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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1482-11T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TIMOTHY PHEASANT,

Defendant-Appellant.

Submitted December 17, 2012 - Decided January 17, 2013

Before Judges Sabatino and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 10-08-2242.

Law Offices of A. Charles Peruto, Jr., attorneys for appellant (A. Charles Peruto, Jr., of counsel; Mark A. Hinrichs, on the brief).

Warren W. Faulk, Camden County Prosecutor, attorney for respondent (Jason Magid, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After the denial of his motion to suppress evidence of marijuana that police seized from his pickup truck without a warrant, defendant Timothy Pheasant entered into a guilty plea to third-degree manufacturing, distributing or dispensing of

marijuana, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(11). He was sentenced to a three-year custodial term, concurrent to any sentence that may be imposed arising from defendant's violation of probation on a prior conviction in Texas. Defendant's present conviction was conditioned on his right, which he has now exercised, to appeal the trial court's suppression ruling. Because the trial court's analysis erroneously co-mingled the respective and discrete elements of the "inevitable discovery" doctrine and the "independent source" doctrine under the Fourth Amendment, we remand for further consideration of the suppression motion and a renewed analysis of the applicable standards.

I.

Although some aspects of the facts relating to this warrantless search remain disputed, the relevant background is essentially as follows. Based upon a tip from an informant that defendant was a marijuana seller, officers of the Bellmawr police department arranged a controlled purchase of one pound of marijuana from defendant on May 13, 2010. After defendant arrived at the informant's home to conduct the transaction, the police officers, who had been conducting a surveillance of the property, confronted defendant.

Defendant's version of what was said and what happened thereafter conflicts with that of the police detective who

testified at the suppression hearing. In any event, the record indicates that the detective, while at the scene, confronted defendant and asked him if he had any marijuana in his pickup truck, which was then parked in the informant's driveway.¹ Defendant allegedly responded in the affirmative, indicating that marijuana was in a tool box in the back of his truck and the detective "could go get it." Without obtaining a warrant, the police searched the tool box and found marijuana inside. Defendant was then arrested.

Defendant was subsequently charged by a grand jury with possession of a controlled dangerous substance ("CDS"), N.J.S.A. 2C:35-10(a)(3) (count one); possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a)(1) (count two); possession of CDS with intent to distribute it within 1,000 feet of school property, N.J.S.A. 2C:35-7 (count three); and possession of CDS with intent to distribute it within 500 feet of a public housing facility, park, or public building, N.J.S.A. 2C:35-7.1(a) (count four).

Defendant moved to suppress the seized marijuana evidence, arguing that his constitutional rights had been violated by the

¹ The parties dispute whether the detective issued defendant Miranda warnings before posing his inquiry. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We note that the State did not produce any Miranda card signed by defendant at the scene of the search.

warrantless search of his vehicle. In opposition, the State contended, as a threshold matter, that defendant's constitutional rights of privacy had not been "triggered" because defendant had voluntarily disclosed to the police that he had marijuana in his truck's toolbox and informed the detective that he could retrieve it. The State maintained that the police detective's inquiry as to whether there was marijuana in his vehicle did not comprise an express or implied request to search the truck. The State further argued that even if, for the sake of discussion, the search of the truck implicated defendant's privacy rights, admission of the marijuana from the ensuing search and seizure was justified based upon what is known as the inevitable discovery doctrine.² See, e.g., State v. Sugar, 100 N.J. 214, 236-37 (1985) ("Sugar II").

After hearing testimony at the suppression hearing from defendant and from Detective William Perna, the Bellmawr police officer who spoke with defendant at the scene and who seized the

² Although they were not invoked by the State, the motion judge also rejected the automobile exception and search-incident-to-arrest exception as alternative grounds for upholding the search. The judge rejected the automobile exception because the police stop of defendant was not unexpected, which is required under that exception. See State v. Pena-Flores, 198 N.J. 6, 28 (2009). The judge also ruled that the search-incident-to-arrest exception does not authorize a search of a motor vehicle in an area outside of defendant's immediate control. See State v. Eckel, 185 N.J. 523, 530 (2006). The State does not contest these determinations in this appeal.

drugs from the truck, the motion judge denied defendant's motion. In her oral opinion, the judge expressed a conclusion that the State had fulfilled the elements of the inevitable discovery exception. However, as we show in Part II of this opinion, infra, the judge mistakenly incorporated into her inevitable discovery analysis elements of the related, but distinct, independent source exception recognized under the Fourth Amendment. See State v. Holland, 176 N.J. 344, 355 (2003).

Following the denial of his suppression motion, defendant entered into a plea agreement with the State, preserving his right to appeal the court's suppression ruling. Sentence was thereafter imposed, consistent with the plea agreement.

This appeal ensued, in which defendant offers the following points for our consideration:

POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE PHYSICAL EVIDENCE OF THE DEFENDANT BASED ON THE INEVITABLE DISCOVERY DOCTRINE

- A. THE INFORMANT'S TIP AND POLICE CORROBORATION DID NOT ESTABLISH PROBABLE CAUSE TO SEARCH THE DEFENDANT'S VEHICLE AS REQUIRED BY THE INEVITABLE DISCOVERY DOCTRINE

- B. A SEARCH WARRANT WOULD NOT HAVE BEEN OBTAINED WITHOUT THE ILLEGAL DISCOVERY OF THE CONTRABAND

C. THE CONTRABAND WOULD NOT HAVE BEEN
INEVITABLY DISCOVERED THROUGH AN
IMPOUNDMENT AND SUBSEQUENT INVENTORY OF
THE DEFENDANT'S VEHICLE

For the reasons that follow, we sustain the trial court's finding that defendant's Fourth Amendment rights were, in fact, implicated here. However, we are constrained to remand the matter because the trial court mistakenly applied the three elements of the independent source doctrine in the inevitable discovery doctrine analysis.

II.

A.

We first briefly express our agreement with the trial court's finding that defendant's Fourth Amendment privacy rights were indeed implicated by the search of his vehicle in this case. The court found that defendant's privacy rights were "clearly" implicated here by Detective Perna's inquiry of him, because such rights are triggered, as the judge noted, by "express or implied [police] request[s] to search or enter." Even though defendant himself allegedly divulged to the police that marijuana was in his truck's tool box and that the detective could retrieve it, such revelation was prompted by the detective's pointed inquiry.³ The detective acknowledged on

³ Notably, because the trial court determined the detective's question invoked defendant's Fourth Amendment privacy rights, it
(continued)

cross-examination that he failed to inform defendant at the scene of his right to not consent to a search.

The State's citation in its appellate brief to State v. McGivern, 167 N.J. Super. 86 (App. Div. 1974), does not invalidate the judge's conclusion. In McGivern, a state trooper stopped the defendant's motor vehicle and asked the defendant if he had any luggage in his car. Id. at 88. In response, the defendant personally opened the trunk for the trooper, pointing out a bag of clothes and a radio, and in the course revealing a box, which happened to smell of marijuana. The trooper opened the box and found marijuana inside. Ibid. We held in that circumstance that the State had not violated the defendant's constitutional rights because the trooper had never made "an express or implied request to see or enter" the vehicle. Id. at 90.

Here, unlike the situation in McGivern, defendant did not take the initiative to display anything to Detective Perna. Instead, he responded to the detective's specific inquiry as to whether drugs were in the truck. By comparison, no such specific inquiry probing into the defendant's potential possession of an illegal item was involved in McGivern. Id. at

(continued)

explicitly noted that it did not find it necessary to make a credibility determination on the issue of whether defendant gave the detective permission to search the toolbox.

88-90. We agree with the trial court that the present situation is distinguishable, and that Detective Perna's inquiry could reasonably have been perceived to communicate a desire to see and inspect any drugs that might be inside the truck. That inquiry placed defendant, in effect, in a difficult predicament. His alleged verbal response admitting where marijuana was located and permitting the detective to retrieve it was unlike the affirmative conduct of the defendant in McGivern responding to a question with a physical display of the vehicle's contents.

B.

We now turn to the question of whether the motion judge correctly analyzed this search and seizure under the inevitable discovery doctrine.

The inevitable discovery doctrine requires the State to demonstrate by clear and convincing proof that: (1) "proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case"; (2) "under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence"; and (3) "the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means." Sugar II, supra, 100 N.J. at 238; see also Holland, supra, 176 N.J. at 361-62 (applying, in a separate

portion of the Court's opinion, the various factors of the inevitable discovery doctrine).

As the State's brief on appeal concedes, the transcript of the trial court's oral decision reflects that the court applied an incorrect legal test in denying defendant's motion to suppress based on the inevitable discovery doctrine. Instead of applying the three-part inevitable discovery test set forth in Sugar II, supra, the court applied the three-part independent source test set forth in Holland, supra, 176 N.J. at 361.⁴

The independent source doctrine considers, in essence, whether the State can prove that incriminating evidence was seized lawfully, in spite of the fact that an earlier constitutional violation had occurred. Holland, supra, 176 N.J. at 354. The three required elements of the independent source doctrine are: (1) the State had probable cause to conduct the search at issue absent the unlawfully-obtained information; (2) the State, "without the tainted knowledge or evidence," would have sought a proper warrant; and (3) the initial impermissible search was "not the product of flagrant police misconduct." Id. at 361.

⁴ In its opinion in Holland, the Supreme Court separately discussed the inevitable discovery doctrine, see 176 N.J. at 361-63, which may well have caused the trial court's error here in extracting from the Court's opinion the wrong elements of the legal standard.

Although these two separate exceptions recognized in case law have rather similar names and have somewhat related or overlapping facets, they are legally distinct exceptions to the Fourth Amendment warrant requirement. As Justice Brennan explained in his dissent in Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1983):

When properly applied, the "independent source" exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means . . . [whereas] [t]he "inevitable discovery" exception . . . differs in one key respect . . . specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed.

[Id. at 459, 104 S. Ct. at 2517, 81 L. Ed. 2d at 397 (emphasis added); see also id. at 443, 104 S. Ct. at 2508, 81 L. Ed. 2d at 387 (in which the Supreme Court majority noted that "[t]he independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation") (emphasis added).]

In other words, the independent source doctrine requires the court to consider whether the State has proven that evidence was seized lawfully, in spite of the fact that an earlier constitutional violation had occurred. Holland, supra, 176 N.J. at 363-64 (reversing the trial court's denial of a suppression motion, because the State failed to prove that the search

warrant it used to seize the disputed evidence would have been pursued without the knowledge obtained during the earlier illegal entry). By comparison, the inevitable discovery doctrine applies when evidence was obtained unlawfully, but the State is able to prove that it would have later been lawfully obtained based on independent grounds. See generally Wayne R. LaFare, Search and Seizure § 11.4(a) at 326-73 (5th ed. 2012).

In Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988), Justice Scalia explained the interrelationship between these two doctrines as follows: "[t]he inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." Id. at 539, 108 S. Ct. at 2534, 101 L. Ed. 2d at 481-82.

The critical differences between these two doctrines were recently illustrated by our own Supreme Court in State v. Smith, 212 N.J. 365 (2012). In Smith, the Court applied a "two-step analysis, involving both the inevitable discovery doctrine and the independent source rule." Id. at 401-02. The Court upheld in Smith the admission of evidence that had been obtained in violation of the defendant's constitutional rights, for two

distinct reasons. First, the Court recognized that the State had an "independent source" to have obtained a search warrant. Id. at 401. Second, the Court separately determined that "the police would, through their normal investigatory steps, have inevitably been led" to the disputed evidence. Id. at 402.

Here, the State only invoked before the trial court the inevitable discovery exception. The State did not invoke the independent source exception. In her oral opinion analyzing defendant's suppression motion, the judge unfortunately melded the elements of these two exceptions.

For example, the judge found that the police had "probable cause" to search the truck, which is an element of the independent source exception but is not part of the inevitable discovery exception. The judge also incorrectly focused upon whether Detective Perna "would have sought a warrant" to remove the marijuana had he not believed that he possessed defendant's consent to search the truck, a consideration that pertains to the independent source doctrine, not the inevitable discovery doctrine. The judge also erred in evaluating whether the detective's alleged misconduct was "flagrant," which is a factor under the independent source test, but not the inevitable discovery test. On the other hand, the judge omitted the necessary finding under the first element of the inevitable discovery exception, i.e., whether "proper, normal and specific

investigatory procedures would have been pursued in order to complete the case." Sugar II, supra, 100 N.J. at 238.

The upshot of this likely inadvertent blending of standards is that the judge ultimately did not address all three of the required elements of the inevitable discovery exception.⁵

Given these circumstances, we must remand this matter so that the motion judge can reconsider her application of the inevitable discovery exception, in light of the three requisite elements. The judge shall issue specific findings of fact and conclusions of law as to each of those elements. We decline to exercise original jurisdiction on the issue, as doing so would result in losing the judge's "feel of the case" and her sense of the respective credibility of the witnesses who testified before her at the suppression hearing. See State v. Johnson 42 N.J. 146, 161 (1964).

Although it has not specifically requested to do so, we decline to allow the State on remand to attempt to justify the search under the independent source doctrine. As we have noted, that doctrine was not invoked by the State in the trial court. It would be unfair to defendant to permit the State to fortify

⁵ For that matter, the judge did not fully examine all the findings that would have been necessary to satisfy the independent source doctrine, had the State asserted it.

its opposition to his suppression motion at this late juncture, on a legal theory that it never had espoused before.

The remand proceedings and decision shall be completed on or before March 15, 2013. The trial court shall have the discretion to hear additional testimony if it finds it necessary to do so. If, on further reflection, the court finds that the three elements of the inevitable discovery doctrine are not met and the search was consequently illegal, then defendant may move to vacate his guilty plea. On the other hand, if the court concludes that the required criteria of the inevitable discovery doctrine are all met here, then defendant may file an amended notice of appeal within forty-five days of that determination, and the parties shall then file supplemental appellate briefs in accordance with a new briefing schedule to be established by the clerk.

Affirmed in part and remanded in part. Jurisdiction is retained.

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


CLERK OF THE APPELLATE DIVISION