

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3350-05T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC TORRES,

Defendant-Appellant.

Submitted June 4, 2007 - Decided June 18, 2007

Before Judges Lintner and Seltzer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, 05-02-0228.

Yvonne Smith Segars, Public Defender, attorney for appellant (Charles H. Landesman, Designated Counsel, on the brief).

Bruce J. Kaplan, Middlesex County Prosecutor, attorney for respondent (Simon Louis Rosenbach, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

On February 10, 2005, a Middlesex County Grand Jury returned Indictment No. 05-02-00226 and Indictment No. 05-02-00228 against defendant, Eric Torres. Indictment No. 05-02-

00226 charged defendant with third-degree burglary at 306 Washington Street, Perth Amboy, N.J.S.A. 2C:18-2 (Count One), and third-degree theft by unlawful taking, N.J.S.A. 2C:20-3 (Count Two). Indictment No. 05-02-00228 charged defendant with third-degree burglary at 212 Broad Street, Perth Amboy, N.J.S.A. 2C:18-2 (Count One), and fourth-degree theft by unlawful taking, N.J.S.A. 2C:20-3 (Count Two).

A Miranda¹ hearing was held on June 7 and 8, 2005, and defendant's motion to exclude statements was denied. The two indictments were consolidated for trial. On August 24, 2005, a jury found defendant not guilty of the charges in Indictment No. 05-02-00226, but guilty on both counts in Indictment No. 05-02-00228. On October 21, 2005, the State's motion for an extended term was granted and the trial judge imposed an eight-year term on the burglary conviction and a concurrent thirty-day term on the theft conviction. Defendant appeals and we affirm the judgment of conviction but remand for re-sentencing.

On December 21, 2004, pursuant to a tip received from an informant concerning an investigation of burglaries in Perth Amboy, including one at the home of Luis Flores at 306 Washington Street, Perth Amboy Police Detectives Steven Killane

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and Kevin Kenny went to defendant's place of employment. They asked defendant to go to police headquarters to answer questions about several burglaries. Killane testified that he "explained to [defendant] it was voluntar[y] and that he didn't have to come if he didn't wish, but he did." According to Killane, defendant was not under arrest, he was not handcuffed, and he was advised that "[h]e was free to leave whenever he wanted to."

At headquarters, defendant was escorted to an interview room. Detective Killane described the interview room as an eight by ten office with two doors, one leading to the hallway, and the other leading to the detective bureau. Both doors were closed but unlocked at the time. Killane advised defendant of his Miranda warnings at approximately 1:50 p.m. Killane read from a standard Miranda form, asking defendant "after each individual warning whether or not [he understood] that warning." After each, defendant "indicated yes, that he did understand that." Defendant then signed the form, which was also signed and dated by Detective Killane.

Killane testified that, after defendant waived his Miranda rights, he conducted a pre-interview, asking defendant about his involvement in any burglaries. Killane discussed defendant's use of heroin and told defendant that he "knew that committing burglaries was a way to get money to buy heroin." Defendant

denied his involvement in any burglaries. Killane testified that during the pre-interview, defendant did not appear to be under the influence of any alcoholic beverage or drugs. The pre-interview lasted approximately one hour, after which Killane "offered a computer voice stress analyzer examination to prove the fact that [defendant had] no link to any burglaries."

At a Miranda hearing, Detective Killane described the computer voice stress analyzer (CVSA) as

a truth verification instrument. Our body does certain things in the parasympathetic nervous system that causes a [change in the] modulation in our voice when we are deceptive, this instrument records . . . answers to questions and it charts patterns of the modulation in your voice at a calm state showing the differences between non stress answers and stressed answers, showing deception and non deception.

Killane explained that he attended training and was certified as a CVSA examiner by the National Institute on Truth Verification. The CVSA examination consisted of a pre-interview, the actual testing, and a post-interview. Before the examination, Killane gave defendant a consent form, which defendant read and signed at approximately 3:15 p.m. Killane testified that "[b]uilt into that standard form is Miranda, so for a second time within a two hour period [defendant] was Mirandized." Killane asked defendant a series of nine questions. "[F]ive questions were irrelevant, they were easy questions to answer truthfully. Two

questions were control questions in which [Killane asked defendant] to actually lie to [him], to pattern a deceptive answer; and then there were two relevant questions asked of [defendant]."

At the completion of the examination, Killane downloaded the charts and emailed them to the 2200 examiners across the country for a second opinion or "code call." Within approximately ten minutes, Killane received two code calls, which concurred with his reading of the charts that the results indicated deception. Killane confronted defendant with the results of the examination and "[w]ith that [defendant] confessed to the burglary on 306 Washington Street." Defendant told Killane

he knew the guy owed him money. He went to his house. He wasn't there so he went around back and he entered, went right into his bedroom which he knew was the front and he took a laptop computer and a digital camera and that he sold it to a guy named Mex on Smith Street.

Defendant's recorded statement was played for the jury at trial.

Defendant was given a McDonald's meal and he told Killane that he had also committed a burglary recently on Broad Street, although he could not remember the exact location. Killane could not verify that any burglaries had been reported in that area, so, at approximately 5:15 p.m., he and Lieutenant Teranova

took defendant to Broad Street where defendant indicated 212 Broad Street as the residence he burglarized. According to Killane, defendant stated that he broke into the home on the morning of December 20 and "[h]e said he went in. He said there was cardboard in the front door. He went in and he took some XBOX games, some sports games and he said he also sold those."

Killane and defendant then went back to police headquarters where Killane took defendant's formal statement regarding the 306 Washington Street burglary. Defendant was processed for that burglary and placed in a cell overnight. At approximately 9:30 a.m. the following day, December 22, 2004, Killane advised defendant once again of his Miranda rights, which defendant acknowledged. At that time, defendant gave a formal statement regarding the 212 Broad Street burglary. A tape of that statement was also played for the jury.

That same day, Officer Steven Petrosino, a Perth Amboy patrol officer, went to 212 Broad Street and spoke with the homeowner, Daniel Murillo-Alvarado, regarding the burglary. Murillo-Alvarado testified at trial that at approximately 3:00 p.m. on December 20, 2004, he returned home with his family and discovered that five X-Box video games valued at twenty-five dollars each, jewelry valued at \$400, and twenty dollars in cash were missing from his home. After unsuccessfully searching for

the items, Murillo-Alvarado concluded that he had been robbed. Petrosino found no signs of forced entry. There was no fingerprint or DNA evidence or other physical evidence linking defendant to the burglary at 212 Broad Street.

Defendant testified that when Killane and Kenny first approached him, Killane "mentioned a burglary on 314 Wagner Avenue in Perth Amboy, New Jersey." According to defendant, Killane and Kenny told him he "had to take a ride with them to the police station to be questioned about . . . the investigation they had going which was the 314 Wagner Avenue burglary." Defendant claimed that he felt as though he was not free to leave and that if he refused there would be "repercussions."

Defendant testified that when he was being interviewed at police headquarters and he denied involvement in any burglary, Killane told him that an informant had already implicated him and that he could "charge [defendant] with the last 21 burglaries that happened in the last two months." Defendant claimed that Killane told him that if he confessed and cooperated he would not go to jail and Killane would make sure that defendant would be with his family for the holidays. According to defendant, he confessed to the burglary at 306

Washington Street because he was addicted to heroin and had been using it the day he spoke with Killane. Defendant stated:

[W]hen I got to the police station . . . I was in a police dominated atmosphere, my high went away. It didn't go away but . . . the only thing I was really thinking about was . . . I'm going to be withdrawing . . . if I go to jail . . . I'm not going to get my fix. I'm going to go through two or three weeks of pain and torture and so I was willing to say whatever it was that they wanted to hear in order for me . . . to keep myself from going through the withdrawals.

Defendant explained that he looked at reports of several burglaries with Killane and since he had learned the most about the 306 Washington Street burglary, he decided to admit to it. At trial, defendant asserted that he was lying when he told Killane that he had committed the burglary. Defendant also gave the following testimony when asked why he confessed to the 212 Broad Street burglary:

Well, being that I work at a barber shop and that the majority of what happens in a barber shop is gossip . . . you hear this and you hear that, there's all type[s] of people that come to the barber shop We get, you know, drug dealers, whatever the case [may be]. And I heard through a source, that, you know, someone had broken into the downstairs apartment under [a heroin dealer's] house. Because she had had an argument with him with the downstairs neighbor and, you know, she sent someone to break into the house.

. . . .
. . . [T]he first burglary that I had admitted to seemed like that that wasn't

enough, they had promised me my freedom. . .
. So the next thing that came to my head
was what I had heard at the job and that's
what I told them. I had no knowledge if the
burglary had been reported or not. I just
knew that, you know, someone had did it and
I, you know, I told them, well, maybe if I
throw that at him and throw that on top of
the other one maybe they'll consider letting
me loose.

On appeal, defendant raises the following points:

POINT I

DEFENDANT'S CONFESSION SHOULD HAVE BEEN
SUPPRESSED BECAUSE THE DEFENDANT DID NOT
MAKE A KNOWING, INTELLIGENT AND VOLUNTARY
WAIVER OF HIS RIGHT TO REMAIN SILENT.

POINT II

THE TRIAL COURT ERRED WHEN IT IMPOSED AN
EXTENDED TERM SENTENCE WITHOUT AFFORDING
DEFENDANT A HEARING.

POINT III

THE MATTER SHOULD BE REMANDED FOR A NEW
SENTENCING HEARING PURSUANT TO STATE V.
PIERCE, 188 N.J. 155 (2006).

Defendant argues that he did not make a knowing, intelligent,
and voluntary waiver because: (1) the police did not have
probable cause to arrest him at his place of employment; (2) he
believed when he was initially taken to headquarters that he was
under arrest and not free to leave; (3) he was a known heroin
user and under the influence when he was questioned; (4) he
"succumbed to a truth verification examination," a test not
shown to be scientifically reliable, which the police used to
"overpower[] [him] by telling him the test administered showed

that he was untruthful," thus causing him to confess; and (5) the atmosphere was coercive because he was threatened with being charged with several burglaries and he was promised that he would be home for the holidays if he confessed.

In deciding to admit defendant's confessions, the motion judge found Detective Killane's testimony "to be credible, very forthright, [and] responsive." On the other hand, the judge found defendant's testimony to be incredible and self-serving. He then found that defendant was not under arrest at the time Detectives Killane and Kenny went to his work and asked him to come to police headquarters, noting that "if he were being arrested it's . . . standard operating procedure for the police to handcuff someone who is going in a police car who is under arrest. So, he's not handcuffed, he's not under arrest."

Concerning the CVSA examination, the motion judge concluded that it was "an investigative tool," even if it may not have been scientifically reliable. The trial court stated that

it was a little tricky what the police used, but I don't find it to be unduly coercive in any way. It was [an] investigative tool. [Detective Killane] did have the training. He did have the certification. It was held at a police academy in New Jersey, and he did have the test results checked out on the e-mail But, it's an investigative tool, nothing more. Apparently, it convinced [defendant] that he was deceptive and, therefore, then, he gave a statement. So, I don't find that to be a problem.

The judge found that when defendant was first given his Miranda warnings, he understood them and "once he agreed to talk to the police that was, in effect, a waiver . . . and all the warnings were given according to Miranda . . . and he indicated he understood his rights, he answered the questions, they were given before he was even arrested, the first time." The motion judge also noted that defendant was Mirandized once again the next day after he had cooperated with the police before he gave his second statement admitting to the burglary at 212 Broad Street. "Looking at the totality of the circumstances," the judge concluded that defendant "waived his constitutional rights; that the statements given were voluntary, they were knowing statements, knowing intelligent waiver."

"The findings of a trial judge will not be disturbed if they could reasonably have been reached on sufficient credible evidence in the record" and are valid legal conclusions. State v. Godfrey, 131 N.J. Super. 168, 174 (1974) (citing State v. Johnson, 42 N.J. 146, 162 (1964)), aff'd o.b., 67 N.J. 267 (1975); see also State v. Alvarez, 238 N.J. Super. 560, 564 (App. Div. 1990). An appellate court should grant deference to findings "influenced by the [trial] judge's opportunity to hear and see the witnesses and to have the 'feel' of the case." Alvarez, supra, 238 N.J. Super. at 564 (quoting Johnson, supra,

42 N.J. at 161). The motion judge credited the police and found defendant's contrary version respecting his being under arrest, under the influence of heroin, and threatened by the police not credible. The motion judge's factual findings were reasonably reached on sufficient credible evidence in the record. See Johnson, supra, 42 N.J. at 162; see also State v. Locurto, 157 N.J. 463, 474 (1999). His credibility findings were based, in part, on defendant's demeanor as a witness and are entitled to our deference. See Locurto, supra, 157 N.J. at 474-75.

Defendant's assertion that the CVSA examination was deceptive and coercive is likewise unavailing. The use of police deception or trickery does not render a confession involuntary per se; rather, it is the use of fabricated evidence to induce a confession that renders the confession unconstitutional. See State v. Patton, 362 N.J. Super. 16, 31-49 (App. Div.), certif. denied, 178 N.J. 35 (2003). In State v. Morton, 155 N.J. 383, 450 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001), our Supreme Court held that

subjecting defendant to polygraph tests did not impugn the voluntariness of his confession. The interrogating officers advised defendant of his right to refuse to take the test, to discontinue the test, and to refuse to answer any question during the test. See United States v. Little Bear, 583 F.2d 411, 414 (8th Cir. 1978). Immediately

before testing defendant, the police reissued Miranda warnings to him, and he signed a polygraph waiver form. Because the officers adequately apprised defendant of his rights regarding the polygraph tests, the tests did not render his confession involuntary or coerced. See [State v. Gerald, 113 N.J. 40, 120-21 (1988)] (holding that a confession was voluntary although it was given after the defendant was informed that he failed a polygraph test).

See also State v. Timmendequas, 161 N.J. 515, 609, 617-18 (1999) (defendant's statements were voluntary even though police confronted him with results of polygraph test showing that he had failed), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed. 2d 89 (2001).

The CVSA examination was used solely as an investigative tool by the police and the State made no attempt to admit the results at trial. Defendant signed a consent form to take the CVSA examination and acknowledged that he understood the form. Defendant was asked whether he had any questions about the examination and stated that he did not. Additionally, the results of the examination were not fabricated, instead, they were administered by a trained and certified examiner (Killane) who compared his conclusions with those of two other trained and certified examiners. Thus, under the totality of the circumstances, defendant's decision to make the confessions following the CVSA examination was voluntary and not coerced.

Based upon our review of the entire record, we perceive no sound basis to disturb the judge's decision to admit defendant's confessions.

The trial judge granted the State's motion for an extended term based upon defendant's prior record as a persistent offender under N.J.S.A. 2C:44-3a. Although not conceded by the State, the record reveals that the judge mistakenly read the word "shall" as used in N.J.S.A. 2C:43-7a(4), which fixes the extended term at between "five and 10 years" in cases of third-degree crimes, as requiring him to impose a mandatory extended term and thus did not require the State to establish its grounds by a preponderance of the evidence at a hearing, as required by N.J.S.A. 2C:44-3. As a persistent offender, under N.J.S.A. 2C:44-3a, the sentencing court is granted the "discretion to impose an extended sentence when the statutory prerequisites for an extended-term sentence are present." State v. Pierce, 188 N.J. 155, 161 (2006). As articulated by the Court in State v. Dunbar, 108 N.J. 80, 89 (1987),

[p]ractical application of the Code's extended sentencing scheme . . . involves a multi-step process. First, the sentencing court must determine whether the minimum statutory predicates for subjecting the defendant to an extended term have been met. Second, the court must determine whether to impose an extended sentence. Third, it must weigh the aggravating and mitigating circumstances to determine the base term of

the extended sentence. Finally, it must determine whether to impose a period of parole ineligibility.

Once the sentencing court has made the first determination that the defendant is eligible for extended sentencing, the court is not able to look to the Code for an explicit standard by which it should exercise its discretion to impose the extended sentence. (emphasis added).

The State, however, concedes that a remand is necessary under Pierce. The Court in Pierce, supra, 188 N.J. at 166-68, observed that, prior to Blakely² and Natale II,³ it was necessary for a sentencing court to determine if an extended term was necessary in order to protect the public under Dunbar, supra, 108 N.J. at 80 and State v. Pennington, 154 N.J. 344 (1998). Recognizing that the determination of the "need to protect the public" represented "a finding beyond the pure fact of the prior conviction," the Court held that a sentencing court is now required to determine first whether a defendant's prior record qualifies that defendant for a discretionary extended term as a persistent offender. Pierce, supra, 188 N.J. at 168-69.

In light of the new "expanded range of sentences available from the bottom of the ordinary-term to the top of the extended-

² Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

³ State v. Natale (Natale II), 184 N.J. 458 (2005).

whether to impose a discretionary extended term. In so doing, the court should consider, both the need to protect the public and the mitigating factors as they apply to a sentence beginning at the bottom of the range of the ordinary term (three years) and extending, in this case, to the eight-year term previously imposed.

We remand for resentencing in accordance with this opinion. In all other respects, the judgment of conviction is affirmed. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION