SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3747-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WADEWORTH G. AFFLICK,
a/k/a WADEWORTH WADE,

Defendant-Appellant.

Submitted September 20, 2022 – Decided November 10, 2022

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 19-10-1636.

Joseph E. Krakora, Public Defender, attorney for appellant (Tamar Y. Lerer, Assistant Deputy Public Defender, of counsel and on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following denial of his motion to suppress a loaded handgun seized pursuant to a warrantless search of his vehicle, defendant Wadeworth G. Afflick pled guilty to second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1), charged in a seven-count Middlesex County indictment. Defendant was sentenced in accordance with the terms of the negotiated plea agreement to a seven-year prison term, with a forty-two-month period of parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6(c).[1]

On appeal, defendant raises two points for our consideration:

POINT I

THERE WAS NO PROBABLE CAUSE TO SEARCH DEFENDANT'S CAR.

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE.

We reject these contentions and affirm.

[1] Pursuant to the plea agreement, the judge dismissed the remaining six counts of the indictment and a disorderly persons offense charged by warrant. Just prior to sentencing, defendant pled guilty to refusal to submit to a chemical breath test, N.J.S.A. 39:4-50.4a, charged in a motor vehicle summons stemming from the same incident as the indicted charges. Defendant was sentenced to fines and penalties, and the remaining motor vehicle violations were dismissed.

I.

During the three-hour suppression hearing, the State presented the testimony of the arresting officer, State Trooper Scott Behnke, and played portions of the fifty-minute video clips from the trooper's motor vehicle recorder in conjunction with his testimony. Defendant did not testify or call any witnesses.

Around 8:44 p.m. on August 2, 2019, Behnke was patrolling the Garden State Parkway when a 2002 gray Nissan Altima, traveling in the southbound local lanes, nearly sideswiped another car. Behnke's radar gun clocked the Nissan's speed at eighty miles per hour, twenty-five miles above the speed limit. Behnke activated his emergency lights, initiating a traffic stop based on the motor vehicle violations. Defendant continued to drive for five seconds before pulling over. Based on his training and experience, Behnke believed defendant's delayed reaction to the emergency lights suggested he was under the influence of an intoxicant. As defendant pulled over, he "looked to the right side twice"; "[h]is whole torso moved over to the right side"; and "at one point," his head was not visible. Behnke suspected defendant "was attempting to conceal" some sort of contraband.

Behnke approached the passenger's side and made multiple requests for defendant's driving credentials. Behnke suspected defendant was impaired: his arm was shaking, he seemed nervous, his speech was slurred, and his responses were delayed. Behnke testified that he detected a "strong" odor of alcohol emanating from defendant's car and saw a bottle of vodka in a black plastic bag on the passenger seat.

Behnke reapproached the Nissan on the driver's side so that that he could "get a closer look at [defendant's] eyes because he was failing to maintain eye contact." Defendant's eyes appeared "bloodshot and watery." Defendant lit a cigarette, which "impacted Behnke's ability to detect the odor of alcohol." Eventually, defendant complied with Behnke's request to extinguish the cigarette.

During this encounter, George Garcia stopped his car in the southbound express roadway and shouted something "to the effect that the man had a gun and to call for backup." Garcia further stated defendant had "pointed a gun at [him]." Behnke ordered defendant out of the Nissan and frisked him for weapons with negative results. Defendant told Behnke he did not know Garcia but acknowledged that the two men had been involved in a road rage incident. Defendant claimed Garcia cut him off and defendant "pointed his hand at him."

Garcia remained at the scene until another trooper arrived and took him to the station to give a statement.

Defendant acknowledged he had consumed "[t]wo shots at a bar." Before conducting the standard field sobriety tests, Behnke asked defendant whether he had any physical injuries. Defendant told Behnke he had suffered "a cracked hip and a fractured spine," and he requested his cane. Because defendant exited the car without limping, Behnke denied defendant's request. Behnke administered the first sobriety test then performed a protective sweep of the Nissan, which lasted "[l]ess than a minute." No contraband was found at that time.

Defendant did not perform well on the tests. On cross-examination, Behnke acknowledged, given "the nature of the scene" including "no backup," his "heart was racing," and he "definitely rushed through the examination." Based on the totality of the circumstances, however, Behnke concluded defendant was impaired and unable to operate his car. Behnke arrested defendant for driving while intoxicated (DWI).

Defendant denied there was a gun in the car. When backup troopers arrived, defendant was frisked with negative results. The troopers then "conducted a probable cause search for open containers." Another trooper

seized a loaded .380 semi-automatic handgun from underneath the steering wheel. The firearm was loaded with five bullets in the magazine and one in the chamber. Police also recovered a small quantity of marijuana, an empty "shooter-size" bottle of vodka, and several unopened vodka shooter bottles.

At the conclusion of oral argument, the motion judge issued a cogent oral decision, spanning more than twenty transcript pages. The judge made detailed factual and credibility determinations based on Behnke's "forthright" testimony. Finding Behnke's testimony "highly credible," the judge explained:

> He was prepared. He provided intelligent and prompt answers. He demonstrated a good demeanor, even tone. He appear[ed] to be experienced. He testified in a professional manner, showing no particular bias. In fact, on cross-examination, when questioned . . . as to whether he properly conducted some of the tests, he readily admitted that he did not comply. He explained, of course, that his failure was due in large measure to his fear at the time and safety concerns . . .
>
> There was no hemming or hawing. He was forthright. He seemed to have a good recollection of the event. His answers were straight. His testimony was detailed. I did not find that he embellished in any way or that he tried to avoid questions. And frankly, there were no contradictions in his testimony.

Acknowledging he viewed the recording, the judge found it "was absolutely consistent with every detail of [Behnke's] testimony."[2]

Recounting Behnke's testimony, the judge squarely addressed the issues raised in view of the applicable legal principles. The judge rejected defendant's argument that Behnke lacked probable cause to arrest defendant for DWI and that "the scope of the search exceeded the search for open alcohol."[3]

Applying the automobile exception to the warrantless search of defendant's car, the judge was persuaded the circumstances giving rise to probable cause were unforeseeable and spontaneous within the meaning our Supreme Court's decision in State v. Witt, 223 N.J. 409, 450 (2015). Quoting our decision in State v. Cusick, 110 N.J. Super. 149, 152 (App. Div. 1970), the judge reiterated our holding thusly:

> The court in Cusick explained that when probable cause exists to make an arrest for driving under the influence, "it is not unconstitutional for a police officer to search for alcohol as an incident to an arrest for

[2] The recording was provided on appeal. Defendant does not raise any issues pertaining to the recording or the judge's findings concerning it.

[3] The motion judge also found the stop was valid. Defendant does not challenge that validity of the stop on appeal, and we need not address it. An issue not briefed is deemed waived. See Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023).

> drunken driving." The court reasoned that "such a search is directed towards and may in fact produce evidence related to the offense for which the arrest was made."

Having found that the search was based on probable cause that defendant was DWI, the motion judge determined "the circumstances giving rise to probable cause in this case were unforeseeable and spontaneous" pursuant to Witt.

Recognizing the troopers "were probably looking for more than the alcohol; they were looking for the gun," the motion judge further found there was probable cause to search for the handgun based on the information provided by the "citizen informant," at the scene and defendant's furtive movements following the stop. Quoting State v. Kurland, 130 N.J. Super. 180, 114-15 (App. Div. 1974), the judge stated:

> An ordinary citizen who reports a crime [has been] committed in his presence stands on a much different ground than a[] police informer. He is a witness to a crime who acts with an intent to aid the police and law enforcement because of his concern for society and, in this case, his concern for the safety of the police officer.

The judge was also persuaded defendant's furtive movements, particularly when "he got out of view" not only "heightened [Behnke's] concern for his own personal safety, but also may [have] corroborate[d] or suggest[ed] that . . . defendant was trying to hide something, presumably, the handgun in this case."

II.

On appeal, defendant initially challenges the motion judge's finding that the troopers had probable cause to search the Nissan. Apparently acknowledging he was DWI, defendant claims "the mere fact of operating a vehicle inebriated does not give rise to an automatic assumption that open containers will be found in the car." Defendant further argues "although Garcia's allegations may have given rise to reasonable suspicion that a weapon would be found in the car, these uncorroborated allegations could not give rise to probable cause."

Having considered defendant's contentions in light of the record and the applicable legal principles, we conclude they lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). We affirm the motion judge's order, substantially for the reasons stated in his thorough oral decision. We add only the following brief remarks.

Our circumscribed review of a trial court's decision on a suppression motion is well established. We defer to the court's factual and credibility findings provided they are supported by sufficient credible evidence in the record. State v. Dunbar, 229 N.J. 521, 538 (2017). Our deference includes the trial court's findings based on video recording or documentary evidence. See

State v. S.S., 229 N.J. 360, 374-81 (2017) (clarifying the deferential and limited scope of appellate review of factual findings based on video evidence); see also State v. McNeil-Thomas, 238 N.J. 256, 271-72 (2019). Deference is afforded because the court's findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). We disregard a trial court's findings only if they "are clearly mistaken." State v. Hubbard, 222 N.J. 249, 262 (2015). Legal conclusions are reviewed de novo. Dunbar, 229 N.J. at 538.

We conclude the judge's factual and credibility findings "are supported by sufficient credible evidence in the record" and, as such, those findings are entitled to our deference. Dunbar, 229 N.J. at 538; S.S., 229 N.J. at 374. Having conducted a de novo review of the judge's conclusions of law, we reject defendant's contentions that the troopers lacked probable cause to search his car. In particular, defendant's reliance on our decision in State v. Jones, 326 N.J. Super. 234 (App. Div. 1999), is misplaced.

In Jones, a state trooper stopped a car for a motor vehicle infraction. Id. at 237-38. The trooper detected alcohol on the defendant's breath, and the defendant admitted drinking "a bottle of Heineken." Id. at 238. After a pat-

down search of the defendant and his passengers yielded no weapons, the trooper searched the car for open containers of alcohol and seized large quantities of cocaine. Id. at 238-39.

In reversing the trial court's order denying defendant's suppression motion, we held the "odor of alcohol the [t]rooper detected on Jones's breath, together with his nervousness and admission concerning the consumption of one beer, does not, when viewed with the other existing circumstances, establish a well-grounded suspicion that either Jones or his passengers had open containers of alcohol." Id. at 244. However, we recognized had the trooper "observed open containers in plain view or any outward signs such as spilled alcohol . . . a further search of the vehicle . . . would have been warranted." Id. at 245.

In the present matter, Behnke observed several indicia of intoxication, including: defendant's bloodshot eyes, slurred speech, shaking arm, failure to maintain eye contact, the odor of alcohol emanating from the Nissan, and his attempts to conceal that odor by lighting a cigarette. Defendant also failed the field sobriety tests however hurried the examination was under the circumstances. Indeed, the very reason Behnke rushed the testing was the information he received on the scene from a concerned citizen, reporting defendant had pointed a gun at him during the road rage incident. That

confluence of events amply supported the judge's probable cause determination. We therefore discern no basis to disturb his decision.

III.

Defendant argues his sentence is excessive. He claims the judge failed to explain his reasons for finding aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will re-offend); six, N.J.S.A. 2C:44-1(a)(6) (extent and seriousness of defendant's prior record); and nine, N.J.S.A. 2C:44-1(a)(9) (general and specific deterrence). For the first time on appeal, defendant contends the judge failed to consider "the risks and hardships" of his incarceration, under mitigating factor eleven, N.J.S.A. 2C:44-1(b)(11), in view of the pandemic's potential impact on his medical diagnosis.

In weighing the aggravating and mitigating factors, a sentencing court must conduct a qualitative, not quantitative analysis. See State v. Kruse, 105 N.J. 354, 363 (1987); State v. Boyer, 221 N.J. Super. 387, 404 (App. Div. 1987) (explaining a sentencing court must go beyond enumerating factors). The court must also state the reason for the sentence, including its findings on the aggravating and mitigating factors. N.J.S.A. 2C:43-2(e); R. 3:21-4(h). However, the court's explanation of the aggravating and mitigating factors need not "be a discourse." State v. Dunbar, 108 N.J. 80, 97 (1987). We may uphold

a sentence when the "transcript makes it possible to 'readily deduce' the judge's reasoning." State v. Miller, 205 N.J. 109, 129-30 (2011) (quoting State v. Bieniek, 200 N.J. 601, 609 (2010)).

Having decided defendant's suppression motion, the judge was fully familiar with the facts and circumstances of defendant's present offense. Noting defendant was thirty-nine years old at the time of sentencing, the judge referenced the offenses that comprised defendant's "significant criminal history," which commenced when defendant was a juvenile. That history included convictions for witness tampering, violation of a restraining order, and violations of probation, and supported the judge's finding that "defendant poses the risk that he will commit another offense." The judge also was persuaded defendant and others must be deterred from committing "this type of . . . violent behavior." The judge's reasons for findings aggravating factors three, six, and nine were apparent from the record. See Miller, 205 N.J. at 129-30.

Nor are we persuaded by defendant's belated contention that the judge sua sponte should have found mitigating factor eleven. On appeal, defendant cites his medical diagnosis, which was mentioned in passing in his hospital records that were provided to the judge in support of defendant's suppression motion. We glean from the record defendant provided his hospital records, which

evidenced a prior automobile accident, to corroborate his claim that he could not properly perform the field sobriety tests. Stated another way, defendant's hospital records were not provided as evidence of his unrelated medical diagnosis. Indeed, there is no indication in the record that defendant cited his unrelated medical diagnosis in mitigation of his sentence. Defendant made no argument, whatsoever, in support of mitigating factor eleven. Nor did defendant make any showing that would warrant application of any mitigating factors.

Applying our well-settled, deferential standard of review, see e.g., State v. Trinidad, 241 N.J. 425, 453 (2020), we discern no basis to disturb defendant's sentence, which was imposed in the middle of the second-degree range, see N.J.S.A. 2C:43-6(a)(2), and consistent with the terms of the negotiated plea agreement. In view of the circumstances of the offense and defendant's criminal history, the sentence does not shock the judicial conscience. See State v. Blackmon, 202 N.J. 283, 297 (2010).

Affirmed.