

State v. Wright, __ N.J. __, (2010).

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0896-08T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD WRIGHT, a/k/a HUBA WRIGHT,
DON WRIGHT,

Defendant-Appellant.

Submitted May 19, 2010 - Decided July 14, 2010

Before Judges Miniman and Waugh.

On appeal from Superior Court of New Jersey,
Law Division, Cape May County, Indictment
No. 07-09-0644.

Yvonne Smith Segars, Public Defender,
attorney for appellant (Michael B. Jones,
Assistant Deputy Public Defender, of counsel
and on the brief).

Robert L. Taylor, Cape May County
Prosecutor, attorney for respondent (J.
Vincent Molitor, Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Donald Wright appeals his conviction for third-
degree possession of a controlled dangerous substance (CDS),

contrary to N.J.S.A. 2C:35-10(a)(1), based on a guilty plea entered after the Law Division denied his motion to suppress drugs found in his possession. We reverse.

I.

We discern the following facts and procedural history from the record.

At approximately 2:00 a.m. on August 9, 2007, Cape May Special Police Officer Scott Krissinger observed Wright sitting on a bench in Wilbraham Park in West Cape May. Krissinger recognized Wright because he had "seen him around" and had helped process Wright at the police station on a prior occasion. Krissinger testified that Wright appeared nervous and "kept looking back over his shoulder at [his] patrol car."

Krissinger parked his patrol car at the entrance to the park. As he was getting out of the vehicle, he observed someone skateboarding in violation of the town's skateboarding ordinance. He stopped the skateboarder and asked for identification.

While Krissinger was speaking with the skateboarder, Wright walked past them towards a 7-Eleven across the street. Krissinger left the skateboarder and went to examine the area where he first observed Wright. On the bench where Wright had been sitting, Krissinger saw that the word "Zion" had been written in what appeared to be black marker.

Krissinger had never seen that particular graffito on the bench before, and suspected that Wright had written it because he had been sitting there. However, at the subsequent suppression hearing, Krissinger acknowledged that there was other graffiti on the bench, that he could not tell how long the "Zion" graffito had been there, and that he did not detect the odor of black marker ink on the bench at the time of his investigation. In addition, he testified that he did not know when he had last looked at the bench and that he had not previously inspected it for graffiti.

Because the writing of graffiti is an act of criminal mischief pursuant to N.J.S.A. 2C:17-3, Krissinger stopped Wright in the 7-Eleven parking lot across the street to question him about it. Krissinger testified that he observed Wright holding a plastic bag that was big enough to hold a black marker. Krissinger told Wright that he was investigating an act of criminal mischief and asked him if he had written the "Zion" graffito on the bench. Wright denied having done so. Krissinger also asked Wright if he had a black marker, to which Wright said he did not.

During the questioning, Wright was pacing and stated: "Quit fucking with me. You guys are always fucking with me." According to Krissinger, Wright tried to hand the plastic bag to another individual in the parking lot. As he was doing so, he

said: "Here, hold this." Krissinger told Wright not to pass the bag and Wright responded by saying, "fuck this," knocking the skateboarder's license from Krissinger's hands, and walking away from Krissinger.

Krissinger testified that he told Wright to remain where he was, but Wright ran away. Krissinger began to chase Wright and used his radio to request backup. While in pursuit, Krissinger shouted: "Stop, police." At some point during the chase, Wright discarded the plastic bag by throwing it to the side of the road.

Krissinger was able to stop and arrest Wright with the help of another officer. The assisting officer retrieved the plastic bag, which contained six clear plastic bags appearing to hold crack-cocaine, and a clear wrapper containing a substance that appeared to be marijuana. There was no black marker inside the bag.

In September 2007, Wright was indicted on a single count alleging a violation of N.J.S.A. 2C:35-10(a)(1). He moved to suppress the drugs found in the plastic bag. Krissinger was the only witness at the suppression hearing on March 14, 2008. In addition to the events described above, he testified that, approximately ten days prior to the incident, there had been reports of graffiti in West Cape May. However, as far as he was

aware, none of those reports involved graffiti in Wilbraham Park.

Defense counsel argued that the evidence seized from Wright at the time of his arrest should be suppressed because Krissinger had no evidence that Wright had committed a crime, and thus, there was no reasonable and articulable suspicion to conduct a Terry¹ stop. The State argued that there was reasonable suspicion justifying a brief investigative stop because there had been "a series of acts of graffiti in the area" and Krissinger stopped Wright to ask him questions concerning the graffiti after seeing him on the park bench. The State further argued that Wright's aggressive acts and attempt to flee escalated the suspicion, thereby creating probable cause for the arrest.

On April 18, 2008, the trial judge denied Wright's motion to suppress. The judge found that Wright's response to Krissinger, and Wright's subsequent actions, gave Krissinger reasonable and articulable suspicion.

In this Court's view, that response to a basic inquiry by a police officer, unwarranted, particularly given the time of day; the place, a public park; the fact that the defendant was the only person observed by the Officer in the park at that time. And upon asking, really, nothing more than community care taking questions, to receive

¹ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

that hostile response, verbally hostile response, likely, further sensitized the Officer as to what was going on and why it would possibly or could possibly be that this subject was responding in such a verbally aggressive way.

To the Officer, at the time, the defendant suddenly appeared ready to flee; and now, as another subject walks by the defendant attempted to hand the bag off, instructing the individual, quote, "Hold this. Here, hold this." Again, nothing inappropriate on the part of the Officer up to this point in time.

But it is at this juncture that this court concludes that this Officer, certainly, had reasonable articulable suspicion to believe that an offense had been committed. If not limited, solely, to the graffiti, but something beyond. . . .

. . . .

I do not find on that record that this Officer lacked reasonable articulable suspicion. I find quite the contrary. It - - the totality of those circumstances, the time and place of the investigation; the detail of the Officer's testimony, I find his conduct to be rational, well measured, reasonable and constitutional.

Wright pled guilty to possession of CDS on May 8, 2008. He was fined and sentenced to four years of incarceration on August 15, 2008. This appeal followed.

II.

Wright raises the following issues on appeal:

POINT I: THE TRIAL JUDGE ERRED IN FINDING THAT [OFFICER] KRISSINGER STOPPED DONALD WRIGHT CONSTITUTIONALLY.

A. The Trial Judge Erred in Finding that Mr. Wright's Person had Been Seized Only After Mr. Wright Attempted to Give Away the Bag.

B. [Officer] Krissinger did not have the Requisite Articulable Suspicion to Conduct a Warrantless Seizure of Donald Wright's Person.

POINT II: ASSUMING, ARGUENDO, THAT THIS COURT FINDS THAT [OFFICER] KRISSINGER'S STOP OF DONALD WRIGHT WAS UNCONSTITUTIONAL; THE FACT THAT DONALD WRIGHT FLED THE SCENE DOES NOT CONSTITUTE A BREAK IN THE CHAIN FROM THE UNCONSTITUTIONAL INVESTIGATORY STOP.

A. Donald Wright's Flight Is Not Governed By The Holding Of State v. Williams Because [Officer] Krissinger Did Not Meet The Good Faith Requirement The Case Sets Out.

B. The Fact That [Officer] Krissinger Stopped Donald Wright Based On a Pretext Further Proves That He Was Not Acting In Good Faith As Mandated By State v. Williams.

A.

The Supreme Court has explained the standard of review applicable with respect to a trial court's fact-finding on a motion to suppress as follows:

Our analysis must begin with an understanding of the standard of appellate review that applies to a motion judge's findings in a suppression hearing. As the Appellate Division in this case clearly recognized, an appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record." [State v. Elders, 386 N.J. Super. 208, 228 (App. Div. 2006)] (citing State v. Locurto, 157 N.J. 463, 474 (1999)); see also State v. Slockbower, 79 N.J. 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the . . . investigatory search [was] not based on probable cause"); State v. Alvarez, 238 N.J. Super. 560, 562-64 (App. Div. 1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present in the record" (citing State v. Johnson, 42 N.J. 146, 164 (1964))).

An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Johnson, supra, 42 N.J. at 161. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. Id. at 162. A trial court's findings

should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." Ibid. In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." Ibid.

[State v. Elders, 192 N.J. 224, 243-44 (2007).]

However, our review of the judge's legal conclusions is plenary. State v. Handy, 412 N.J. Super. 492, 498 (App. Div. 2010).

Under the Fourth Amendment of the United States Constitution and under Article 1, paragraph 7 of the New Jersey Constitution, "[a] warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." State v. Cooke, 163 N.J. 657, 664 (2000); see also State v. Alston, 88 N.J. 211, 230 (1981). The same is true of the warrantless seizure of a person or property. Terry v. Ohio, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879-80, 20 L. Ed. 2d 889, 905-06 (1968) (seizure of a person); State v. Hempele, 120 N.J. 182, 218-19 (1990) (seizure of property).

The seizure of a person occurs in a police encounter if the facts objectively indicate that "'the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'" State v. Tucker, 136 N.J. 158, 166 (1994) (quoting Florida v. Bostick, 501 U.S. 429, 439, 111 S. Ct. 2382, 2389,

115 L. Ed. 2d 389, 402 (1991)). In applying this test, our courts implement the constitutional guarantee to protect the "reasonable expectations of citizens to be 'secure in their persons, houses, papers and effects.'" Id. at 165 (quoting N.J. Const. art. I, ¶ 7).

It appears that the motion judge credited Krissinger's testimony that he was concerned about graffiti, rather than drug dealing, when he first approached Wright. Because our standard of review requires us to defer to that finding, Elders, supra, 192 N.J. at 243-44, we analyze the legal implications of what happened based upon that premise. We must first determine whether Krissinger's initial encounter with Wright can properly be characterized as a field inquiry or an act of community caretaking.

In State v. Pineiro, 181 N.J. 13, 20 (2004), the Supreme Court defined a field inquiry as "the least intrusive encounter," occurring when a police officer approaches a person and asks if he or she is willing to answer some questions. "A field inquiry is permissible so long as the questions '[are] not harassing, overbearing, or accusatory in nature.'" Ibid. (quoting State v. Nishina, 175 N.J. 502, 510 (2003)). During such a field inquiry, "the individual approached 'need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.'" State v.

Privott, ____ N.J. ____, ____ (2010) (slip op. at 8) (quoting State v. Maryland, 167 N.J. 471, 483 (2001) (internal quotation marks and citation omitted)).

It is clear from Krissinger's own testimony that his initial encounter with Wright was not a field inquiry. Based on his observations of Wright sitting on a bench that had a graffito on it and acting nervously, Krissinger formed the belief that Wright had committed an act of criminal mischief, approached him, told him he was investigating the graffito, and asked Wright if he had written it. The "accusatory nature" of that initial encounter is inconsistent with the encounter being a field inquiry. A person in Wright's shoes reasonably would believe that "he was the subject of a particularized investigation by the question[] presupposing the suspicion of criminal conduct." State ex rel. J.G., 320 N.J. Super. 21, 31 (App. Div. 1999). It was also clear from the facts that Wright was not free to leave.

Krissinger's intent to investigate Wright's perceived criminal activity and the accusatory nature of his questioning was also inconsistent with a characterization of the encounter as an exercise in "community caretaking," State v. Bogan, 200 N.J. 61, 73 (2009), which is how the motion judge described it. Because our review of the judge's legal conclusions is plenary, Handy, supra, 412 N.J. Super. at 498, we are not bound by his

determination in that regard. "The 'community caretaker doctrine' . . . applies when the 'police are engaged in functions, [which are] totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a [criminal] statute.'" State v. Diloreto, 180 N.J. 264, 275 (2004) (quoting State v. Cassidy, 179 N.J. 150, 161 n.4 (2004)).

Because Krissinger's initial encounter with Wright was neither a field inquiry nor an exercise in community caretaking, we must next determine whether the facts justified Krissinger in making an investigatory stop under Terry. An investigatory stop, unlike a field inquiry, is characterized by a detention in which the person approached by a police officer would not reasonably feel free to leave, even though the encounter falls short of a formal arrest. State v. Stovall, 170 N.J. 346, 355-56 (2002); see also Terry, supra, 392 U.S. at 19, 88 S. Ct. at 1878-79, 20 L. Ed. 2d at 904.

The Terry exception to the warrant requirement permits a police officer to detain an individual for a brief period, and to pat him down for the officer's safety, if that stop is "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. Rodriguez, 172 N.J. 117, 126 (2002) (quoting Terry, supra, 392 U.S. at 21, 88 S. Ct.

at 1880, 20 L. Ed. 2d at 906). Under this well-established standard, "[a]n investigatory stop is valid only if the officer has a 'particularized suspicion' based upon an objective observation that the person stopped has been [engaged] or is about to engage in criminal wrongdoing." State v. Davis, 104 N.J. 490, 504 (1986). The critical issue for us to resolve, therefore, is whether Krissinger's initial action in stopping and questioning Wright in the parking lot satisfied that standard.

"To determine whether the State has shown a valid investigative detention requires a consideration of the totality of the circumstances." Elders, supra, 192 N.J. at 247; see also Privott, supra, slip op. at 10. As the Supreme Court observed in Davis, supra, 104 N.J. at 505,

Such encounters are justified only if the evidence, when interpreted in an objectively reasonable manner, shows that the encounter was preceded by activity that would lead a reasonable police officer to have an articulable suspicion that criminal activity had occurred or would shortly occur. No mathematical formula exists for deciding whether the totality of circumstances provided the officer with an articulable or particularized suspicion that the individual in question was involved in criminal activity. Such a determination can be made only through a sensitive appraisal of the circumstances in each case.

In evaluating the "totality of the circumstances," we "are to 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. Citarella, 154 N.J. 272, 279 (1998) (quoting State v. Arthur, 149 N.J. 1, 10-11 (1997)). "The fact that purely innocent connotations can be ascribed to a person's actions does not mean that an officer cannot base a finding of reasonable suspicion on those actions as long as 'a reasonable person would find the actions are consistent with guilt.'" Id. at 279-80 (quoting Arthur, supra, 149 N.J. at 11).

Our review of the record convinces us that, under the totality of the circumstances, the State has failed to demonstrate a reasonable and articulable suspicion to support Krissinger's investigative detention of Wright. According to Krissinger, the stop was premised on his knowledge that there had been reports of graffiti in another area of town, his observations of Wright sitting on a bench late at night, his observation that the bench had a graffito on it, the fact that he did not recall having seen the word "Zion" there before, Wright's apparently nervous conduct when he realized that there was a police officer present in the area, Wright's decision to leave the area, and Wright's carrying a plastic bag large enough for a black marker. However, Krissinger did not see Wright make any marks on the bench, nor did he detect the odor of wet marker ink on the bench when he examined it prior to stopping Wright.

In addition, he did not know how long the word "Zion" had been there. Finally, almost any plastic bag would be large enough to hold a marker. Even taking Krissinger's expertise as a special police officer into account, we simply fail to see how those facts, viewed objectively, could give rise to a reasonable and articulable suspicion that Wright had engaged in an act of criminal mischief contrary to N.J.S.A. 2C:17-3.

Because we conclude that Krissinger lacked the reasonable and articulable suspicion required for a Terry stop, we hold that he violated Wright's right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Article 1, paragraph 7 of the New Jersey Constitution, and that the stop was, consequently, unconstitutional.

B.

Our decision that the initial stop was unconstitutional does not, however, end the inquiry. We must next determine whether Wright's actions during the illegal stop, particularly pushing the papers out of Krissinger's hands and running away, constituted obstruction, N.J.S.A. 2C:29-1, and provided the probable cause required to justify Wright's arrest and a basis to admit evidence of the cocaine discarded as he was fleeing.

As we recently observed in State v. Williams, 410 N.J. Super. 549, 558 (App. Div. 2009), certif. denied, 201 N.J. 440 (2010), this determination requires a review of the Supreme Court's recent decisions in State v. Crawley, 187 N.J. 440, cert. denied, 549 U.S. 107, 127 S. Ct. 740, 166 L. Ed. 2d 563 (2006), and State v. Williams, 192 N.J. 1 (2007). In Crawley, supra, 187 N.J. at 460-61, the Court held that a person who flees from an investigatory stop may be convicted of obstruction even though the stop is later found to have been unconstitutional if the police officer making the stop was "acting in objective good faith, under color of law in the execution of his duties." In Williams, supra, 192 N.J. at 15, the Supreme Court held that evidence the police obtained in apprehending a person who has obstructed an unconstitutional investigatory stop may be admissible if the evidence is "sufficiently attenuated from the taint" of the unconstitutional stop.

Because the motion judge credited Krissinger's testimony concerning the nature of his investigation, we must analyze this issue from the prospective of a public servant acting in good faith. The question then becomes whether the recovery of the cocaine was "sufficiently attenuated from the taint" of the unconstitutional stop. Ibid.

In our Williams decision, we observed as follows:

[A]s pointed out in the leading treatise in the field of search and seizure law, the question whether a person may be prosecuted for a new crime committed in response to an unconstitutional stop or other police misconduct is a different question than "whether an arrest for the new crime should be deemed so substantially 'purified' by that new crime as to provide a lawful basis for admitting evidence of some other offense . . . found in a search incident to that arrest." 6 Wayne R. LaFare, Search & Seizure: A Treatise on the Fourth Amendment § 11.4(j), at 66 (4th ed. Supp. 2009).

Consistent with this view, our Supreme Court in Williams did not say that any conduct that could be found to constitute obstruction automatically constitutes "an intervening act . . . that completely purge[s] the taint from the unconstitutional investigatory stop." 192 N.J. at 18. Instead, the Court indicated that the determination "whether evidence is sufficiently attenuated from the taint of a constitutional violation" must be made on a case-by-case basis in light of the three-factor test set forth in [State v. Johnson, 118 N.J. 639 (1990)], and reaffirmed in Williams, 192 N.J. at 15.

In concluding that the recovery of the handgun at the end of the police pursuit in Williams was sufficiently attenuated from the taint of the unconstitutional stop to justify the admission of that evidence, the Court pointed to State v. Seymour, 289 N.J. Super. 80 (App. Div. 1996) and State v. Casimono, 250 N.J. Super. 173 (App. Div. 1991), certif. denied, 127 N.J. 558, cert. denied, 504 U.S. 924, 112 S. Ct. 1978, 118 L. Ed. 2d 577 (1992), as other examples of cases in which the taint of unlawful police conduct had sufficiently dissipated as a result of intervening criminal acts to justify admission of evidence recovered

after the defendant's apprehension. Id. at 16. Therefore, it is illuminating to consider the factual circumstances that this court found to establish a sufficient attenuation between an unconstitutional stop and subsequent seizure of evidence to justify admission of that evidence in those cases.

In Seymour, the defendant disobeyed a police signal to stop his car, which resulted in a mile and a quarter police pursuit during which defendant increased his speed from forty to fifty miles per hour and swerved onto the shoulder of the road several times. 289 N.J. Super. at 83-85. In the course of this police pursuit, the defendant discarded cocaine out the window of his car. Id. at 83. Although the court assumed that the initial police signal to defendant to stop his car was unlawful, id. at 84, it nevertheless concluded that defendant's failure to comply with that command constituted eluding, in violation of N.J.S.A. 2C:29-2(b), id. at 85, and affirmed the denial of the defendant's motion to suppress evidence of the cocaine discarded during the course of the police pursuit. Id. at 86-89. In reaching this conclusion, the court observed: "Fleeing from the police in a motor vehicle with the police in vehicular pursuit could endanger defendant, the officer, other motorist, or pedestrians." Id. at 87.

In Casimono, the police directed a car to pull over to the shoulder of the road because the driver had made several lane changes without signaling. 250 N.J. Super. at 177. As the car pulled over, the police observed the defendant, who was a passenger, make a "furtive" movement. Ibid. Based on this observation, the police subjected both the driver and the defendant to pat down searches. Id. at 178. The driver resisted the search, first refusing to take his hand

out of his pocket and then throwing something over the guardrail located along the shoulder of the roadway, which was subsequently determined to be a dollar bill containing cocaine residue. Ibid. At this point, defendant returned to the car where he retrieved a paper bag, which was subsequently determined to contain a substantial amount of cocaine, and also threw it over the guardrail. Ibid. The defendant and the driver then had to be physically subdued. Ibid.

We concluded that even though the stop of the car in which defendant had been riding was lawful, the pat down searches of the driver and the defendant had been unlawful. Id. at 178-82. Applying the three-factor test adopted in Johnson and later reaffirmed in Williams, we held that evidence of the cocaine in the dollar bill should have been suppressed because the driver "threw [the] dollar bill containing cocaine residue over the guardrail during and in direct response to the illegal pat down search[.]" Id. at 186. On the other hand, we held that the trial court had properly denied the motion to suppress the cocaine contained in the paper bag because the unlawful pat down search of defendant had been completed before he voluntarily returned to the car, in violation of the police officer's directions, and retrieved the paper bag that he threw over the guardrail. Ibid. We noted that the only unlawful police conduct was the pat down searches of the defendant and the driver, that the bag of cocaine was not located on their persons but rather in the car, and that defendant had gained access to the bag only by disobeying a lawful police order to remain outside the car. Id. at 186-87. Under these circumstances, we concluded that "there was a significant break in the chain of causation between the illegal searches and the discovery of the cocaine." Id. at

187.

Under the three-factor test for determining significant attenuation between unlawful police conduct and seizure of evidence reaffirmed in Williams, we perceive no basis for concluding that the unconstitutional stop of defendant constituted "flagran[t] . . . police misconduct." Williams, supra, 192 N.J. at 15 (quoting Johnson, supra, 118 N.J. at 653). However, the other Williams factors militate against the conclusion that there was a significant attenuation between the stop and the seizure of the cocaine discarded by defendant. Only four or five seconds elapsed between when Officer Delaprida directed defendant to stop his bicycle and defendant discarded the cocaine. Consequently, there was a very close "temporal proximity between the illegal conduct and the [recovery of] the challenged evidence[.]" Ibid. (quoting Johnson, supra, 118 N.J. at 653).

Most importantly, there were no significant "intervening circumstances" between the unlawful police command to defendant to stop his bicycle and defendant's discard of the box that resulted in the seizure of cocaine. Ibid. Defendant did not push a police officer, as in Williams, flee in a car resulting in a mile and a quarter police pursuit, as in Seymour, or seek to avoid apprehension by returning to a lawfully stopped car after the police had removed him from the car, as in Casimono. In those cases the defendant's intervening criminal acts not only constituted a break in the chain of causation between the unlawful police conduct and seizure of evidence but also posed a risk of physical injury to police officers and, at least in Seymour, members of the public. In contrast, defendant did not force the officers to engage in a

lengthy and dangerous pursuit to apprehend him or engage in any act of physical aggression against Officer Delaprida and his partner. In fact, the officers physically accosted defendant by grabbing him on his bicycle. Therefore, there is no basis for concluding that the police seized the cocaine discarded by defendant "by means that [were] sufficiently independent to dissipate the taint of their [prior] illegal conduct." Williams, supra, 192 N.J. at 15 (quoting Johnson, supra, 118 N.J. at 653).

"The purpose of the exclusionary rule is to deter police misconduct and to preserve the integrity of the courts." Johnson, supra, 118 N.J. at 651. The attenuation exception applied in Williams, Seymour and Casimono was established in recognition of the fact that the seizure of evidence following police misconduct is in some circumstances so "far removed from the constitutional breach" that suppression "is a cost [that is] not justified" by the purposes of the exclusionary rule. State v. Badessa, 185 N.J. 303, 311 (2005). However, it is equally true that an overly expansive application of the attenuation exception can undermine the salutary objectives of the exclusionary rule. In New Jersey, the three-factor test reaffirmed in Williams delineates the circumstances in which the attenuation exception may be properly applied. . . .

[Williams, supra, 410 N.J. Super. at 560-64.]

We now review the facts in this case in light of the three factors enunciated by the Supreme Court in Johnson and in Williams, i.e., "(1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of

intervening circumstances; and (3) the flagrancy and purpose of the police misconduct." Williams, supra, 192 N.J. at 15 (quoting State v. Johnson, 118 N.J. 639, 653 (1990)). Although we have concluded that Krissinger's conduct was unconstitutional, we do not believe that it was particularly "flagrant," given the motion judge's findings of fact. However, Krissinger's seizure of the plastic bag was virtually simultaneous with his unconstitutional seizure of Wright. Just as Wright was not free to leave during Krissinger's interrogation about the graffito, he was prohibited by Krissinger from handing the bag to someone else at a time when there was neither reasonable and articulable suspicion for a Terry stop nor probable cause for an arrest. Consequently, although Krissinger did not have the opportunity to ascertain the contents of the bag until after Wright's attempted flight, he had already seized the bag before Wright pushed the papers out of Krissinger's hand and started to run away.

Although Wright might have been subject to prosecution for obstruction in hitting the papers out of Krissinger's hands and running away, we find that those actions were not "intervening circumstances" that would remove the taint from Krissinger's preceding unconstitutional seizure of both Wright and the plastic bag.

III.

In summary, we hold that Krissinger acted unconstitutionally in stopping Wright for questioning because his actions amounted to a Terry stop for which he had no reasonable and articulable suspicion. We further hold that the almost simultaneous seizure of the plastic bag was tainted by the unconstitutional stop. Consequently, we reverse the denial of the motion to suppress the cocaine contained in the bag and vacate Wright's guilty plea.

Reversed.

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



CLERK OF THE APPELLATE DIVISION