State v. Tyler

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Submitted October 27, 2010

Before Judges Cuff and Fisher.

After closely examining the issues raised in this appeal, we reject defendant's arguments that the trial judge erroneously instructed the jury on flight and on defendant's decision not to testify and that the sentence imposed was excessive, and affirm.

Defendant was indicted and charged with first-degree murder, N.J.S.A. 2C:11-3(a), as well as third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d), arising from the stabbing death of Gerald Cooper.

The jury heard evidence that Ashley Alston was in a relationship with defendant and also had a prior relationship with Gerald Cooper. Gerald was frequently incarcerated during the term of their relationship, but Ashley continued to communicate with him by telephone or by letter. She ended her relationship with Gerald upon learning he was also receiving calls and letters from another woman. Ashley, however, did not tell Gerald the relationship had ended; she simply stopped communicating with him.

A few days after being released from an eighteen-month prison term, Gerald telephone Ashley at her Passaic residence at or about 3:30 a.m. or 4:00 a.m. on March 29, 2005. During this call, Gerald professed his love for Ashley. She responded that she loved him too but that they could no longer be together because she was dating defendant, who was asleep near Ashley when she received this and other calls from Gerald that morning. When Gerald began yelling, Ashley disconnected the call. She also hung up when Gerald called back several times, and she eventually turned off the ringer on her phone.

A short time later, Ashley heard someone repeatedly call her name from outside the residence, and then heard the sound of things thrown against the window. Ashley got out of bed, went to the window, and saw Gerald outside. She told Gerald to leave, but he refused and said he would kick in the window unless she came outside. During this discussion, defendant woke up and Ashley went outside to see if she could "get rid of" Gerald. Ashley approached Gerald outside, and told him to

leave; Gerald "immediately... punched [her] in the face." Gerald continued to punch Ashley, and, when she tried to fight back, Gerald threw her against a parked car.

In a minute or two, defendant arrived outside and began trading punches with Gerald. Ashley testified that at some point during this fight, she saw defendant pick up a knife and stab Gerald in the left shoulder area. That, however, did not stop the fight, and Gerald continued throwing punches. At some point, Ashley's mother exited the building and yelled for the two to stop; her efforts only caused defendant and Gerald to run away from the immediate area.

Within a block's distance, Gerald fell to the ground. Defendant said he was sorry as blood pooled about Gerald.

Someone had called a taxi, and, at Ashley's urging, defendant entered the taxi and was driven away to Paterson.

The medical examiner testified that Gerald sustained fourteen knife wounds. A wound to Gerald's left shoulder severed the carotid artery and was the cause of death, which was pronounced that morning at 6:00 a.m.

Defendant was arrested in Paterson and indicted. At the conclusion of a trial, the jury acquitted defendant of murder, but found him guilty of aggravated manslaughter, N.J.S.A. 2C:11-4(a), as well as the charged weapons offenses. The trial judge merged the weapons convictions into the manslaughter conviction for sentencing purposes and imposed the maximum prison term possible -- a thirty-year term subject to an eighty-five percent period of parole ineligibility. See N.J.S.A. 2C:11-4(c) (declaring aggravated manslaughter a crime of the first degree, which, "upon conviction thereof[,] a person may... be sentenced to an ordinary term of imprisonment between 10 and 30 years").

In appealing, defendant argues:

I. TWO JURY INSTRUCTIONS WERE FATALLY FLAWED: THE FLIGHT INSTRUCTION WAS IMPROPER AND INCOMPLETE; AND THE INSTRUCTION ON DEFENDANT'S RIGHT TO REMAIN SILENT SUGGESTED THAT HE HAD AN OBLIGATION TO TESTIFY. AS A RESULT, DEFENDANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS AND TO REMAIN SILENT WERE VIOLATED.

A. The Flight Charge Should Not Have Been Given. Moreover, The Charge Provided By The Court Was Inadequate Because It Failed To Include For The Jury's Consideration An Alternative Explanation For Defendant's Departure.

B. The Instruction On Defendant's Exercise Of His Right To Remain Silent Suggested That He Had

An Obligation To Testify And Thereby Violated His State And Federal Rights To Remain Silent.

C. Conclusion.

II. IN IMPOSING THE 30-YEAR SENTENCE WITH 85% PAROLE DISQUALIFIER, THE COURT IMPROPERLY CONSIDERED INAPPLICABLE AGGRAVATING FACTORS, FAILED TO CONSIDER APPLICABLE MITIGATING FACTORS, AND IMPROPERLY USED THE MAXIMUM SENTENCE TO "CORRECT" WHAT IT CONSIDERED AN INCORRECT JURY FINDING.

I.

In Point I, defendant argued that the judge's jury instructions were erroneous regarding both the issue of flight and defendant's choice not to testify. We reject both these arguments.

A.

Defendant contends that a flight charge should not have been given but, if ultimately held appropriate, the content of the charge was erroneous and prejudicial because it should have been tailored to suggest an alternative to the State's theory. Because we examine instructions on the whole and not each portion in isolation, State v. Adams, 194 N.J. 186, 207 (2008), we consider the judge's entire charge on flight, which was as follows:

The question of whether the defendant fled after the commission of the crime is another question of fact for your determination. Mere departure from a place where a crime has been committed does not constitute flight. If you find that the defendant, fearing an accusation or arrest would be made against him on the charge involved in the indictment, took refuge and flight for the purpose of evading the accusation or arrest on that charge, then you may consider such flight in connection with all the other evidence in the case as an indication of proof of consciousness of guilt.

Flight may only be considered as evidence of consciousness of guilt if you should determine that the defendant's purpose in leaving was to evade accusation or arrest for the offense charged in the indictment.

If, after consideration of all the evidence, you find that the defendant, fearing that an accusation or arrest would be made against him on the charge involved in the indictment, took refuge and flight for the purpose of evading the accusation or arrest, then you may consider such flight in connection with all the other evidence in the case as an indication or proof of a consciousness of guilt.

It is for you, as judges of the facts, to decide whether or not evidence of flight shows a consciousness of guilt, and the weight to be given such evidence in light of all the other evidence in the case.

The trial judge gave this instruction on flight again when, during deliberations, the jury asked for further guidance.

Defendant did not object to the original instructions or their repetition during jury deliberations. Now, he contends for the first time that the judge should never have given a flight instruction. We reject this.

As a general matter, flight may be admitted "as evidence of consciousness of guilt and, therefore, of guilt." State v. Ingram, 196 N.J. 23, 46 (2008). However, "mere departure from the scene of the crime does not constitute flight," State v. Wilson, 57 N.J. 39, 48 (1970), and not every instance in which an accused departs from a crime scene or supposed crime scene "warrant[s] an inference of guilt," State v. Sullivan, 43 N.J. 209, 238 (1964), cert. denied, 382 U.S. 990, 86 S.Ct. 564, 15 L.Ed. 2d 477 (1966). For departure "to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt." Ingram, supra, 196 N.J. at 46; State v. Mann, 132 N.J. 410, 418-19 (1993); Sullivan, supra, 43 N.J. at 238--39. Accordingly, an adequate jury instruction on flight would require the jury to find not only a departure, but also "a motive for the departure, such as an attempt to avoid arrest or prosecution, that would turn the departure into flight." Mann, supra, 132 N.J. at 421. Here, evidence in the record fully supported a finding that there was both a departure and a motive for the departure that warranted the judge's charge, which was entirely consistent with the legal principles we have described.

Defendant, however, also argues that the flight charge should have described for the jury an alternative explanation for his departure. Without question there may be reasons why an innocent person might leave a crime scene or supposed crime scene, and the Supreme Court of the United States has "consistently doubted" the probative value of flight alone as evidence of consciousness of guilt. Wong Sun v. United States, 371 U.S. 471, 483 n.10, 83 S.Ct. 407, 415 n.10, 9 L.Ed. 2d 441, 452 n.10 (1963).[1] Certainly, it would be appropriate for a judge to advise a jury of an alternative explanation for an accused's departure from the scene if the evidence supported it or if defendant requested it. Mann, supra, 132 N.J. at 421 (holding that "[i]f a defendant offers an explanation for departure, the judge should instruct the jury that if it finds the defendant's explanation credible, it should not draw any inference of the defendant's consciousness of guilt from the defendant's departure").

Defendant argues that the evidence supported a finding that he left the place where Gerald lay bleeding to death only at Ashley's urging and not because he believed he acted in any way other than in his own or Ashley's defense from the combative Gerald. But defendant did not argue this at trial; although Ashley's testimony could have been viewed as defendant now argues, his counsel's summation did not incorporate such a theory. That fact, together with defendant's failure to object to the judge's instructions on flight, demonstrates that the judge's failure to sua sponte advise the jury of a possible explanation for defendant's departure, which defendant never urged, was not clearly

capable of producing an unjust result. State v. Nero, 195 N.J. 397, 407 (2008); State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S.Ct. 2254, 26 L.Ed. 2d 797 (1970).

B.

Defendant also argues that the judge erroneously instructed the jury about defendant's election not to testify.

Specifically, defendant focuses on the last sentence of the charge on this point, where the judge advised the jury that defendant "is presumed innocent even if he chooses not to testify" (emphasis added). Defendant did not object at trial to this choice of language; indeed the judge's charge on this point adopted the language contained in the Model Jury Charges in effect at the time. Instead, defendant seizes on the fact that the Model Jury Charges have since been revised to substitute "whether or not he chose to testify" for "even if he chooses not to testify." Certainly, the language of the current Model Jury Charge possesses a more neutral connotation, but we do not find that the use of the former version -- especially when viewing this portion of the charge on the whole, Adams, supra, 194 N.J. at 207[2] -- was capable of producing an unjust result. Nero, supra, 195 N.J. at 407. In considering defendant's argument on this point, we need state nothing more than our agreement with the thoughtful resolution of the same issue in State v. Miller, 411 N.J. Super. 521, 533 (App. Div.), certif. granted, 202 N.J. 44 (2010), that a jury hearing the same charge given here "could not be confused by use of the word 'even' and led to conclude that defendant had an obligation to testify."[3]

For these reasons, we find no error in the proceedings that resulted in defendant's conviction.

II.

Defendant also argues the sentence was excessive because, in his view, the trial judge misconstrued the weight and applicability of the aggravating and mitigating factors and --in indicating at sentencing his belief that the jury gave defendant a "break" by finding him not guilty of murder -- the judge applied his own personal view of the evidence rather than the jury's actual verdict. We reject these arguments.

In examining a sentence, we "exercise a vigorous and close review for abuses of discretion by the trial courts," State v. Cassady, 198 N.J. 165, 180 (2009), and "assess the aggravating and mitigating factors to determine whether they 'were based upon competent credible evidence in the record,'" State v. Bieniek, 200 N.J. 601, 608 (2010) (quoting State v. Roth, 95 N.J. 334, 364 (1984)), but we will not "substitute [our] judgment for that of the trial court," Cassady, supra, 198 N.J. at 180, which we will affirm unless "shock[ing] [to] the judicial conscience," id. at 181. Even when a sentencing judge may not have clearly expressed his application of proper sentencing principles, we are obligated to read the judge's comments in their "totality," Bieniek, supra, 200 N.J. at 611, in determining whether the judge considered all the aggravating and mitigating factors urged by the parties, id. at 609. As long as

we can "readily deduce" or "discern" the judge's findings on each factor, ibid., we are forbidden to remand even for a further explanation of the judge's determinations, id. at 611-12.

With this standard in mind, we recognize that the trial judge discussed and made findings on each aggravating and mitigating factor urged by the parties in their arguments at sentencing. In imposing a thirty-year prison term, the judge found applicable five aggravating factors. Aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3), (6), (9), were supported by evidence of defendant's prior criminal history.

Aggravating factor two, N.J.S.A. 2C:44-1(a)(2) ("the gravity and seriousness of the harm inflicted on the victim including whether the victim was vulnerable"), was supported by evidence the jury obviously credited -- that Gerald was vulnerable to defendant's attack because he was unarmed and defendant was armed with a knife. See State v. Kruse, 105 N.J. 354, 362--63 (1987) (recognizing "the use of a weapon against an unarmed person" as an aggravating factor). And aggravating factor one, N.J.S.A. 2C:44-1(a)(1) ("the nature and circumstances of the offense and the role of the actor therein including if committed in a heinous, cruel or depraved manner"), was supported by evidence that Gerald suffered not one or two but fourteen knife wounds, including numerous wounds to the face and one that severed his carotid artery.

The judge addressed and rejected each of the mitigating factors urged by defendant. Defendant's arguments on appeal with regard to those determinations are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We lastly mention defendant's argument that the judge may have sentenced him based upon a view of the evidence that was at odds with the jury's verdict. See State v. Sainz, 107 N.J. 283, 293 (1987). That is, defendant contends that in imposing a lengthy term of incarceration the judge sought to punish defendant for the crime he believed defendant committed rather than the crime for which he was convicted. To support this contention, defendant relies upon the judge's following comments:

This was what... causes homicides on the streets and it's been since time [im]memorial, this concept of disrespect. Somebody disrespects somebody on the street, it amazes this [c]court how many people get killed because somebody said something disrespectful.

There's a lot of pride. There's a lot of street respect. There's a lot of credibility that people have to have on the street. They can't allow being disrespected and that's what this was about. This was about disrespect, it wasn't about saving [Ashley] from being beaten. That might have been part of it, but that was why [defendant] went out there with that knife.

So the [c]court has weighed the aggravating and mitigating factors. The [c]court finds that the aggravating factors very substantially outweigh the mitigating factors.

The jury quite honestly gave Mr. Tyler the biggest break that it could give him. The biggest break was if they found him guilty of murder, he was looking at life with 30 years before parole ineligibility. [Emphasis added.]

We do not view these comments, in the overall context of the judge's explanation for the sentence imposed, as representative of a desire to impose a sentence for a more serious crime than the jury found defendant to have committed.

Rather, the judge's comments represented little more than his further explanation for his application of the aggravating factors found present here. We cannot extrapolate from this explanation support for defendant's argument that the judge was actually meting out punishment for an offense upon which defendant was acquitted.

The judge imposed the maximum term for aggravated manslaughter, N.J.S.A. 2C:11-4(c), based upon the presence of numerous aggravating factors -- all supported by evidence in the record -- and the absence of any mitigating factors. Because the judge adhered to the sentencing principles set forth by the Legislature, his exercise of discretion is "immune from second-guessing" by this court and must be affirmed. Bieniek, supra, 200 N.J. at 612.

Affirmed.

1. Wong Sun observed that at least as far back as Alberty v. United States, 162 U.S. 499, 511, 16 S.Ct. 864, 868, 40 L.Ed. 1051, 1056 (1896), the Court had rejected as "an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'" 371 U.S. at 483 n.10, 83 S.Ct. at 415 n.10, 9 L.Ed. 2d at 453 n.10.

2. For the sake of completeness, the judge's entire instructions on defendant's decision not to testify is as follows, with the phrase in question emphasized: Now as you know, Tory Tyler elected not to testify at trial. It is his constitutional right to remain silent. You must not consider for any purpose or in any manner in arriving at your verdict the fact that Tory Tyler did not testify. That fact should not enter into your deliberations or discussions in [any] manner at any time. Tory Tyler is entitled to have the jury consider all evidence presented at trial. He is presumed innocent even if he chooses not to testify.

3. As indicated, the Supreme Court recently granted certification in Miller. However, the Court granted certification not to consider the issue raised here but only to consider whether we applied "the appropriate standard of review" in considering "the trial court's determinations to impose consecutive sentences." See http://www.judiciary.state.nj.us/calendars/sc_appeal.htm.