SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0070-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALFREDO LOPEZ, a/k/a BUGSY,

Defendant-Appellant.

Submitted May 3, 2017 – Decided June 29, 2017

Before Judges Accurso and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 13-10-01370.

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

Gurbir S. Grewal, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After his motion to suppress evidence seized as a result of a search conducted pursuant to, or as a consequence of, a communications data warrant authorizing the installation and use of a Global Positioning System (GPS) device on his automobile, defendant pled guilty to first-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5a(1) and 5b(1). He was sentenced in accordance with the recommendation in his plea agreement to ten years imprisonment with a five-year parole disqualifier, to be served consecutively to a sentence he was then serving. On appeal, defendant argues:

> POINT I
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> DEFENDANT'S MOTION TO SUPPRESS THE ITEMS SEIZED SHOULD HAVE BEEN GRANTED; THERE WAS NOT PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT.
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> POINT II
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> THE MATTER SHOULD BE REMANDED FOR RECONSIDERATION OF THE SENTENCE.

We reject these arguments and affirm.

The warrant authorizing the GPS device was issued on February 19, 2013. It was supported by the affidavit of that date by New Jersey State Trooper Richard Pogorzelski, who was assigned to the Violent and Organized Crime Control North Bureau, Drug Trafficking North Unit (DTNU), Strategic Targeting Squad. The judge to whom the affidavit was presented was limited to the information

contained within the four corners of the affidavit. State v. Wilson, 178 N.J. 7, 14 (2003). Accordingly, we will set forth a summary of those facts, to which both the Law Division judge and we are limited in determining the propriety of the warrant.

Pogorzelski had extensive training and experience in drug identification and investigative procedures, including with respect to illicit distribution of narcotics, gang investigations, and the collection of gang-related intelligence. He possessed a Bachelor of Arts degree in criminal justice, and had been assigned to the DTNU for eight years at the time of making the affidavit. He had participated in more than one hundred narcotics and criminal investigations. He had arrested and interviewed individuals involved with violating drug laws as well as members and associates of street gangs. He had conducted surveillance on individuals and groups who are members of criminal organizations. Through these activities and contacts with other law enforcement agencies enforcing gang and narcotics violations, he had become familiar with methods and patterns of activities associated with street gangs and the distribution of illegal drugs.

In January 2012, the DTNU received information from the Drug Enforcement Agency (DEA) that defendant was involved in the distribution of heroin in and around northern New Jersey and New York. The information provided defendant's date of birth and

described the car he was using, a gray Jaguar XJ, to transport and store heroin and the proceeds derived from sales.

A check of motor vehicle records revealed that defendant also owned a 2007 Cadillac Escalade. It was later learned that this vehicle received a parking ticket in the area of Charles Street in Garfield on October 10, 2012.

A subsequent criminal history check revealed that on March 3, 2012, defendant had been arrested in Paramus for eluding the police. During the pursuit, he allegedly threw approximately 2500 decks of heroin out of the motor vehicle before being apprehended. He was under indictment in Bergen County for those charges at the time of Pogorzelski's affidavit.

The criminal history check also revealed that defendant had indictable convictions for drug distribution crimes committed in 1998, 2003 and 2005, resulting respectively in State Prison sentences of eight, four, and five years. He also had other criminal convictions.

An inquiry into employment records revealed that defendant was unemployed at the time of Pogorzelski's affidavit. His last known employment was in 2009.

Physical surveillance of defendant by the DTNU began on January 9, 2013. The affidavit described observations made on January 9, 21 and 25, and February 12, 2013.

On January 9, 2013, defendant's Jaguar was observed parked in front of 217 MacArthur Avenue in Garfield. An individual matching defendant's description walked toward it, entered it, and drove away from the area. The car had a temporary registration tag, a look-up of which revealed that it had been issued to defendant, with an address of 22 Stegman Terrace in Jersey City. Surveillance was conducted at that location, but neither the Jaguar nor defendant were ever seen there.

On January 21, 2013, the Jaguar was again seen at 217 MacArthur Avenue. Defendant was observed walking around the block, repeatedly looking from side-to-side, scanning the area. Defendant did not approach the Jaguar, but continued looking side-to-side, as if checking for law enforcement presence.

Based on his training and experience, Pogorzelski stated that the use of fictitious addresses is a typical practice utilized by large-scale drug dealers to thwart detection of their actual whereabouts. Likewise, his training and experience taught him that "squaring the block and looking inside parked cars are counter-surveillance maneuvers used by individuals to detect the presence of law enforcement."

On January 25, 2013, the Jaguar was parked in front of 217 MacArthur Avenue. It contained a temporary registration issued to defendant, but this was different than the one previously

observed. Based on his training and experience, Pogorzelski was aware that "criminals often change the license plates on their vehicles in order to hide their true identity or to avoid detection of law enforcement." Further, a second temporary registration is not typically issued for a vehicle. The temporary registration initially issued is typically replaced by a permanent license plate.

Another observation was also made on January 25, 2013. A black Dodge Challenger bearing a Georgia temporary registration was parked in front of 217 MacArthur Avenue. An individual later identified as Brandon Pinzon exited the vehicle and walked up to the front door while talking on his cell phone, and then returned to the Dodge Challenger and sat in the driver's seat for some time. A criminal record check revealed that Pinzon had been arrested for distribution of heroin, cocaine and marijuana, and possession of a firearm during the commission of a crime.

After about an hour, Pinzon travelled slowly around the block, a maneuver Pogorzelski described as another counter-surveillance technique. Defendant then exited 217 MacArthur Avenue and got into the Challenger with Pinzon. After traveling approximately a half of a block, they parked for a short time and then returned to where defendant had entered the vehicle. Defendant got out of the Dodge Challenger, entered his Jaguar, and drove away.

Pogorzelski stated that, based on his training and experience, he believed this short meeting was indicative of a narcotics transaction or narcotics business meeting, having taken place away from 217 MacArthur Avenue because "many times drug dealers conduct their illicit business inside vehicles in order to remain hidden from view and away from their homes or stash locations."

On February 12, 2013, defendant came out of 217 MacArthur Avenue and walked toward his Jaguar, the whole time talking on his cell phone and scanning the area side-to-side. He got into the Jaguar and drove off. He was followed and observed to make erratic lane changes and turns without signaling. He traveled to the Paterson Stamp Store in Clifton. He got out of the Jaguar and entered the store for about five minutes. The store is known to members of the DTNU, based on debriefing several defendants and confidential sources, as a place used by narcotics traffickers, specifically heroin mill managers, to purchase stamps for their production facilities. These are used to affix their brand name to the drugs they sell.

Defendant then drove from the stamp store to Hackensack. He was observed squaring blocks, driving past the same locations, repeatedly passing the same streets, looking into vehicles as they passed him, and, in one instance, activating his left-turn signal but making a right turn. He eventually parked the Jaguar and

walked into a building. These maneuvers appeared to Pogorzelski to be further counter-surveillance techniques utilized by defendant to see if law enforcement was following him.

A utility company record check, with subpoenaed records, revealed that defendant was not among the names and addresses of any subscribers or customers at 217 MacArthur Avenue. The building contained four apartments but defendant was not listed as a subscriber or customer in any of them. Again, based upon his training and experience, Pogorzelski knew "that members of drug trafficking organizations utilize fictitious or third party names when renting apartments in an attempt to isolate themselves from prosecution or detection by law enforcement."

Pogorzelski expressed the need for the GPS device in order to continue this investigation. Because of the observed counter-surveillance techniques defendant was utilizing, it was his belief that "continued physical surveillance increases the risk of compromising the integrity and effectiveness of this investigation" because their cover would eventually be compromised, "thereby endangering the chances of ascertaining the full scope of the illegal operation." Accordingly, "the requested device is a crucial aid to physical surveillance that will permit the investigation to remain covert and for the safety of the officers involved in this surveillance." Further, the device will

permit monitoring of the location of the Jaguar, "which there is probable cause to believe will be the transport vehicle for the narcotics." Additionally, the device would help to establish a pattern for defendant's movements and contacts.

The affidavit also contained the following paragraphs:

> 17. Based upon my training and experience, and the information developed thus far in this investigation, I know that transactions and meetings related to the transportation and distribution of controlled dangerous substances occur at diverse hours of the day and night on a seven day-a-week basis. I also know, based upon my training and experience, that persons involved in illegal drug distribution activities often vary the patterns of operation to avoid detection. I further believe that the captioned gray Jaguar XJ, will be used in the furtherance of the commission of the specified crimes on an unpredictable basis and at all hours of the day and night, seven days-a-week.
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> 18. I believe that the execution of the Communications Data Warrant and Search Warrant described in Paragraph 2, supra, will reveal the location of the captioned gray Jaguar XJ as it travels in and around New Jersey, as well as to neighboring jurisdictions. By tracking the captioned vehicle, I will be able to determine the time and route of the captioned vehicle and the locations to which it is driven. I will be able to make arrangements to place the said vehicle under physical surveillance when feasible and safe to do so. The combined use of the monitoring device and physical surveillance will assist in identifying other individuals involved in, and significant locations used by this organization for the processing, transfer, and storage of illicit narcotics, and the proceeds

> generated therefrom. Determining the identities of all the individuals involved in this operation, as well as key locations used, will assist in defining the overall scope of the operation and in gathering sufficient evidence to successfully prosecute its members.

The affidavit was presented to Judge Edward A. Jerejian, who issued the warrant. By its terms, the warrant expressed the judge's findings that

> the facts presented in said application show probable cause for believing that issuance of an Order to install and monitor a tracking device . . . upon the subject automobile will lead to the discovery of evidence of [drug] crimes . . . and that said installation and monitoring will tend to identify individuals engaged in violations of the aforementioned offenses.

Defendant pled guilty on January 13, 2015, to possession with intent to distribute heroin. In the plea colloquy he acknowledged that on March 21, 2013, he possessed, along with others, five ounces or more of heroin with the purpose to give or sell it to others. The pre-sentence report reveals that the incident in which the drugs were seized and the arrests were made involved defendant who arrived at the location in the gray Jaguar. The matters contained in this paragraph, of course, are not contained within the four corners of the search warrant affidavit. We merely state them for purposes of completeness.

Defendant moved to suppress the evidence seized as a result of the search warrant authorizing installation of the GPS device on his Jaguar. The motion came before Judge Liliana S. DeAvila-Silebi. No testimony was presented. The sole issue was whether the search warrant affidavit provided the requisite probable cause to authorize issuance of the warrant.

After hearing oral argument, Judge DeAvila-Silebi issued a comprehensive oral opinion. She recognized the deference that should be accorded to the issuing judge's probable cause assessment, and she set forth the proper standards required to establish probable cause. She recognized that the information in the affidavit must be considered under a totality of the circumstances test. Recognizing Pogorzelski's extensive training and experience, she observed that it is necessary "to take into account what is the trooper observing or what is the police officer reporting based on his training and experience because to a layperson certain information may be just innocent behavior but to a trooper with specific training and experience may see it differently."

The judge then went through the particulars set forth in Pogorzelski's affidavit. She noted that each incident could be viewed as innocent behavior, especially by a layperson, but even by a law enforcement officer. However, in the aggregate, she was

persuaded that based on all of the information provided, including defendant's criminal history and the counter-surveillance maneuvers recognized by members of the DTNU, a pattern of conduct emerged. When viewed through the perspective of a law enforcement officer well trained and experienced in investigating the behaviors of individuals involved in high-level drug distribution enterprises, that pattern of conduct established probable cause that defendant was engaged in drug distribution activity and was utilizing his Jaguar in those activities. She therefore denied defendant's suppression motion. She said:

> So for that reason based on everything that I've said and the totality of the circumstances and all the specific facts that I've brought out out of the affidavit, and you'll notice I didn't bring out all the facts because the other facts are not important in my evaluation of the standard. Those facts alone that I brought out are sufficient enough to establish a suspicion of criminal activity to warrant the GPS installation.
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> It's a well founded suspicion or belief of guilt. And also traditional surveillance methods would not have been effective in this case based on the totality of everything that happened in the affidavit, how it was difficult for them to follow them for long periods of time because of the fact that in fact they were doing a lot of squaring of the blocks.
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> So for that reason the GPS was valid. The search warrant was valid. It's not going to be suppressed, any of the evidence.

Under the Constitutions of the United States and New Jersey, individuals are protected from unreasonable searches and seizures, and no warrant shall issue except upon probable cause. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Unless a search falls within one of the recognized exceptions to the warrant requirement, the police must first obtain a warrant from a neutral judicial officer as a prerequisite to a search. State v. Sullivan, 169 N.J. 204, 210 (2001). Before issuing a warrant, the judge must be satisfied that probable cause exists to support the belief that a crime has been or is being committed at a specific location, or that evidence of a crime will be found at the place to be searched. Ibid. The installation of a GPS device on a vehicle is a search within this context. United States v. Jones, 565 U.S. 400, 404-12, 132 S. Ct. 945, 949-53, 181 L. Ed. 2d 911, 917-23 (2012).

The concept of probable cause "eludes precise definition." Sullivan, supra, 169 N.J. at 210 (quoting Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000)). Courts generally accept it to mean "less than legal evidence necessary to convict though more than mere naked suspicion." Id. at 210-11 (quoting State v. Mark, 46 N.J. 262, 271 (1966)). Probable cause is "consistently characterized . . . as a common-sense, practical standard" for testing a warrant's validity, State v. Novembrino, 105 N.J. 95, 120 (1987), which is met when police have a well grounded suspicion

that a crime is being committed. Sullivan, supra, 169 N.J. at 211.

In identifying the competing policy concerns behind the probable cause requirement, our Supreme Court has said:

> Probable cause is a flexible, nontechnical concept. It includes a conscious balancing of the governmental need for enforcement of the criminal law against the citizens' constitutionality protected right of privacy. It must be regarded as representing an effort to accommodate those often competing interests so as to serve them both in a practical fashion without unduly hampering the one or unreasonably impairing the significant content of the other.
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> [State v. Kasabucki, 52 N.J. 110, 116 (1968).]

The United States Supreme Court similarly described probable cause as a "practical, non-technical conception." Illinois v. Gates, 462 U.S. 213, 231, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, 544 (1983). Probable cause requires more than mere suspicion; it requires a showing of a "fair probability" that criminal activity is taking place. State v. Demeter, 124 N.J. 374, 380-81 (1991).

A probable cause determination must be based on the totality of the circumstances and requires consideration of probabilities. State v. Jones, 179 N.J. 377, 389. The totality of the circumstances is, by definition, very fact sensitive. A qualitative analysis is required to be applied to the unique facts and circumstances in any given case. State v. Keyes, 184 N.J.

541, 556 (2005). The analysis comes down to a "practical, common-sense decision." Jones, supra, 179 N.J. at 390. Whether probable cause exists "involves no more than a value judgment upon a factual complex rather than an evident application of a precise rule of law, and indeed a value judgment which inevitably reflects the seasoning and experience of the one who judges." Schneider v. Simonini, 163 N.J. 336, 362 (2000), cert. denied, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001) (quoting State v. Funicello, 60 N.J. 60, 72-73 (Weintraub, C.J., concurring), cert. denied, 408 U.S. 942, 92 S. Ct. 2849, 33 L. Ed. 2d 766 (1972)).

For these reasons, a reviewing judge should pay "substantial deference" to the discretionary determination of the judge who issued the warrant. Sullivan, supra, 169 N.J. at 211; Kasabucki, supra, 52 N.J. at 117. Review of a warrant's efficacy "is guided by the flexible nature of probable cause and by the deference shown to issuing courts that apply that doctrine." Sullivan, supra, 169 N.J. at 217. Warrant applications "should be read sensibly rather than hypercritically and should be deemed legally sufficient so long as they contain[] factual assertions which would lead a prudent [person] to believe that a crime [has] been committed and that evidence . . . of the crime [is] at the place sought to be searched." Ibid. (quoting State v. Laws, 50 N.J.

159, 173 (1967) (alteration in original), cert. denied, 393 U.S. 971, 89 S. Ct. 408, 21 L. Ed. 2d 384 (1968)).

If the information in the affidavit could have reasonably led the issuing judge to find probable cause, that judge's determination should not be second guessed upon review. When the adequacy of the facts supporting probable cause in a search warrant affidavit is challenged, "and their adequacy appears to be marginal, the doubt should ordinarily be resolved by sustaining the search." Jones, supra, 179 N.J. at 388-89 (quoting Kasabucki, supra, 52 N.J. at 116). It is therefore well settled that a search executed pursuant to a warrant is presumed valid, and the defendant bears the burden of proving lack of probable cause in the warrant application. Sullivan, supra, 169 N.J. at 211.

For the purposes of this court's appellate review, a Law Division judge's review of whether a search warrant was supported by adequate probable cause is a question of law. The trial court's interpretation of the law is not entitled to any special deference, and our review is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Applying these principles, upon our de novo review, we concur with Judge DeAvila-Silebi's conclusion that the issuing judge did not err in finding that Pogorzelski's affidavit provided sufficient facts to establish probable cause that defendant was

engaged in ongoing drug distribution activity. We reject defendant's argument that Pogorzelski set forth nothing more than a series of hunches which, even if considered in the aggregate, did not establish a reasonable probability of criminal activity. We agree, as did Judge DeAvila-Silebi, that viewed in isolation, each of the observed incidents would not support a probable cause finding. Likewise, the information received from the DEA, although reliable and sufficiently detailed to lend credibility to it, was a year old when physical surveillance of defendant began. However, it did provide background information which, along with defendant's prior criminal history, including three separate indictable convictions for drug distribution offenses, was properly considered. It was also appropriate for members of the DTNU to take into account defendant's arrest on March 3, 2012, for a drug related offense, in which he allegedly possessed a very large quantity of heroin which was packaged for distribution.

The counter-surveillance techniques described by Pogorzelski might not be obvious to laypersons, and might not be significant in a single isolated incident. However, through the lens of training and experience, the continuous utilization of these techniques demonstrated to law enforcement officers possessing expertise in investigating high-level drug distribution organizations a substantial probability that drug distribution

activity was being conducted. Defendant's suppression motion was properly denied.

Defendant's excessive sentencing argument requires little discussion. Pursuant to the plea agreement, defendant was sentenced for this first-degree crime to a base term at the bottom of the first-degree range, namely ten years, with a parole disqualifier of five years. Also, as provided in the plea agreement, the sentence was ordered to be served consecutively to the sentence defendant was then serving for a drug conviction arising out of the March 3, 2012 arrest.

Judge James J. Guida imposed the sentence. He found the applicability of aggravating factors (3) the risk that defendant will commit another offense, (6) the extent and seriousness of defendant's prior criminal record, and (9) the need for deterrence. N.J.S.A. 2C:44-1a(3), (6) and (9). Because of defendant's advanced kidney disease for which he was receiving dialysis treatment, the judge found the applicability of mitigating factor (11) the imprisonment of defendant would entail excessive hardship. N.J.S.A. 2C:44-1b(11). The judge found a substantial preponderance of aggravating factors. Defendant does not dispute those findings by Judge Guida.

This, of course, would have justified at least a mid-range base term of fifteen years up to the twenty-year maximum for a

first-degree crime. However, because of the plea agreement, defendant was given the benefit of the bottom-of-the-range ten-year base term. In these circumstances, we find no abuse of discretion in the imposition of a period of parole ineligibility of five years, rather than the three-and-one-third years defendant seeks.

Pursuant to N.J.S.A. 2C:44-5h, when a defendant is sentenced for an offense committed while released pending disposition of a previous offense,

> the term of imprisonment shall run consecutively to any sentence of imprisonment imposed for the previous offense, unless the court, in consideration of the character and conditions of the defendant, finds that imposition of consecutive sentences would be a serious injustice which overrides the need to deter such conduct by others.

Defendant argues that Judge Guida did not give adequate consideration to whether or not defendant satisfied the serious injustice test. Defendant seeks a remand for further consideration of the issue. We do not agree.

Judge Guida expressed his reasons for finding that the serious injustice test was not satisfied. In doing so, he gave due consideration to defendant's serious medical condition. His stated reasons included the following:

> I also find that he is suffering from late-stage or end-stage kidney disease which

> apparently is being treated at the prison facility. To the extent that he's performing now -- he appears to be healthy and I -- I say that exteriorly; I don't know what's going on inside him. He's able to communicate with me, answer questions and gave me a statement as to his position which was actually eloquent, and also indicating from the records that were given to me or the letters that were given to me, certificates that he's able to be a mentor in the prison. So while it is a hardship, I don't find that it is an extreme hardship in that regard.

The judge did not err in finding that defendant had not satisfied the very high standard required to trigger the exception to the presumptive consecutive sentencing requirement of N.J.S.A. 2C:44-5h. We are satisfied that the judge's findings regarding aggravating and mitigating factors were based on competent and credible evidence in the record, he correctly applied the sentencing guidelines set forth in the Code of Criminal Justice, and the sentence imposed was not excessive or unduly punitive and did not constitute an abuse of discretion. State v. O'Donnell, 117 N.J. 210 (1989); State v. Gertler, 114 N.J. 383 (1989); State v. Roth, 95 N.J. 334 (1984).

Affirmed.