exceed 149 percent of the federal poverty level." Ibid.

When sentencing defendant, the judge did not indicate that she would be imposing this penalty. Thus, at sentencing, the judge did not make a finding as to whether defendant's income exceeded 149 percent of the federal poverty level. In addition, the plea agreement states that defendant would not be required to pay this penalty. Therefore, we vacate the sex offender supervisory penalty and remand for reconsideration by the judge.

Defendant also contends the judge erred by imposing a $1000 penalty pursuant to N.J.S.A. 2C:14-10 for the SCVTF. Among other things, the statute provides for assessment of a penalty not to

exceed $1000 for sex offenders convicted of a second-degree offense. N.J.S.A. 2C:14-10(a)(2).

The Supreme Court has stated that, "[i]n setting an SCVTF penalty, the sentencing court should consider the nature of the offense, as well as the defendant's ability to pay the penalty during any custodial sentence imposed and after his or her release." State v. Bolvito, 217 N.J. 221, 224 (2014). The Court also stated that "the sentencing court should provide a statement of reasons as to the amount of any penalty imposed pursuant to N.J.S.A. 2C:14-10(a)." Ibid.

We note that in his plea form, defendant acknowledged he would be required to pay a $1000 SCVTF penalty. However, the decision as to the amount of the penalty is committed to the sound discretion of the sentencing judge. Here, the judge did not provide a statement as to the reasons for imposing the maximum penalty of $1000. Therefore, we remand for reconsideration of this penalty.

Accordingly, we affirm defendant's conviction. In addition, we vacate the sex offender surcharge imposed pursuant to N.J.S.A. 2C:43-3.7, and the $100 assessment to compensate victims of crime pursuant to N.J.S.A. 2C:43-3.1(a)(1). We remand the matter to the trial court to impose the $50 assessment pursuant to N.J.S.A. 2C:43-3.1(a)(2)(a), and to reconsider the sex offender supervisory

fee imposed pursuant to N.J.S.A. 30:4-123.97 and the $1000 SCVTF penalty imposed pursuant to N.J.S.A. 2C:14-10.

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