SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3223-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN B. RIVERA,

Defendant-Appellant.

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Argued March 7, 2023 – Decided August 14, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 19-03-0655.

Brian P. Keenan, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Melanie K. Dellplain, Assistant Deputy Public Defender, of counsel and on the brief).

Steven A. Yomtov, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Steven A. Yomtov, of counsel and on the brief).

PER CURIAM

Under the influence of Xanax, defendant John B. Rivera caused a rear-end collision with another car at the intersection of Black Horse Pike and Tower Avenue in Egg Harbor on the evening of June 17, 2017. The other car's driver, Jeffrey Weiss, was pronounced dead at the scene; the passenger, Weiss's sister, Jean Burrell, was seriously injured. It was defendant's second motor vehicle collision that day in the same car, the first having occurred less than two hours earlier in the same municipality. Defendant's airbag deployed during the first crash; police advised him not to drive the car.

Defendant was hospitalized with a concussion and laceration to his scalp. While en route to the hospital, first responders administered narcotics for pain. Upon admission, defendant was treated in the trauma bay of the emergency room, where he was administered additional pain medication.

A local police officer responded to the hospital and obtained defendant's consent to draw blood and urine samples. Thereafter, other officers interviewed defendant about the accident. Defendant was not issued Miranda[1] warnings. During the interview, defendant made incriminating statements and consented to a search of his car, including the seizure of his cell phone. His blood and

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

urine test results were positive for benzodiazepines, cannabis, and opiates. No drugs were found in defendant's car; it is unclear from the record whether police seized defendant's phone.

Around eighteen months later, in December 2018, police issued an arrest warrant, charging defendant with criminal offenses and motor vehicle violations, including driving while intoxicated, (DWI), N.J.S.A. 39:4-50(a); reckless driving, N.J.S.A. 39:4-96; careless driving, N.J.S.A. 39:4-97; and failure to wear a seatbelt, N.J.S.A. 39:3-76.2. Shortly thereafter, defendant was charged in an Atlantic County indictment with second-degree vehicular homicide, N.J.S.A. 2C:11-5(a); third-degree assault by auto, N.J.S.A. 2C:12-1(c)(2); and third-degree possession of a controlled substance, N.J.S.A. 2C:35-10.

Defendant moved to suppress the physical evidence obtained as a result of the consent searches and his incriminatory statements to law enforcement. From the record provided on appeal,[2] it appears defendant essentially argued his

[2] The parties did not provide a transcript of their closing arguments. According to defendant's merits brief, "the trial court was unable to locate any record of any oral argument" concerning the motions and, as such, defendant appended the parties' trial briefs. However, those briefs relate only to defendant's motion to suppress his blood draw and urine test and his statement to police. During the first day of testimony, the motion judge granted defendant's motion to

consent and statements were not voluntarily and knowingly made in view of his medical treatment and injuries. Defendant further contended he was interrogated in violation of Miranda.[3] Following an evidentiary hearing, the motion judge denied defendant's motions.

Defendant thereafter pled guilty to vehicular homicide, assault by auto, and DWI, preserving his right to appeal the denial of his motion to suppress his statement pursuant to Rule 3:9-3(f); his right to appeal the denial of his motions to suppress the physical evidence was permitted by Rule 3:5-7(d). Defendant was sentenced in accordance with the terms of the negotiated plea agreement to an aggregate six-year prison term pursuant the No Early Release Act, N.J.S.A. 2C:43-7.2, for the vehicular homicide conviction. The remaining offenses and violations were dismissed. Because defendant was previously convicted of

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suppress his consent to search his car and afforded the parties the opportunity to file supplemental briefs. It is unclear from the record whether supplemental briefs were filed.

[3] Defendant also contended the State lacked probable cause or exigent circumstances to justify the warrant exception to his blood draw and urine test, and the second consent to search his automobile was invalidated by the erroneous police procedures concerning his initial consent. Because those issues were not asserted on appeal, we decline to address them. "[I]ssues not briefed on appeal [are] deemed waived." State v. W.C., 468 N.J. Super. 324, 341 (App. Div. 2021) (alteration in original) (quoting Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011)); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023)).

DWI, the judge also ordered a seven-year suspension of his driving privileges and thirty days of community service. The judge denied defendant's request for a civil reservation under N.J.S.A. 2C:11-5(c) and Rule 3:9-2.

On appeal, defendant challenges his convictions, reprising the same arguments asserted before the motion judge. In the alternative, he contends his sentence was excessive. He raises the following points for our consideration:

POINT I

DEFENDANT'S RECORDED STATEMENT SHOULD NOT HAVE BEEN ADMITTED BECAUSE HE WAS SUBJECTED TO CUSTODIAL INTERROGATION AT THE HOSPITAL AND WAS NOT INFORMED OF HIS MIRANDA RIGHTS, AND THE STATEMENT WAS NOT MADE VOLUNTARILY.

[A]. Because Defendant Was Subjected to Custodial Interrogation At the Hospital, The Failure to Inform Him Of His Miranda Rights Renders The Statement Inadmissible.

[B]. Because The Effect Of Both The Severe Pain And The Pain Medication On Defendant's Cognitive State Rendered His Statement Involuntary And Unreliable, It Should Have Been Suppressed.

POINT II

LAW ENFORCEMENT OFFICERS VIOLATED DEFENDANT'S FOURTH AMENDMENT RIGHTS

BY CONDUCTING A WARRANTLESS BLOOD AND URINE DRAW AND A WARRANTLESS CAR SEARCH, AS DEFENDANT'S CONSENT TO THE SEARCHES WAS INVOLUNTARY.

POINT III

DEFENDANT'S SENTENCE IS EXCESSIVE BECAUSE THE SENTENCING COURT ERRED WHEN IT DOUBLE-COUNTED ELEMENTS OF THE OFFENSE IN APPLYING AGGRAVATING FACTORS THREE AND NINE, FAILED TO APPLY MITIGATING FACTOR SIX, AND DENIED DEFENDANT A CIVIL RESERVATION.

[A]. The Sentencing Court Failed to Properly Weigh the Aggravating and Mitigating Factors.

[B]. The Sentencing Court Should Have Granted Defendant's Application for a Civil Reservation.

We reject these contentions and affirm. But we remand for the limited purpose of correcting the judgment of conviction (JOC) to remove aggravating factor six, N.J.S.A. 2C:44-1(a)(6) (the extent of defendant's criminal history), consistent with the judge's "oral pronouncement of sentence." State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016); see also State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956) (recognizing the oral pronouncement is "the true source of the sentence" whereas the creation of the JOC is "merely the work of a clerk").

I.

We summarize the facts from the testimony adduced at the three-day evidentiary hearing, during which the State called three law enforcement officers who interacted with defendant in the hospital: Officer Paul Janetta, of the Egg Harbor Township Police Department (EHTPD); Detective Ryan Hutton, who was assigned to the fatal accident investigation unit of the Atlantic County Prosecutor's Office; and Officer Robert Moran, who was assigned to the EHTPD's traffic safety unit. The State also moved into evidence the consent forms, and the recording and transcript of defendant's audio-recorded statement to police. Defendant did not testify but presented the testimony of Dr. Frank DeAngelo, M.D., the emergency room physician who treated him.

Around 7:00 p.m. on the date of the incident, defendant was transported from the collision scene to the hospital. Janetta was dispatched to the hospital to seek defendant's consent to a blood draw and urine sample. When Janetta arrived, defendant was awake in the trauma room, which the officer described as "an open room" with "a couple beds." Medical staff were present in the trauma room, but it was otherwise unoccupied.

Janetta testified that during their interaction, defendant presented as "polite," "engaged," "cooperative," and "alert." He did not appear "dazed,"

"confused," or "disoriented." Nor did defendant ask any "incoherent questions." When questioned whether defendant was "complaining of any type of pain or injury," Janetta recalled that "his head was bandaged" and he was speaking about the "cut on his head." Defendant "probably" said, "'It hurts[,]'" and "probably ask[ed] medical staff for medicine or something to help the pain." But defendant was not "crying in pain." Janetta denied that defendant's speech was slurred but said defendant was "talking slow and kind of drawing out his words." During the ensuing months, Janetta twice spoke with defendant at police headquarters and he "sounded the same way."

Janetta detailed the manner in which he obtained consent for the blood draw and urine sample. Janetta read verbatim both forms aloud to defendant, who signed and dated the forms in Janetta's presence. Defendant did not ask the officer any questions, answered the questions posed without hesitation, and did not seek to confer with anyone before giving consent. Defendant posed no objection when providing both samples. Janetta did not ask defendant any questions about the collision. On cross-examination, Janetta acknowledged that he rewrote defendant's "illegible" date on one of the forms and inserted the date for defendant on the other form.

Hutton testified that he assisted the EHTPD at the collision scene. After confirming with EHTPD's on-scene sergeant that defendant had no outstanding warrants or charges, Hutton responded to the hospital to interview defendant. Moran and Janetta were present when Hutton arrived at the hospital.

Hutton and Moran entered the "big open room" where defendant was inclined in bed. He appeared "awake" and "alert." Defendant's forehead was bandaged but he did not complain about his injuries. He was not handcuffed or otherwise restrained. No other patients were assigned to the room; hospital staff "walk[ed] through and in and out, but there was nobody there with [the officers]."

The twenty-minute interview commenced at 10:10 p.m. After introducing himself and Moran, Hutton told defendant he had some questions about the crash. Citing the transcript of the recorded interview, Hutton elaborated:

> Just want to let you know you're not under arrest. If for any reason – you're not being charged . . . [and] you're not under arrest for any reason. You're not being charged with anything today. If you want to stop answering questions, let us know. Okay? If you want us to leave, we'll leave. You understand?

Defendant responded, "Yeah." Hutton described defendant as "engaged" and "cooperative." Defendant gave Hutton no indication "that he couldn't talk

. . . or he was confused in any way." At no point did defendant ask the officers to leave.

Before Hutton interviewed defendant, he did not know whether defendant was aware that Weiss had died during the crash. More than halfway through the interview, Hutton disclosed that information to defendant and noticed a change in defendant's "tone." Defendant "immediately started saying things like, 'I didn't mean to hit him.'" His answers were "more . . . precise" and "recognized th[e] seriousness of the accident." Defendant made statements that were inconsistent with the evidence, including that he applied his brakes prior to the crash, was wearing his seatbelt during the crash, and his airbags deployed after the crash. Defendant claimed he was not under the influence of any substances, including prescription medications. He acknowledged that he had used marijuana around 11:00 a.m. that day.

Defendant signed the consent-to-search form at 10:19 p.m. When asked whether law enforcement could seize his cell phone from the car, defendant paused, and responded, "Yeah, I think you guys should be fine." Defendant acknowledged there might be some "weed" in the car for "recreational" use.

After he left the hospital, Hutton realized "Moran had not read the consent-to-search form to [defendant]." Because Hutton "wanted to make sure

[defendant] knew he had the right to refuse to give consent to search his vehicle," Hutton directed Moran to return to the hospital, read the form to defendant, and obtain his signature. Police searched defendant's car after he signed the second form.

On cross-examination Hutton confirmed that he did not read defendant his Miranda rights during the interview. Hutton explained:

> At the time when I was going in there to interview [defendant,] he wasn't in custody. He hadn't been placed in custody and at that point I was interviewing him more as a witness than anything, so I was trying to find out what happened in the crash. So, he wasn't in custody. He hadn't been taken into custody, and I was basically interviewing him as a witness.

Moran testified that he initially responded to the hospital to "mak[e] contact with the victim's family." He corroborated Hutton's testimony that defendant was not under arrest when they spoke with him, and he was free to ask the officers to leave. Moran said he did not initially read the consent form to defendant "[b]ecause [he] didn't want to interrupt the interview." When Hutton returned to the hospital, he read the second consent-to-search form to defendant, who appeared "alert and able." Defendant asked no questions and signed the second form at 11:37 p.m.

A trauma and surgical critical care specialist, Dr. DeAngelo was the attending physician assigned to the hospital's trauma department on the night of the incident. Dr. DeAngelo only recalled that he had treated defendant by referring to the hospital chart. When defendant arrived, paramedics "reported that the patient had loss of consciousness in the accident." Dr. DeAngelo's physical examination revealed a scalp laceration.

Dr. DeAngelo testified about the medications administered to defendant and their general side effects. Paramedics first administered 200 milligrams of fentanyl. While his wound was sutured at the hospital, defendant was administered a 100-milligram dose of fentanyl at 7:15 p.m., followed by another 100-milligram dose at 9:25 p.m. Dr. DeAngelo explained that the side effects of fentanyl are "drowsiness," "dizziness," "light-headedness," "euphoria," "confusion." He also stated that there may be "increased" side effects when fentanyl is mixed with Xanax. Defendant also was administered two morphine injections at around 9:00 p.m. Dr. DeAngelo testified that common side effects of morphine include "nausea" and "sleepiness." In response to the motion judge's inquiry, Dr. DeAngelo confirmed no side effects were noted in defendant's chart.

Defendant's "ultimate diagnoses" were "[c]oncussion and scalp laceration." Dr. DeAngelo explained that the "general symptoms of a concussion" include "headache, . . . nausea, sleep disturbance, [and] some brief periods of confusion." Defendant was moved to a floor from the trauma bay and admitted overnight.

Dr. DeAngelo acknowledged that defendant's mother signed the consent-to-treat form. He did not know why defendant did not sign the form. The doctor explained that most often the form is signed by a patient's representative when the patient is unconscious. Other reasons include when the patient is "in extremis," such as when the patient's "blood pressure is low, they're badly injured, and they're basically being wheeled out of the bay to go to the [operating room]."

On cross-examination, Dr. DeAngelo testified about defendant's Glasgow Coma Score (GCS), which measures a patient's "mental abilities." Medical staff initially performed defendant's GCS test every five minutes to determine whether there is any decline, and then at longer intervals. Defendant's GSC score remained "fifteen out of fifteen" – the best possible score – on every test. Dr. DeAngelo confirmed that defendant's "CT scan did not show any injury."

Defendant's physical examination revealed he was "alert, oriented and ha[d] normal sensory and normal motor function" and his speech was "clear."

In her written decision, the judge found all the officers "very credible," evidenced by their "prompt answers" and "accurate recollection of the details." She further found Hutton's testimony about his interview of defendant was corroborated by the audio recording. The judge similarly credited Dr. DeAngelo's testimony.

II.

We first consider defendant's challenges to the consent searches under point II, to give context to his contentions under point IB, that his medical condition rendered his statement involuntary. Defendant claims he neither consented to the collection of his blood and urine nor the search of his vehicle.

Noting the "dearth of precedent" addressing the voluntariness of consent provided by a patient undergoing medical treatment, the motion judge first considered "the totality of the circumstances," surrounding defendant's consent to the blood draw and urine simple. Those circumstances included "the setting in which consent was obtained, the parties' verbal and non-verbal actions, and the age, intelligence[,] and educational background of the consenting individual." The judge also noted "courts have found that intoxication may

override voluntary consent but only when it is clear from the situation that the person did not comprehend the implications of the consent."

The motion judge rejected defendant's contention that his "physical and mental" state rendered his consent to the blood draw and urine test invalid. Acknowledging defendant's blood test results "showed the presence of multiple substances which would have impacted his ability to comprehend what he was doing," the judge found defendant "had the opportunity to read the forms, had the forms explained to him, and then executed the forms." Citing Janetta's testimony, the judge found defendant "did not seem hostile, but was very cooperative, did not show any signs of slurred or irregular speech, but instead showed a full understanding of what was taking place." Further, defendant posed no objection when the blood draw and urine test were administered. Finally, the judge noted defendant "repeatedly scored 15 out of a possible 15 on the G[SC] scale."

For similar reasons, the motion judge concluded defendant voluntarily consented to the search of his car. Without expressly addressing the factors enunciated in State v. King, 44 N.J. 346, 352 (1965), the judge found defendant's consent was not coerced. The judge elaborated:

> Detective Hutton testified that . . . [d]efendant was able to list off personal information without any issues, that

> he was able to provide specific details, he was able to provide answers to relevant questions, he showed an understanding of the seriousness of the accident when he learned that the victim ha[d] died, and he was able to understand that the search of the car may have revealed possible marijuana in which he asked the police to "use their discretion" when finding it. Lastly, Officer Moran testified that even when he returned the second time to complete the consent to search form again . . . [d]efendant was alert and attentive to the conversation, did not present any hesitation in signing the form[,] and was engaging.

Although the judge acknowledged defendant had "moments of confusion regarding the details of the present accident," she considered that defendant had been involved in two accidents on the same day, might have misremembered certain information or could have been "aiming to withhold information." Nonetheless, the judge observed defendant was not rendered disoriented by "not remembering a few facts."

Our review of a trial court's decision on a motion to suppress evidence is well-settled. We "must defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record." State v. Erazo, 254 N.J. 277, 297 (2023); see also State v. Evans, 235 N.J. 125, 133 (2018). Generally, appellate courts "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)). We review de novo the trial court's legal determinations "and its view of the consequences that flow from established facts." Ibid. (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

"Federal and New Jersey courts recognize the consent to search exception to the warrant requirement." State v. Lamb, 218 N.J. 300, 315 (2014). "It is, of course, fundamental that consent to search must be voluntary." State v. Chapman, 332 N.J. Super. 452, 466 (App. Div. 2000). "To determine whether a person voluntarily consented to a search, the focus of the analysis is 'whether a person has knowingly waived [the] right to refuse to consent to the search.'" Lamb, 218 N.J. at 315 (quoting State v. Domicz, 188 N.J. 285, 308 (2006)). In addition, "under the New Jersey Constitution, a consent to search is valid only if the person giving consent has knowledge of [the] right to refuse." Chapman, 332 N.J. Super. at 466. "The State has the burden of proving consent was given freely and voluntarily." Lamb, 218 N.J. at 315.

Nearly sixty years ago, in King, our Supreme Court set forth "factors which courts have considered as tending to show that the consent was coerced." 44 N.J. at 352-53. More recently, in State v. Hagans, the Court reiterated these factors:

> (1) that consent was made by an individual already arrested; (2) that consent was obtained despite a denial of guilt; (3) that consent was obtained only after the accused had refused initial requests for consent to search; (4) that consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered; [and] (5) that consent was given while the defendant was handcuffed.
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> [233 N.J. 30, 39 (2018) (alteration in original) (quoting King, 44 N.J. at 352-53).]

The Court also restated the factors that tend to indicate the voluntariness of consent:

> (1) that consent was given where the accused had reason to believe that the police would find no contraband; (2) that the defendant admitted his guilt before consent; [and] (3) that the defendant affirmatively assisted the police officers.
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> [Id. at 39-40 (alterations in original) (quoting King, 44 N.J. at 353).]

In both cases, "[t]he Court emphasized that those factors were not commandments, but 'guideposts' to aid a trial [court] in arriving at [its] conclusion." Id. at 40.

On appeal, defendant maintains his consent was not voluntary in view of his medical condition. Citing the applicable King factors, defendant now contends he "was in a coercive custodial environment" when the officers sought

his consent – and "interrogated him about the accident."[4] Defendant further claims his consent was not voluntary pursuant to State v. Nyhammer, 197 N.J. 383 (2009), and State v. Diaz, 470 N.J. Super. 495 (App. Div. 2022), because it was rendered before police disclosed that Weiss had died in the crash. After the parties' briefs were filed, the State filed a supplemental letter, pursuant to Rule 2:6-11(d), citing this court's recent decision in State v. Hahn, 473 N.J. Super. 349 (App. Div. 2022), certif. denied, 252 N.J. 530 (2023), to counter defendant's misplaced reliance on authority "limited to the Miranda context."

Having reviewed the record evidence in view of the governing legal principles, we are satisfied the totality of the circumstances amply supports the judge's determination that defendant's medical condition did not hamper his ability to voluntarily and knowingly consent to the blood draw and urine sample, and to the search of his car. See Erazo, 254 N.J. at 297. There is no evidence in the record that the injury defendant sustained – or the medication administered to defendant for that injury – actually interfered with his ability to

[4] Because defendant does not claim the motion judge failed to assess each of the King factors, it is unclear whether he now raises this argument for the first time on appeal. For the sake of completeness, we have considered his contentions and conclude they lack sufficient merit to warrant further discussion in a written decision. R. 2:11-3(e)(2).

understand his rights, or knowingly and voluntarily waive them. Defendant spoke coherently with all the officers, in the same manner that he later spoke with Janetta. Further, Dr. DeAngelo confirmed there was no indication in defendant's chart that he suffered side effects from the medication. Rather, defendant responded affirmatively to the requests, signed the consent forms, and did not protest when providing his blood and urine samples.

Nor are we persuaded by defendant's argument under Nyhammer – and the line of cases addressing the voluntariness of a defendant's confession in the Miranda context – that his consent was not voluntary because he was unaware Weiss had died. In Hahn, this court considered whether the defendant had voluntarily waived his Miranda rights where police "truthfully told [the] defendant they were investigating the motor vehicle crash" at issue. 473 N.J. Super. at 369. We distinguished the circumstances in Hahn from the police conduct in Diaz, where the officers had "'carefully orchestrated' custodial interrogation . . . designed to affirmatively mislead [the] defendant." Ibid. (quoting Diaz, 470 N.J. Super. at 521). Although the police in Hahn were "investigating a fatal accident, to be sure, and the troopers most likely knew [the] defendant faced some criminal charges . . . they did not misrepresent the

circumstances [the] defendant faced in response to his direct inquiry." Id. at 370.

Even if Miranda caselaw were applicable in a consent-to-search voluntariness assessment, which defendant argues without supporting authority, the officers in this case did not "affirmatively mislead defendant." Id. at 367. Indeed, defendant was not charged with the present offenses until eighteen months after the incident. Moreover, defendant confirmed his consent to search his car after he was told Weiss had died. We therefore discern no basis to disturb the motion judge's decision.

III.

In point IA, defendant contends his police interview while he was confined to an emergency room hospital bed rendered him "in custody," requiring the protections under Miranda. Asserting the motion judge "ignored evidence that showed [he] was not actually free to leave the interrogation," defendant claims police elicited his statement in violation of his constitutional rights.

Acknowledging defendant's medical treatment made it "extremely difficult . . . to freely leave if he desired while the police were questioning him," the motion judge nonetheless concluded defendant was not subjected to

"custodial interrogation" within the meaning of State v. Stott, 171 N.J. 343, 364 (2002). Citing Hutton's testimony that "[n]ot all fatal accidents result in criminal charges," the judge was persuaded the detective's reason for questioning defendant was "to fully understand what had happened at the accident." Thus, Hutton did not view defendant as a suspect at that time. The judge further noted defendant was not arrested until months after the incident.[5]

We review the court's decision on a motion to suppress a statement guided by the same deferential standard that applies to our review of motions to suppress physical evidence. See Erazo, 254 N.J. at 297; see also State v. Ahmad, 246 N.J. 592, 609 (2021). However, "[w]hen faced with a trial court's admission of police-obtained statements, an appellate court should engage in a 'searching and critical' review of the record to ensure protection of a defendant's constitutional rights." State v. Hreha, 217 N.J. 368, 381-382 (2014) (quoting State v. Pickles, 46 N.J. 542, 577 (1966)).

It is axiomatic that "the protections provided by Miranda are only invoked when a person is both in custody and subjected to police interrogation." Hubbard, 222 N.J. at 266. "Essentially, 'Miranda turns on the potentially

[5] The judge mistakenly calculated the time between the crash and defendant's arrest as seven months. The accurate time frame of eighteen months only underscores her rationale.

inquisitorial nature of police questioning and the inherent psychological pressure on a suspect in custody.'" Ibid. (quoting State v. P.Z., 152 N.J. 86, 102 (1997)); see also Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) ("Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

The determination of whether a person is in custody is "fact-sensitive," requiring a "'case-by-case approach in which the totality of the circumstances must be examined.'" State v. O'Neal, 190 N.J. 601, 622 (2007) (quoting State v. Godfrey, 131 N.J. Super. 168, 175-77 (App. Div. 1974)); see also Stott, 171 N.J. at 364 ("Whether a suspect has been placed in custody is fact-sensitive and sometimes not easily discernible."). "[C]ustody in the Miranda sense does not necessitate a formal arrest, nor does it require physical restraint in a police station, nor the application of handcuffs, and may occur in a suspect's home or a public place other than a police station." Hubbard, 222 N.J. at 266 (alteration in original) (quoting P.Z., 152 N.J. at 103).

"The critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action based on the objective circumstances, including the time and place of the interrogation, the status of the interrogator, the status of the suspect, and other such factors." Id. at 266-67

(quoting P.Z., 152 N.J. at 103). However, "[i]f the questioning is simply part of an investigation and is not targeted at the individual because she or he is a suspect, the rights provided by Miranda are not implicated." Id. at 266 (alteration in original) (quoting State v. Timmendequas, 161 N.J. 515, 614-15 (1999)).

Defendant argues the Court's decision in Stott supports his argument that he was in custody when questioned by police. We disagree.

In Stott, the defendant was a long-term patient, who was involuntarily committed to a psychiatric hospital when police questioned him without administering Miranda warnings and searched his room without a warrant. 171 N.J. 348-49. The defendant and his roommate ingested narcotics before going to sleep; the roommate died from an overdose. Id. at 350. Relevant here, police told the defendant "'it was a voluntary interview'" and "he was 'free to leave.'" Id. at 351. The detectives transported the defendant to the police office located in the basement of the hospital for questioning. Id. at 352. At the conclusion of the statement, the defendant told the detectives, "I don't feel that I was ready to speak to police at all today but sometimes you gotta do what you gotta do." Ibid.

Analyzing whether the defendant was in custody for purposes of Miranda, the Court found

> the severe restrictions already imposed on [the] defendant, as an involuntarily committed patient, provide[d] the context within which to evaluate the officers' statements. Simply put, [the] defendant was unable to move freely within any area of [the psychiatric hospital]. Consequently, the phrase "you are free to leave," when stated to this particular defendant, [wa]s "not a talisman in whose presence the [Fifth] Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971).
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> [Id. at 367-68.]

The Court concluded the "defendant was in custody during his interviews for purposes of Miranda because the interrogations took place in a police-dominated atmosphere, there were objective indications that [the] defendant was a suspect, and his movements were circumscribed as a result of his commitment status." Id. at 368.

In contrast to the facts in Stott, the questioning in this case occurred in the less private and temporary confines of a hospital emergency room, not in a police office of a hospital. See State v. Choinacki, 324 N.J. Super. 19, 44 (App. Div. 1999) (holding "[a] hospital room generally lacks the 'compelling atmosphere inherent in the process of in-custody interrogation.'" Ibid. (quoting State v. Zucconi, 50 N.J. 361, 364 (1967)). At no time did defendant indicate that he did not wish to speak with any of the officers. Moreover, defendant was not handcuffed; nor does the record reveal that any officers were assigned to

watch him. Hutton told defendant he was not under arrest; would not be charged "today"; could stop answering his questions; and the officers would leave if he wanted them to. Based on the totality of these circumstances, we conclude the judge's decision is supported by the record evidence.

IV.

In point IB, defendant contends his statement was not voluntary in view of his medical condition. In its responding brief, the State noted that although the motion judge expressly decided defendant's consent was voluntarily given, "she did not make specific findings regarding the voluntariness of defendant's statement." That assessment requires the court to consider the totality of the circumstances surrounding a defendant's statement to police, including: "the defendant's age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved." Nyhammer, 197 N.J. at 402 (quoting State v. Presha, 163 N.J. 304, 313 (2000)).

Not unlike his argument contesting the consent searches, the crux of defendant's challenge to the voluntariness of his statement is that his medical condition rendered his statement involuntary. We reject defendant's contentions for the same reasons we rejected his similar argument under point II.

Moreover, we are not persuaded by defendant's argument that Hutton's questioning was "inherently coercive" under our decision in State v. Burney, 471 N.J. Super. 297, 305 (App. Div. 2022), rev'd on other grounds, ___ N.J. ___ (2023). In Burney, law enforcement officers responded to the hospital to speak with a robbery suspect after he failed to appear at the police station for his scheduled interview. Id. at 309-10. Police interviewed the defendant in the intensive care unit, where he was "preparing to receive kidney dialysis," and "was connected to an intravenous line . . . and an electrocardiogram." Id. at 310. The officers interviewed the defendant without properly issuing his Miranda rights. Id. at 312.

At the suppression hearing in Burney, the defendant's hospital records were admitted into evidence without an expert witness to explain their meaning. Id. at 316. The records indicated that the defendant was suffering from "toxic/metabolic derangement" during his interaction with police. Ibid. The motion judge acknowledged he did not "fully appreciate the meaning of . . . toxic/metabolic derangement" but "declined to find that [the] defendant 'was in distress.'" Id. at 316-17. We remanded for a hearing for the State "to present expert medical testimony concerning [the] defendant's condition at the time of the interrogation." Id. at 318.

In its responding brief, the State briefly distinguished the circumstances in Burney from the facts here. Defendant did not file a reply brief. Instead, he filed a supplemental letter pursuant to Rule 2:6-11(d) four days prior to oral argument before us addressing Burney. Notwithstanding this procedural irregularity, we have considered his contentions and conclude they lack merit.

Unlike Burney, the motion judge in the present case heard the testimony of defendant's treating physician. Dr. DeAngelo testified about defendant's diagnoses, the effects of his concussion, the medications prescribed and their potential side-effects – and that none were noted in his chart. Nor is there any indication in the record that the judge did not understand the medical terms adduced at the hearing. Expert testimony was not required to determine whether defendant "had the capacity to voluntarily answer the detective's questions," as defendant argues. Based on the totality of these circumstances, we conclude the judge's decision is supported by the record evidence.

V.

Lastly, we address defendant's two-fold sentencing argument. Defendant contends the judge double-counted the seriousness of the offense in her assessment of aggravating factors three (risk of reoffending) and nine (general and specific deterrence), N.J.S.A. 2C:44-1(a)(3) and (9). For the first time on

appeal, defendant claims that because his second DWI conviction mandated community service under N.J.S.A. 39:4-50(a)(2) (requiring a thirty-day period of community service for a second DWI violation), he was entitled to mitigating factor six, N.J.S.A. 2C:44-1(b)(6) (defendant "will participate in a program of community service"). Defendant also argues the judge failed to grant his request for a civil reservation.

Prior to sentencing, defendant sought several mitigating factors: two (defendant failed to consider his conduct would cause serious harm); seven (defendant's lack of criminal history or juvenile delinquency); eight (defendant is unlikely to repeat the conduct); nine (defendant's character and attitude indicate an unlikelihood of reoffending); and ten (defendant is "particularly likely to respond affirmatively to probationary treatment"). N.J.S.A. 2C:44-1(b)(2), (7), (8), (9), and (10). Defendant did not, however, argue for the application of mitigating factor six.

The judge was persuaded all but mitigating factor two applied. In her assessment of the aggravating factors, the judge recognized defendant had no prior criminal convictions and discounted his two prior disorderly persons convictions for marijuana in view of the recent changes in the law. The judge therefore declined to find aggravating factor six. However, the judge found

defendant "ha[d] a history of this type of offense, and this offense is very serious," under aggravating factor three, and there was "a very clear need to deter others from committing this type of offense," under aggravating factor nine. Finding the aggravating factors outweighed the mitigating factors, the judge sentenced defendant pursuant to the terms of the negotiated plea agreement.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 127 (2011). Ordinarily, we defer to the sentencing court's determination, State v. Trinidad, 241 N.J. 425, 453 (2020), and do not substitute our assessment of the aggravating and mitigating factors for that of the trial judge, Miller, 205 N.J. at 127. We must affirm the sentence, unless: "the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record." State v. Fuentes, 217 N.J. 57, 70 (2014). "Elements of a crime, including those that establish its grade, may not be used as aggravating factors for sentencing of that particular crime," State v. Lawless, 214 N.J. 594, 608 (2013), which "would result in impermissible double-counting." State v. A.T.C., 454 N.J. Super. 235, 254 (App. Div. 2018); see also State v. Yarbough, 100 N.J. 627, 640-41 (1985). We will remand for resentencing if the sentencing court considers an inappropriate

aggravating factor. Fuentes, 217 N.J. at 70.

Applying our deferential standard of review, we discern no basis to second guess the judge's assessment of aggravating and mitigating factors, which were based on the record evidence and fully considered the arguments of counsel. We therefore decline to disturb defendant's aggregate six-year prison sentence, which is imposed at the lowest end of the second-degree range, see N.J.S.A. 2C:43-6(a)(2), and is consistent with the terms of the negotiated plea agreement, see Fuentes, 217 N.J. at 70 (recognizing "[a] sentence imposed pursuant to a plea agreement is presumed to be reasonable"). In view of the circumstances of this offense and defendant's prior DWI conviction, the sentence does not shock the judicial conscience. See State v. Blackmon, 202 N.J. 283, 297 (2010).

Little need be said concerning defendant's argument that the judge failed to grant defendant's application for a civil reservation. As we have recognized, in the absence of a civil reservation, "[g]uilty pleas in criminal proceedings are admissible in related civil cases as statements of a party opponent under Rule 803(b)(1)." State v. Lavrik, 472 N.J. Super. 192, 205 (App. Div. 2022). Pursuant to Rule 3:9-2, the court may grant an application for a civil reservation upon a showing of "good cause." That standard may be satisfied where it is: "necessary to remove an obstacle to a defendant's pleading guilty to a criminal

charge"; or "the civil consequences of a plea may wreak devastating financial havoc on a defendant." State v. McIntyre-Caulfield, 455 N.J. Super. 1, 9 (App. Div. 2018). "Whether a civil reservation is supported by good cause is a legal question subject to de novo review." Lavrik, 472 N.J. Super. at 213.

The judge denied defendant's request in this case, recognizing his guilty plea was not premised on a civil reservation. Instead, the plea agreement reflects the State's opposition to defendant's application. Moreover, defendant failed to demonstrate he "was facing a 'precarious financial situation' absent a civil reservation." Id. at 215 (quoting McIntyre-Caulfield, 455 N.J. Super. at 10).

To the extent we have not specifically addressed a particular argument, it is because either our disposition makes it unnecessary, or the argument was without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed but remanded solely to correct the JOC by removing aggravating factor six, N.J.S.A. 2C:44-1(a)(6). Jurisdiction is not retained.