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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1099-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTOPHER TOLBERT,
a/k/a CHRISTOPHER A.
TOLBERT, JR.,

Defendant-Appellant.

Submitted December 5, 2022 — Decided December 12, 2022

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment Nos. 18-01-0034 and 19-01-0204, and Accusation No. 19-04-0708.

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

William E. Reynolds, Atlantic County Prosecutor, attorney for respondent (Debra B. Albuquerque, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Christopher Tolbert appeals from a July 18, 2018 order denying a motion to suppress evidence seized from a warrantless search and challenges his sentence. We affirm in all respects, but remand for entry of an amended judgment of conviction for the reasons expressed herein.

The underlying incident was described in detail in the trial judge's written opinion. At the suppression hearing, the State called Atlantic City Police Detective Ermino Marsini, who testified he and another officer were patrolling a high drug and crime area. Detectives observed defendant exit from the front passenger side of a vehicle "shoving a clear baggie containing multiple objects down his pants." A co-defendant exited the driver's side and shoved objects down his pants. When the men saw detectives pull up, they shut the vehicle doors and attempted to walk away.

As detectives approached the vehicle, they smelled a strong odor of burnt marijuana coming from the vehicle and on both men. Detectives placed the men into custody, and a search of defendant produced a clear plastic baggie suspected to be heroin and cocaine, and cash of varying denominations. Detectives also recovered suspected controlled dangerous substances (CDS) and currency from the co-defendant. Although defendant exited the passenger side, he had the

vehicle's key. Both men claimed they did not know who owned the vehicle. A search of the vehicle yielded a handgun in the glove compartment. No marijuana was recovered from the vehicle or either man.

Defendant's suppression motion argued there were no grounds for detectives to conduct an investigatory stop. He asserted the officers' claim they smelled marijuana from the vehicle was impossible because the windows and the doors were closed before the officers exited their vehicle. Defendant argued: neither he nor the co-defendant presented any threat or danger to the officers to warrant a search; officers did not report either man was intoxicated; and, even if officers smelled marijuana, it would not be a basis for search.

The judge found "Detective Marsini's testimony was reliable, complete and entirely credible[,] and conformed to the surveillance video entered into evidence and viewed by the [c]ourt." The judge noted the odor of burnt marijuana emanating from the vehicle and both men, whom detectives had just seen exiting the vehicle, created an inference there was marijuana in the vehicle and that it had been smoked recently.

The judge determined "[i]t is not unreasonable to conclude that the act of closing the car doors forced air from the interior of the vehicle's passenger compartment and into the immediate area surrounding the vehicle. The . . .

officers could very well have detected the stale air as they approached the vehicle." The judge noted the possession or use of marijuana in a vehicle was a per se violation of the law. He concluded "the smell of marijuana . . . from the vehicle and the defendants gave the detectives probable cause to arrest and then proceed to search . . . [d]efendant." Likewise, the odor emanating from the vehicle justified its search. The fact detectives recovered no marijuana did not affect the outcome because "the physical state of marijuana is destroyed when set ablaze."

After the judge denied the motion, defendant pled guilty to second-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1), and second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1). Defendant also pled guilty to one count of third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1), under a second indictment, and second-degree possession of a firearm while committing a drug crime, N.J.S.A. 2C:39-4.1(a), under a separate accusation. He agreed to testify against the co-defendant.

In addition to dismissing the remaining charges under the indictments, the State agreed to recommend a ten-year sentence with a five-year parole disqualifier on the second-degree gun charge to run concurrently with a five-

year flat sentence on the second-degree CDS possession offense. The State would also recommend an extended-term sentence of eight years with a four-year parole disqualifier on the drug charge in the second indictment, to run concurrent with a five-year sentence with a three-and-one-half year parole disqualifier on the drug charge, and concurrent with the sentences from the first indictment.

At sentencing, the judge noted defendant's: Age; admitted history of substance abuse and unemployment; and criminal history, including five felony convictions and a municipal conviction. Defendant's convictions were for aggravated assault, possession, and distribution of CDS, conspiracy to commit burglary, and weapons offenses. The judge found "[p]rior sanctions have included probation, [c]ounty jail and state prison terms. When afforded probation, . . . defendant has violated." The judge also recounted the facts related to the defendant's plea in the instant matter.

The trial judge found aggravating factors three, six, and nine, N.J.S.A. 2C:44-1(a)(3), (6), and (9), applied "and preponderate over the absence of mitigating factors." He denied defendant's request for credit for time served on electronic monitoring, noting he fled the state and had to be extradited, which not only affected his case, but "seriously affected the rights of his co-defendant

. . . and the timing of his case, which could have been tried months ago" Further, defendant "was not on strict home detention. He was allowed to go to work. He was allowed to go to church. . . . He was essentially at modified liberty." The judge sentenced defendant in accordance with the plea agreements.

Defendant raises the following points on appeal:

POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE POLICE LACKED PROBABLE CAUSE TO SEARCH THE CAR AND WERE NOT PERMITTED TO ARREST OR SEARCH THE DEFENDANT.

A. The Police Lacked Probable Cause That The Car Contained Contraband And That [Defendant] Had Committed An Offense.

B. Alternatively, If The Smell Of Marijuana Provided Probable Cause That Defendant Had Committed An Offense, That Offense Was Not Committed In The Officer's Presence And Therefore Could Not Support An Arrest, Let Alone A Custodial Arrest And Search Incident To That Arrest.

POINT II

THE TRIAL COURT'S FAILURES TO AWARD JAIL CREDITS AND MAKE APPROPRIATE FINDINGS OF AGGRAVATING AND MITIGATING FACTORS RENDER DEFENDANT'S SENTENCE EXCESSIVE AND REQUIRE A REMAND FOR RESENTENCING.

I.

In reviewing a motion to suppress, we defer to the factual and credibility findings of the trial court, "so long as those findings are supported by sufficient credible evidence in the record." State v. Coles, 218 N.J. 322, 342 (2014) (quoting State v. Hinton, 216 N.J. 211, 228 (2013)). Deference is afforded "because the 'findings of the trial judge . . . are substantially influenced by [their] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Reece, 222 N.J. 154, 166 (2015) (first alteration in original) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). "An appellate court should disregard those findings only when a trial court's findings of fact are clearly mistaken." State v. Hubbard, 222 N.J. 249, 262 (2015). The legal conclusions of the trial court "are reviewed de novo." Id. at 263.

With these guiding principles in mind, we reject defendant's arguments and affirm, substantially for the reasons set forth in the motion judge's opinion. A police officer may lawfully detain someone on less than probable cause to conduct an investigatory stop without a warrant. Terry v. Ohio, 392 U.S. 1, 21-22 (1968); State v. Stovall, 170 N.J. 346, 356 (2002). A warrantless investigative stop is valid when an "officer observes unusual conduct which

leads [the officer] reasonably to conclude in light of [their] experience that criminal activity may be afoot" Terry, 392 U.S. at 30. The stop must be "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. Pineiro, 181 N.J. 13, 20 (2004) (quoting State v. Nishina, 175 N.J. 502, 511 (2003)).

We "look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing" by the detained individual. United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting U.S. v. Cortez, 449 U.S. 411, 417 (1991)). Further, we "give weight to 'the officer's knowledge and experience' as well as 'rational inferences that could be drawn from the facts objectively and reasonably viewed in light of the officer's expertise.'" State v. Richards, 351 N.J. Super. 289, 299-300 (App. Div. 2002) (quoting State v. Arthur, 149 N.J. 1, 10 (1997)).

The trial judge's conclusion detectives had reasonable suspicion to stop defendant and the co-defendant is well-supported by the record. Detective Marsini, an experienced officer who the judge found credible, observed both men in a high drug and crime area stuffing items down their pants and smelled burnt marijuana, indicating its recent consumption inside a vehicle, which

defendant had the key to, but claimed not to know the owner. Defendant's actions taken together gave rise to the detective's reasonable suspicion of criminal activity. See State v. Lund, 119 N.J. 35, 48 (1990); Nishina, 175 N.J. at 511.

We reject defendant's argument Detective Marsini wrongfully searched him, which hinges on a finding the initial investigatory stop was unlawful. Having "form[ed] a reasonable and articulable suspicion to justify an investigatory stop," the pat-down was permissible. See State v. Gamble, 218 N.J. 412, 430 (2014) (citing Terry, 392 U.S. at 30-31). Reasonable suspicion ripened into probable cause when detectives smelled marijuana as they approached the men and the vehicle. "[T]he smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and . . . additional contraband might be present.'" State v. Walker, 213 N.J. 281, 290 (2013) (second alteration in original) (quoting Nishina, 175 N.J. at 516-17). Accordingly, officers may "conduct a warrantless search of the persons in the immediate area from where the smell has emanated." State v. Vanderveer, 285 N.J. Super. 475, 481 (App. Div. 1995).

Detective Marsini had probable cause to search defendant based on the odor of marijuana coming from both men and the car, because he had probable

cause to believe defendant was in possession of marijuana, in violation of N.J.S.A. 2C:35-10(a)(4)(a), and that other contraband might be present. See Walker, 213 N.J. at 290. The judge did not err in finding detectives conducted a valid search.

II.

We employ a deferential standard when reviewing a trial court's sentencing decision. State v. Grate, 220 N.J. 317, 337 (2015); State v. Fuentes, 217 N.J. 57, 70 (2014). "[A] trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." State v. O'Donnell, 117 N.J. 210, 215 (1989). "The court must qualitatively assess" and assign each factor "its appropriate weight." State v. Case, 220 N.J. 49, 65 (2014).

Aggravating factor three permits the sentencing court to consider "[t]he risk that the defendant will commit another offense[.]" N.J.S.A. 2C:44-1(a)(3). A court's predictive assessment of recidivism should "involve determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history." State v. Thomas, 188 N.J. 137, 153 (2006). Here, the judge did more than reference

defendant's criminal history. He discussed how prior sanctions did not work. Moreover, among defendant's prior convictions were CDS and weapons offenses, like the ones he pled guilty to here. The risk of re-offense was obvious.

Further, the judge reviewed defendant's prior offenses, which satisfied the finding of aggravating factor six, N.J.S.A. 2C:44-1(a)(6), applied. Aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), the need to deter defendant and others from violating the law, was also evident from the judge's finding "[t]his conviction stems from street-level drug activity with . . . defendant found in a high-crime area seeking to sell CDS, and when arrested[,] a handgun was found in the car which he occupied."

Rule 3:21-8 permits a court to award jail credit for "time served in custody in jail or in a state hospital between arrest and the imposition of sentence." We have rejected the assertion a defendant subject to home confinement on electronic monitoring and a curfew meets the criterion for jail credit. State v. Mastapeter, 290 N.J. Super. 56, 62-63 (App. Div. 1996). For these reasons, the trial judge did not err when he declined to grant defendant jail credit for home detention. We affirm for the reasons expressed by the judge at sentencing.

Finally, the parties agree the judgment of conviction contains an error, namely, the imposition of a five-year parole disqualifier on the second-degree

CDS possession offense in the first indictment, which the judge did not pronounce. Where there is "a discrepancy between the court's oral pronouncement of sentence and the . . . judgment of conviction, the sentencing transcript controls[,] and a corrective judgment is to be entered." State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016). For these reasons, we remand for correction of the judgment of conviction to conform with the sentence imposed.

Affirmed, and remanded for entry of an amended judgment.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION