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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1413-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OTIS R. JENKINS,
a/k/a EZEKIEL JENKINS,
EZEKIEL J. JENKINS, OZ,
and OTIS JENKINS,

Defendant-Appellant.

Submitted November 4, 2021 – Decided April 7, 2022

Before Judges Fuentes, Gilson, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment Nos. 18-05-0366 and 18-06-0534.

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

Christine A. Hoffman, Acting Gloucester County Prosecutor, attorney for respondent (Dana R. Anton,

Special Deputy Attorney General/Acting Senior
Assistant Prosecutor, on the brief).

PER CURIAM

In two separate indictments, defendant Otis Jenkins was charged with six drug-related crimes and two offenses involving the altering of and presenting false motor-vehicle documents. Following the denial of his motions to suppress physical evidence and one of his statements, defendant pled guilty to second- and third-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(b)(2) and (3). He was sentenced to seven years in prison with three years of parole ineligibility.

Defendant appeals from the orders denying his motions to suppress. He argues that one of the searches was illegal because it was conducted without valid consent, his statement was not voluntary, and the search of his vehicle was illegal. We reject these arguments because the trial court's factual findings are supported by substantial credible evidence and the law was correctly applied in denying the motions. Accordingly, we affirm both of defendant's convictions.

I.

The charges against defendant arose out of two separate events. Both involved searches and seizures and, after each event, defendant gave a statement.

The first incident occurred on October 5, 2017, and involved the search of a vehicle defendant was driving. Officer Matthew Martinez stopped the vehicle because the temporary license plate appeared to be fake. Defendant was not able to produce a valid driver's license and Officer Martinez believed the registration defendant had shown him was not valid. During the stop, Martinez was advised by dispatch that defendant had an active arrest warrant because he had failed to pay child support. Defendant was, therefore, asked to get out of the car, was arrested, and was placed in a police vehicle. While in the police vehicle, defendant was questioned by Martinez. In response to those questions, defendant made several incriminating statements.

Officer David Paul, who had arrived as backup, separately questioned two passengers who had remained in the vehicle. When Officer Paul leaned down to speak with the passengers through an open window, he smelled the odor of raw marijuana. Officers then searched the car and found a vial of marijuana, two marijuana cigarettes in the purse of one of the passengers, a bag of crack cocaine, and packaging materials.

Based on the drugs found in the vehicle and the documents defendant had produced, defendant was charged and later indicted for six crimes: third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1); third-degree possession of

cocaine with intent to distribute, N.J.S.A. 2C:35-5(b)(3); third-degree possession of cocaine with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-7(a); second-degree possession of cocaine with intent to distribute within 500 feet of a public park, N.J.S.A. 2C:35-7.1(a); third-degree altering a temporary registration tag, N.J.S.A. 2C:21-1(a)(1); and third-degree uttering a fraudulent car insurance card, N.J.S.A. 2C:21-1(a)(3).

The second incident occurred approximately six months later in April 2018. On April 3, 2018, a citizen came to the Clayton police station and told Detective Jackson Harrington that defendant was involved in narcotics activity. Harrington checked and learned that defendant had an outstanding arrest warrant.

Early the next morning, Harrington and several other law enforcement personnel went to an apartment where they had reason to believe defendant was staying. Based on prior communications with the occupant of that apartment, Harrington knew the apartment was leased to A.G.¹ When the police knocked on the apartment door, A.G. opened the door and officers could see defendant sitting on the couch in the room behind A.G. Defendant was arrested, and officers conducted a protective sweep of the one-bedroom apartment.

¹ We use initials to protect the privacy interests of A.G.

After defendant was removed from the apartment, Harrington asked A.G. for consent to search the apartment. A.G. was shown and signed a consent-to-search form. Harrington's conversation with A.G. concerning the consent form was not recorded. During the search of the apartment, police found crack cocaine hidden above a drop-ceiling panel in the bathroom. The police also found drug paraphernalia in a suitcase located in the living room.

Following his arrest, defendant was taken to the police station where he was interrogated by Detective Harrington. Before the formal interrogation, Harrington briefly spoke with defendant in the processing room. Thereafter, defendant was moved to another room, where he was interrogated by Harrington. That interrogation was recorded. Initially, Harrington read defendant his Miranda rights, and defendant reviewed and signed a Miranda waiver form. See Miranda v. Arizona, 384 U.S. 436 (1966).

During questioning, defendant admitted that he had bought and possessed illegal drugs to sell. In response to one of Harrington's questions, defendant asked: "How is this going to help me? Be honest." Harrington responded:

[DETECTIVE] HARRINGTON: Listen, I can try to help you as much as I can. Obviously there's other people that deal in other things. I have a meeting with them all. They're busy. They can't come down here, so they asked me to interview you on their behalf. Okay. So that's why we're here. I'm going to talk to them later

today, so we'll move from there. That's why I need a phone number from you. Do you understand what I'm saying?

THE DEFENDANT: But I mean, but you didn't give the phone so I was confused like, let me go or something.

[DETECTIVE] HARRINGTON: You're going to get - - listen, you, you're selling drugs; right? We found drugs at the apartment.

THE DEFENDANT: Yeah.

[DETECTIVE] HARRINGTON: Okay. It doesn't mean that later on, you know, I may not - - may or may not need you (inaudible) do you understand what I'm saying? So that's why we're here having a conversation. All right?

Based on the drugs seized from the apartment and defendant's statements, defendant was later indicted for two crimes: third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1), and second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(b)(2).

Defendant moved to suppress the physical evidence seized from his car and A.G.'s apartment. He also moved to suppress the statements he had given following both incidents. The trial court conducted separate hearings concerning the vehicle stop and the search of the apartment.

At the hearing concerning the October 2017 vehicle search, the State presented testimony from Officers Martinez and Paul. The State also submitted and played the video recordings from the body cameras worn by both officers. Officer Martinez's body camera showed his interaction with defendant after he had made the motor vehicle stop and questioned defendant about his license and registration. The body camera from Officer Martinez captured his questioning of defendant following defendant's arrest. Defendant did not testify and did not call any witnesses.

The trial court found the testimony by both officers to be credible. The court also found that the body camera recordings corroborated the officers' testimony. Based on Officer Martinez's testimony, the court found that the officer had lawfully stopped defendant's vehicle because the license plate was fake. The court also found that defendant had been lawfully arrested because he had an outstanding arrest warrant for failure to pay child support.

Concerning the search of the vehicle, the trial court credited Officer Paul's testimony that he smelled raw marijuana when he was standing outside the car speaking to the passengers in the car. In making that finding, the court found no inconsistency between the testimony of Officer Martinez and Officer Paul. Although the court noted that Martinez had not smelled marijuana when he was

next to the car, the court found that Officer Paul had been at a different "vantage point" when he smelled the raw marijuana. The court then reasoned that the roadside search of the vehicle was based on probable cause and lawful. See State v. Witt, 223 N.J. 409, 432-33 (2015) (explaining that police can lawfully search a car when probable cause arises from unforeseeable and spontaneous circumstances).

The trial court suppressed the statements made by defendant to Officer Martinez because those statements were made after defendant was arrested, but before defendant had been advised of his Miranda rights. Accordingly, on August 13, 2019, the trial court entered two orders, one denying defendant's motion to suppress the physical evidence seized from defendant's vehicle and the other granting defendant's motion to suppress the statements he had given after his arrest.

At the hearing concerning the search of the apartment and defendant's subsequent statement, the court heard testimony from one witness: Detective Harrington. The court also reviewed the consent-to-search form signed by A.G., the Miranda waiver form signed by defendant, and the video of defendant's interrogation.

The court found that A.G. had given a knowing and valid consent to search his apartment. The court, therefore, did not suppress the seizure of the cocaine found above the drop-ceiling panel in the bathroom. The court suppressed the drug paraphernalia found in the suitcase because the court determined that A.G. did not have authority to consent to the search of defendant's suitcase.

The court also denied the motion to suppress defendant's statement following his arrest at the apartment. The court found that defendant had been advised of and had waived his Miranda rights. The court also found that defendant had not been coerced or threatened into giving a statement. Instead, the trial court found that Detective Harrington had "some discussions regarding whether there could be some type of cooperation," but the court found that defendant's will was not overborne. The court clarified that any discussions of the drugs seized from the suitcase would have to be redacted from defendant's statement. The trial court's rulings were embodied in an order issued on May 10, 2019.

Following the rulings on his motions, defendant pled guilty to two crimes. In connection with the October 2017 vehicle search, defendant pled guilty to third-degree possession of cocaine with intent to distribute. In connection with

the April 2018 search of the apartment, defendant pled guilty to second-degree possession of cocaine with intent to distribute.

In accordance with his plea agreement, defendant was sentenced to seven years in prison with three years of parole ineligibility on the second-degree conviction. On the third-degree conviction, defendant was sentenced to a concurrent term of five years in prison with three years of parole ineligibility. Defendant now appeals from his convictions, arguing that his motions to suppress should have been granted.

II.

Defendant presents three arguments for our consideration on this appeal:

POINT I THE STATE FAILED TO MEET ITS BURDEN OF PROVING THAT [A.G.] KNOWINGLY AND VOLUNTARILY PROVIDED CONSENT TO SEARCH THE APARTMENT.

POINT II MR. JENKINS'S CUSTODIAL STATEMENT TO DETECTIVE HARRINGTON MUST BE SUPPRESSED BECAUSE THE STATE FAILED TO PROVE IT WAS VOLUNTARY BEYOND A REASONABLE DOUBT.

POINT III THE EVIDENCE SEIZED FROM THE CAR MUST BE SUPPRESSED BECAUSE OFFICER PAUL WAS NOT AT A LAWFUL VANTAGE POINT WHEN HE DETECTED THE ODOR OF MARIJUANA WHILE BREAKING THE PLANE OF THE CAR AND LEANING INTO THE VEHICLE.

Our review of a denial of a motion to suppress following an evidentiary hearing is limited. State v. A.M., 237 N.J. 384, 395 (2019). We disturb factual findings made by the trial court only when they are not supported by sufficient credible evidence in the record. State v. Hagans, 233 N.J. 30, 37 (2018). This deference is required "because those findings 'are substantially influenced by [an] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy.'" State v. Gamble, 218 N.J. 412, 424-25 (2014) (alteration in original) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Accordingly, we "reverse only when the trial court's determination is 'so clearly mistaken that the interests of justice demand intervention and correction.'" Hagans, 233 N.J. at 37-38 (quoting Gamble, 218 N.J. at 425). We review the trial court's legal determinations de novo. Id. at 38.

A. The Consent to Search the Apartment.

Defendant argues that the State failed to prove that A.G. gave a knowing, voluntary, and unequivocal consent to search his apartment. We are not persuaded by that argument because it is rebutted by the factual findings made by the trial court.

The United States Constitution and the New Jersey Constitution protect individuals from "'unreasonable searches and seizures' by government officials."

Hagans, 233 N.J. at 38 (quoting State v. Watts, 223 N.J. 503, 513 (2015)). A warrantless search is presumptively unreasonable. Ibid. To overcome this presumption, the State must prove by a preponderance of the evidence that the search was based on probable cause and "f[ell] within one of the few well-delineated exceptions to the warrant requirement." Id. at 38-39 (alteration in original) (quoting State v. Bryant, 227 N.J. 60, 69-70 (2016)). One such exception is consent to search. Id. at 39.

To justify a warrantless search based on consent, "the State must prove that the consent was voluntary and that the consenting party understood his or her right to refuse to consent." State v. Maristany, 133 N.J. 299, 305 (1993). "[T]he State is required to prove voluntariness by 'clear and positive testimony.'" State v. Chapman, 332 N.J. Super. 452, 466 (App. Div. 2000) (quoting State v. King, 44 N.J. 346, 352 (1965)). To determine whether consent was given voluntarily, the courts examine "the totality of the particular circumstances of the case." Hagans, 233 N.J. at 40 (quoting King, 44 N.J. at 353). In making that determination, courts consider numerous factors. See King, 44 N.J. at 352-53.

The person who gives consent must have lawful authority over the premises or thing to be searched. See United States v. Matlock, 415 U.S. 164,

171 (1974); State v. Earls, 420 N.J. Super. 583, 591-92 (App. Div. 2011), rev'd on other grounds, 214 N.J. 564 (2013). Accordingly, an authorized third-party consent is effective against a joint occupant of premises such as an apartment. See Matlock, 415 U.S. at 171. Even when police remove a defendant from an apartment, a third party can authorize the search provided they have authority to do so. Fernandez v. California, 571 U.S. 292, 302-03 (2014); State v. Lamb, 218 N.J. 300, 320-21 (2014).

Based on the testimony at the evidentiary hearing, the trial court found that A.G. provided a knowing, voluntary, and unequivocal consent to search. The trial court relied on the testimony of Detective Harrington and reviewed the written consent-to-search form signed by A.G. On the form, A.G. put his initials next to the statement: "I understand that I have the right to refuse to consent." The evidence at the hearing also established that A.G. was the person who leased the apartment and, therefore, he had authority to consent to a search of the common areas of the apartment. We, therefore, hold that substantial credible evidence supported the trial court's finding that A.G. had consented to search the apartment, including the area above the drop ceiling where cocaine was found.

Defendant argues that the consent was not valid because Harrington's conversation with A.G. when he obtained the consent was not recorded. That argument is rebutted by the trial court's appropriate reliance on Harrington's testimony and the written waiver form signed by A.G.

Defendant also argues that the consent search was a secondary search because defendant had already been arrested and a protective sweep had been conducted. The testimony at the hearing establishes that the protective sweep was done for officer safety and that sweep did not invalidate the search that was later conducted after A.G. gave a knowing, voluntary, and unequivocal consent to search the apartment.

B. Defendant's Statement Given to Detective Harrington.

Defendant contends that the State failed to meet its burden of proving that he had provided a voluntary statement. He asserts that his statement was not voluntary and his will was overborne because Harrington had promised him leniency when he asked how speaking with Harrington could help him.

The "right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and this [S]tate's common law, now embodied in . . . N.J.S.A. 2A:84A-19, and . . . N.J.R.E. 503." A.M., 237 N.J. at 396 (quoting State v. S.S., 229 N.J. 360, 381-82 (2017)). Before a

defendant gives a statement, he must be advised of his Miranda rights. Miranda, 384 U.S. at 478-79. Accordingly, "a defendant must be informed 'that he has the right to remain silent,' that anything he says, 'can and will be used against [him] in court,' and that he has 'the right to have counsel present at the interrogation.'" A.M., 237 N.J. at 396-97 (alteration in original) (internal citations omitted).

The State must "prove beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary in light of all the circumstances." Id. at 397 (quoting State v. Presha, 163 N.J. 304, 313 (2000)). Accordingly, the question is "whether the suspect understood that he did not have to speak, the consequences of speaking, and that he had the right to counsel before doing so if he wished." Ibid. (quoting State v. Nyhammer, 197 N.J. 383, 402 (2009)). That inquiry is "determined by the totality of the circumstances surrounding the custodial interrogation based on the fact-based assessments of the trial court." Id. at 398. Relevant factors of the court's analysis include "the suspect'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." Ibid. (quoting State v. Miller, 76 N.J. 392, 402 (1978)).

Law enforcement officers have some leeway in questioning a suspect and "may employ deception or trickery" and even "tell some lies" provided those tactics are not designed to produce an untruthful confession and do not violate due process. See State v. L.H., 239 N.J. 22, 44 (2019); State v. Baylor, 423 N.J. Super. 578, 588-89 (App. Div. 2011). If, however, lies or promises of leniency have the capacity to overbear the suspect's will, a confession may be involuntary. L.H., 239 N.J. at 27.

In L.H., a twenty-six-year-old defendant's statement was held not to be voluntary because "the detectives overbore [the] defendant's will by false promises of leniency that assured counseling instead of incarceration, by representations that conflicted with the Miranda warnings, and by minimization of the gravity of the offenses." Id. at 29. The defendant in L.H. was arrested at 2:30 a.m., and a three-hour interrogation began at 5:31 a.m. Id. at 30. During the questioning, the detectives promised the defendant counseling, indicated he would not go to jail if he cooperated, and told him "the truth would set him free." Id. at 31. The Court found that those false promises of leniency, when considered under the totality of the circumstances, went beyond the scope of permissible tactics because they had "the capacity to overbear [the] suspect's will." Id. at 27.

The trial court here found that defendant had been given his Miranda rights, he voluntarily, knowingly, and intelligently waived those rights, and he agreed to speak with Detective Harrington. Having reviewed the video recording of the interrogation, the trial court also found that defendant's will had not been overborne nor were his statements coerced by an improper promise of leniency. Instead, the trial court credited Detective Harrington's explanation that his response to a question by defendant of how the questioning could help him was a reference to a potential agreement to cooperate. The trial court specifically found that that reference had not overborne defendant's will in a way that made his statements involuntary.

The trial court's factual findings are supported by substantial credible evidence. Moreover, applying those facts to the totality of the circumstances of defendant's interview establishes that Detective Harrington did not overstep the permissible bounds of interrogation. Compare L.H., 239 N.J. at 27-28 (finding detective overbore defendant's will by false promises of leniency during interrogation) with State v. Cook, 179 N.J. 533, 563 (2004) (reasoning defendant was emotionally distraught during lengthy interrogation but not subject to psychological pressure warranting suppression of statements) and State v.

Galloway, 133 N.J. 631, 656 (1993) (holding defendant's emotional state during interrogation was not by itself sufficient to render confession involuntary).

C. The Search of the Vehicle.

Finally, defendant challenges the trial court's denial of his motion to suppress the drugs seized from his vehicle. He argues that Officer Paul "broke the plane of the car[;]" that is, part of Paul's body went into the car window when he spoke to the occupants and smelled marijuana.

A vehicle stop is lawful when it is based on a reasonable and articulable suspicion that a traffic or other offense has been committed. State v. Amelio, 197 N.J. 207, 211 (2008). Moreover, under the automobile exception to the warrant requirement, the car may be searched without a warrant "when the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous." Witt, 223 N.J. at 447 (citing State v. Alston, 88 N.J. 211, 233 (1981)).

When defendant's car was stopped in April 2018, possession of marijuana was a criminal offense. Possession of marijuana became legal in 2021. See L. 2021, c. 16 (New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act). While possession of marijuana was illegal,

New Jersey courts recognized that "the smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Walker, 213 N.J. 281, 290 (2013) (alternation in original) (quoting State v. Nishina, 175 N.J. 502, 516-17 (2003)). The "smell of marijuana emanating from [an] automobile" establishes "probable cause [for an officer] to believe that it contain[s] contraband." State v. Myers, 442 N.J. Super. 287, 296 (App. Div. 2015) (quoting State v. Pena-Flores, 198 N.J. 6, 30 (2009), overruled on other grounds by Witt, 223 N.J. at 414).

The trial court found that Officer Martinez had reasonable articulable suspicion to stop defendant's vehicle. The trial court also found that Officer Paul had smelled marijuana when he bent down and spoke to the passengers in the vehicle through an open window. Those factual findings are supported by substantial credible evidence. Those findings also support the legal conclusion that the car was lawfully stopped and that police had probable cause to search the car under the automobile exception.

Defendant disputes the trial court's factual finding, contending that a review of the videos from the body camera show that Officer Paul's arm went into the car through the open window when he leaned down to speak with the occupants. We reject that argument for two reasons. First, the trial court did

not make that finding. Instead, the trial court found that Officer Paul was lawfully outside the vehicle when he smelled the marijuana.

Second, courts look to the purpose behind an officer's action when determining whether a search was reasonable. See State v. Mandel, 455 N.J. Super. 109, 116 (App. Div. 2018). Accordingly, courts have found that even when an officer puts his head or other body part into a vehicle to speak with occupants, that action may not constitute an unreasonable search. Id. at 116-17 (citing United States v. Ryles, 988 F.2d 13, 15-16 (5th Cir. 1993); United States v. Pierre, 958 F.2d 1304, 1309-10 (5th Cir. 1992) (en banc); Lewis v. State, 949 N.E.2d 1243, 1245 (Ind. 2011); People v. Vasquez, 483 N.Y.S.2d 244, 245-46 (N.Y. App. Div. 1984), aff'd on other grounds, 498 N.Y.S.2d 788 (N.Y. 1985)).

Just like in Mandel, there was no evidence that Officer Paul placed any part of his body in the window to smell marijuana. At most, the video from the body cam shows that the officer was trying to speak with the passengers of the vehicle. Thus, any intrusion into the vehicle was minimal and was not an unreasonable search.

D. Summary

In summary, we reject defendant's arguments concerning the motions to suppress the physical evidence from the vehicle search and the motion to

suppress the statements he gave to Detective Harrington. We, therefore, affirm both his convictions.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION