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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0460-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TAHIR S. GREGORY,
a/k/a TAHIR NELSON,
TAHIR GREGORY,
TAHIR S. SAHKOOR,
TAMIR SHAKUR, and
KAREEM GREGORY,

Defendant-Appellant.

Argued November 16, 2022 – Decided November 29, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Atlantic County, Indictment No. 17-09-1922.

Taylor L. Napolitano, Assistant Deputy Public
Defender, argued the cause for appellant (Joseph E.
Krakora, Public Defender, attorney; Taylor L.
Napolitano, of counsel and on the briefs).

Katrina M. Koerner, Assistant Prosecutor, argued the cause for respondent (William Reynolds, Atlantic County Prosecutor, attorney; Katrina M. Koerner, of counsel and on the brief).

PER CURIAM

An Atlantic County grand jury returned a five-count indictment charging defendant Tahir S. Gregory with third-degree possession of fentanyl in violation of N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of fentanyl with intent to distribute it in violation of N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(5) (count two); second-degree possession of fentanyl with intent to distribute it within 500 feet of a public housing facility, public park, or public building in violation of N.J.S.A. 2C:35-7.1(a) (count three); second-degree unlawful possession of a handgun without a permit in violation of N.J.S.A. 2C:39-5(b)(1) (count four); and second-degree certain persons not to possess a firearm in violation of N.J.S.A. 2C:39-7(b)(1) (count five). Before the trial began, the judge denied defendant's motion to represent himself.

Following a multi-day trial, the jury convicted defendant of counts one, two, and three. The jury found defendant not guilty of the weapons possession charge and the trial judge then dismissed count five of the indictment. The judge merged counts one and two into count three, and sentenced defendant to an

extended term of fifteen years in prison with seven and one-half years of parole ineligibility. This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

BECAUSE THE TRIAL COURT ADDRESSED [DEFENDANT'S] REQUESTS TO PROCEED PRO SE BY TESTING HIS KNOWLEDGE OF THE LAW RATHER THAN ASSESSING WHETHER HIS WAIVER OF THE RIGHT TO COUNSEL WAS KNOWING AND VOLUNTARY, AND MISINFORMED HIM ABOUT THE ROLE OF STANDBY COUNSEL, HE IS ENTITLED TO A NEW TRIAL.

POINT II

[DEFENDANT] WAS DENIED THE RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR VIOLATED THE COURT'S ORDERS TO (1) SANITIZE GREGORY'S PRIOR CONVICTION FOR DRUG POSSESSION WITH INTENT TO DISTRIBUTE UNDER STATE V. BRUNSON, 132 N.J. 377 (1993), AND (2) STRIKE POLICE TESTIMONY REGARDING THE DANGEROUSNESS OF FENTANYL.

- A. Violation of the Brunson Order.
- B. Violation of the Fentanyl Order.
- C. Both Instances of Prosecutorial Misconduct Prejudiced [Defendant].

POINT III

BECAUSE THE STATE FAILED TO PROPERLY AUTHENTICATE THE MAP INTRODUCED TO PROVE POSSESSION WITH INTENT TO DISTRIBUTE WITHIN 500 FEET OF A PUBLIC PARK UNDER N.J.S.A. 2C:35-7.1A, AND THE MAP WAS ITS ONLY PROOF THAT POSSESSION OCCURRED WITHIN 500 FEET OF A PUBLIC PARK, [DEFENDANT] IS ENTITLED TO A NEW TRIAL ON THAT COUNT.

POINT IV

[DEFENDANT] IS ENTITLED TO RESENTENCING BECAUSE THE COURT MISAPPREHENDED THE APPLICABLE SENTENCING RANGE.

We address only defendant's first claim of error, as this decision makes the others moot. For the reasons that follow, we conclude that the trial judge did not sufficiently address defendant's motion to represent himself. Therefore, we reverse and remand for a new trial.¹

The trial judge held a conference with the parties prior to the beginning of jury selection. Defendant complained that his appointed attorney did not provide him with the discovery for his case and failed to visit him to prepare for

¹ The facts adduced at trial concerning the charges are not relevant to our decision and thus will not be recited here.

trial. Defendant told the judge he wanted to fire the attorney and represent himself.

In response, the judge asked defendant whether he knew how many jurors would "listen" to his case, if he knew what his sentencing exposure was, or if he was aware of the charges against him. Defendant stated the parties would select twelve or fourteen jurors, that he did not care what his sentencing exposure was, and had not received the discovery needed to know the charges against him.

After a short break, the judge told the attorneys outside defendant's presence that she was going to ask defendant some additional questions about his request to represent himself. The judge stated, "If for some reason I find that he's able to represent himself[,] we'll go forth that way. If not[,] then we'll proceed with [defendant's appointed attorney] and I'll let [defendant] know that."

Defendant was then brought back to the courtroom. The judge told defendant, "[I]n order for me to determine whether you can represent yourself[,] I'm going to ask you some questions and you have to answer them to my satisfaction so I know you can represent yourself."

The judge then questioned defendant regarding his level of education; knowledge of the law and rules of evidence; and whether he knew his sentencing exposure, the charges against him, or the elements of any of the offenses

involved in the case and the defenses he could raise at trial. Defendant replied he was a high school graduate, had not studied the law, and had never observed a trial. He named some of the charges against him, but did not know his sentencing exposure, the elements of any of the offenses, or the defenses he might be able to assert at trial. Defendant also stated he did not know how to file a motion or a subpoena, or what lesser-included offenses might be applicable. The judge did not supply any of this information to defendant during the colloquy.

At the conclusion of the questioning, the judge denied defendant's motion to represent himself. The judge stated:

[B]ased upon your answers to me[,] it does not appear as though you have enough ability to represent yourself. You don't even know the burdens of proof. You don't know the Rules of Evidence. You don't even know what your exposure is. They're key things in a trial and selecting a jury, and if you don't understand those basic defenses and claims and evidence rules and burdens, then you can't waive your constitutional right to have counsel present.

[(emphasis added).]

Based on the judge's ruling, defendant's appointed attorney represented him at the trial. However, just before defendant testified, he again told the judge

he wanted to fire his attorney and represent himself. The judge replied, "I already found that you're not capable of representing yourself."

On appeal, defendant argues the judge incorrectly tested defendant's knowledge of the law instead of assessing whether his attempted waiver of his right to appointed counsel was knowing and voluntary. We agree.

We review a trial judge's decision regarding self-representation for abuse of discretion. State v. DuBois, 189 N.J. 454, 475 (2007). Both the United States and New Jersey Supreme Courts have long held "the United States Constitution and our New Jersey Constitution grant defendants charged with a criminal offense the right to have the assistance of counsel." State v. King, 210 N.J. 2, 16 (2012) (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). "The corollary to the right of a criminal defendant to be represented by an attorney is the defendant's right to represent himself." Ibid. (citing Faretta v. California, 422 U.S. 806, 814 (1975)). "The right [of self-representation] is either respected or denied; its deprivation cannot be harmless." Id. at 22 (alteration in original) (quoting McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)). "Defendant may have been represented by a skilled attorney, the evidence against him may have been substantial, and the verdict may find strong support in the record; that matters not." Ibid.

Our Supreme Court recently reiterated that a trial court must address a series of topics with a defendant seeking to represent himself. State v. Outland, 245 N.J. 494, 506 (2021). Trial courts must

inform defendants seeking to proceed pro se about:

(1) the nature of the charges, statutory defenses, and possible range of punishment; (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful; (3) the necessity that defendant comply with the rules of criminal procedure and the rules of evidence; (4) the fact that the lack of knowledge of the law may impair defendant's ability to defend himself or herself; (5) the impact that the dual role of counsel and defendant may have; (6) the reality that it would be unwise not to accept the assistance of counsel; (7) the need for an open-ended discussion so that the defendant may express an understanding in his or her own words; (8) the fact that, if defendant proceeds pro se, he or she will be unable to assert an ineffective assistance of counsel claim; and (9) the ramifications that self-representation will have on the right to remain silent and the privilege against self-incrimination.

[Ibid. (quoting DuBois, 189 N.J. at 468-69).]

The purpose of providing this information is not for the trial court to determine whether a defendant has "technical legal knowledge[;]" it is to inform

the defendant "of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Ibid. (quoting Faretta, 422 U.S. at 835-36). However, a defendant's right to self-representation "is about respecting a defendant's capacity to make choices for himself, whether to his benefit or to his detriment." State v. Reddish, 181 N.J. 553, 585 (2004). Even if the decision is "fraught with risk[,]" a defendant should not be denied the choice to proceed pro se. State v. King, 210 N.J. 2, 17 (2012).

Here, the judge's colloquy with defendant focused exclusively on defendant's knowledge of the law. The judge asked personal background questions along with technical questions regarding the nature of the charges, statutory elements of the offenses, sentencing consequences, motion practice, trial strategy, and other legal topics. When defendant's responses were unsatisfactory, the judge found he did not "have enough ability to represent himself" and denied his motion.

The judge should have done more. See Outland, 245 N.J. at 507 ("[T]he trial court's colloquy fell short of that required by our jurisprudence . . . the trial court did not inform defendant of the nature and consequences of his waiver to ensure that waiver was knowing and intelligent, but rather quizzed him on a

variety of criminal law topics."). The judge did not supply defendant with information concerning his charges, the defenses he could raise, or the possible range of punishment. In short, "[t]he colloquy here was a textbook example of testing defendant's technical legal knowledge as opposed to determining whether he was knowingly and intelligently waiving his right to counsel." Id. at 508. As the Court stated in Outland, the judge's conclusion that defendant lacked the ability to represent himself, "no matter how well-intentioned, cannot override defendant's exercise of his right to decide to represent himself." Id. at 510 (quoting King, 210 N.J. at 21).

Reversed and remanded for a new trial. 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