SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0349-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLEE M. BRENNAN,

Defendant-Appellant.

Submitted May 10, 2017 – Decided June 28, 2017

Before Judges Alvarez and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Indictment No. 13-09-1079.

Joseph E. Krakora, Public Defender, attorney for appellant (Sophie Kaiser, of counsel and on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Sarah E. Ross, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Carlee Brennan appeals from her conviction after a conditional plea of guilty. Defendant entered her plea following

the denial of a motion to suppress. In a single point on appeal, defendant argues:

POINT I

> THE JUDGE ERRONEOUSLY DENIED BRENNAN'S MOTION TO SUPPRESS BECAUSE THE OFFICER LACKED A REASONABLE SUSPICION TO STOP THE VEHICLE AND HAD NO "HEIGHTENED AWARENESS OF DANGER" TO ORDER BRENNAN TO EXIT THE VEHICLE.
>
> A. The Officer Lacked Reasonable Articulable Suspicion To Conduct An Investigatory Stop.
>
> B. The Officer Lacked the "Heightened Awareness Of Danger" Necessary To Order Brennan To Exit The Vehicle.
>
> C. The Judge Erred In Concluding That The Drugs Would Have Been Inevitably Discovered.
>
> 1. The State Failed To Prove That [T]he Heroin Would Have Been Inevitably Discovered Through Impoundment.
>
> 2. The State Failed To Prove That [T]he Heroin Would Have Been Inevitably Discovered Through A Search Warrant.

Following our review of the arguments, in light of the facts and applicable law, we conclude that the denial of the motion was not erroneous. Accordingly, we affirm.

We take the facts from the suppression hearing record. Around midnight on July 14, 2013, Morristown police officers Brian LaBarre

and Carmen Caponegro arranged to meet at a Dunkin Donuts. LaBarre arrived first. While LaBarre was waiting, he was approached by a citizen that reported observing "someone [] slumped over into the passenger compartment" of a gray sedan in the parking lot.

Based upon that information, LaBarre proceeded to walk to the car carrying his flashlight. Caponegro, who just arrived, followed. As he approached the vehicle, LaBarre observed a female, later identified as defendant, moving about in the passenger seat. Just prior to announcing his presence, LaBarre observed defendant mouth "cops" while moving objects in her lap. When he reached the vehicle, LaBarre observed a syringe cap on the center console.

At this time, the driver turned the vehicle on and attempted to leave the parking lot. LaBarre shouted, "police" and ordered that the vehicle be turned off. Concerned that there would be another attempt to leave the scene, LaBarre walked behind the vehicle and approached the driver. Caponegro took up a position at the passenger door.

LaBarre requested the driver to step out of the vehicle and to provide him with identification. He also inquired of the driver why he and defendant were sitting in an empty parking lot. While the driver was exiting the vehicle, LaBarre observed a hypodermic needle on the floorboard. When a third police officer arrived at

the scene, LaBarre requested that he remain with the driver while he spoke with defendant.

LaBarre asked defendant the reason for her presence in the lot, to which defendant responded they were "lost." LaBarre, based upon his training and experience, did not believe defendant and inquired further as to the reason for being in the lot to which defendant replied by blurting out that it was "her dope," that she did not want the driver to get in trouble, and that she "had everything and the dope was hers."

LaBarre requested defendant exit the vehicle. Upon exiting, a tan-colored pouch fell from defendant's lap into a cavity in the passenger door. LaBarre asked if the narcotics defendant referred to were in the pouch. Defendant replied, "they were." LaBarre then asked defendant if he could look inside the pouch, to which defendant responded in the affirmative. Inside the pouch were several glassine folds of suspended heroin. Defendant was placed under arrest.[1]

After her arrest, defendant was transported to police headquarters for processing. Since there was no female officer present to conduct a search, LaBarre contacted a neighboring police

[1] A search of the vehicle's interior also took place based upon the consent of the driver. That search is not relevant to our determination.

department to request a female officer to assist. While waiting for the female officer to arrive, defendant reached beneath her shirt and removed a plastic bag containing several white pills. Defendant admitted the pills were Xanax.

Subsequent to defendant's indictment on two counts of third-degree possession of a controlled dangerous substance (CDS), she filed a motion seeking to suppress the evidence seized and the statement she made to LaBarre. At the conclusion of the hearing, Judge Robert J. Gilson denied both motions in a comprehensive, well-reasoned, written opinion.[2]

The judge found LaBarre credible in his testimony recounting the events leading to defendant's arrest. The judge held that the information from the citizen and the driver's attempt to "flee" after defendant mouthed "cops," provided LaBarre with a reasonable and articulable basis to stop the vehicle. Further, the judge held that LaBarre's observations of the syringe cap on the center console and the syringe needle on the floorboard provided him with a reasonable and articulable suspicion to continue the investigative stop. The judge concluded that while LaBarre had a reasonable basis to request consent to "look into the pouch," he did not provide defendant with the required notice of her right

[2] Defendant has not appealed the denial of the motion to suppress her statements.

of refusal to sustain a valid consent search. State v. Johnson, 68 N.J. 349, 354 (1975). However, the judge held that the doctrine of inevitable discovery applied as the pouch would have been subject to a later search since the vehicle was to be impounded.

When analyzing a warrantless search and seizure, we start with the parameters defined by our Federal and State Constitutions. These protections require police to first secure a warrant before seizing a person or conducting a search of a home or a person. State v. Watts, 223 N.J. 503, 513 (2015).

> [B]oth the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guarantee to New Jersey's citizens "[t]he right to walk freely on the streets of a city without fear of [an] arbitrary arrest[.]" State v. Gibson, 218 N.J. 277[, 281] (2014). When evaluating the reasonableness of a detention, the "totality of circumstances surrounding the police-citizen encounter" must be considered. State v. Privott, 203 N.J. 16, 25 (2010) (quoting [State v. Davis, 104 N.J. 490, 504 (1986)]).
>
> [State v. Coles, 218 N.J. 322, 343 (2014) (second alteration in original).]

While the warrantless seizure of a person is "presumptively invalid as contrary to the United States and the New Jersey Constitutions," id. at 342 (quoting State v. Mann, 203 N.J. 328, 337 (2010)), there remains a critical "balance to be struck between individual freedom from police interference and the legitimate and

reasonable needs of law enforcement." Id. at 343. A reviewing court must determine whether the State has met its burden, by a preponderance of the evidence, to establish the warrantless search or seizure of an individual was justified in light of the totality of the circumstances. See Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983).

We first address defendant's argument that the investigatory stop was not based upon a reasonable articulable decision. The parameters for an investigatory stop are well defined.

> [A] police officer may conduct an investigatory stop of a person if that officer has "particularized suspicion based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing." [Davis, supra, 104 N.J. at 504.] The stop must be reasonable and justified by articulable facts; it may not be based on arbitrary police practices, the officer's subjective good faith, or a mere hunch.
>
> [Coles, supra, 218 N.J. at 343 (citation omitted).]

When reviewing whether the State has shown a valid investigative detention, consideration of the totality of the circumstances requires we "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).

Finally, we must remember the "touchstone" for evaluating whether police conduct has violated constitutional protections is "reasonableness." State v. Hathaway, 222 N.J. 453, 476 (2015) (quoting State v. Judge, 275 N.J. Super. 194, 200 (App. Div. 1994)). The reasonableness of police conduct is assessed with regard to circumstances facing the officers, who must make split second decisions in a fluid situation. See State v. Bruzzese, 94 N.J. 210, 228 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984).

> 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.

> [Davis, supra, 104 N.J. at 505 (emphasis added).]

Guided by these principles, we examine the facts and circumstances presented in this case.

Judge Gilson referenced the culmination of events which, when considered in their totality, formed LaBarre's reasonable articulable suspicion of criminal activity. As we find the recitation by the judge of these facts to be consistent with the hearing record, we need not repeat them at length herein. Suffice it to state, we agree the totality of these facts presented display that LaBarre's conduct during his initial encounter with defendant resulted from more than a hunch. When taken together, the facts demonstrate that LaBarre's perception that defendant was potentially engaged in criminal activity was objectively reasonable.

Further, the request by LaBarre of defendant to exit the vehicle was a continuum of a fluid investigation, especially after LaBarre observed the syringe cap and the syringe in the vehicle. See Coles, supra, 218 N.J. 343-44 (recognizing law enforcement's need to respond to the fluidity of a street encounter where there is reasonable suspicion of wrongdoing).

Giving due weight to LaBarre's professional insight and observations, we are satisfied there was a sufficient basis to

believe that defendant was engaged in criminal activity to warrant his further investigation.

Defendant further argues that the judge erred in employing the doctrine of inevitable discovery to sustain the search. "The exclusionary rule generally bars the State from introducing into evidence the 'fruits' of an unconstitutional search or seizure." State v. Shaw, 213 N.J. 398, 412-13 (2012) (quoting Wong Sun v. United States, 371 U.S. 471, 485, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441, 454 (1963)). "Under the exclusionary rule, 'the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.'" State v. Smith, 212 N.J. 365, 388 (2012) (quoting Nix v. Williams, 467 U.S. 431, 443, 104 S. Ct. 2501, 2508, 81 L. Ed. 2d 377, 387 (1984)), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013).

An exception to the judicially-created exclusionary rule is the inevitable discovery doctrine. Nix, supra, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d at 387; Smith, supra, 212 N.J. at 389. Under this doctrine, unlawfully obtained evidence is admissible, if it "would inevitably have been discovered without reference to the police error or misconduct, [because] there is no nexus sufficient to provide a taint[.]" Nix, supra, 467 U.S. at 448, 104 S. Ct. at 2511, 81 L. Ed. 2d at 390. The analysis "ensures that the prosecution is not put in a worse position simply

because of some earlier police error or misconduct." Id. at 443, 104 S. Ct. at 2508, 81 L. Ed. 2d at 387; see also State v. Sugar, 100 N.J. 214, 237 (1985) (Sugar II) (deterrent purposes of the exclusionary rule are not served by excluding evidence that would have inevitably been discovered).

In order to invoke the doctrine in New Jersey, the State must show by clear and convincing evidence 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.]

In other words, the State must show that "had the illegality not occurred, it would have pursued established investigatory procedures that would have inevitably resulted in the discovery of the controverted evidence, wholly apart from its unlawful acquisition." Id. at 240; see also State v. Johnson, 120 N.J. 263, 290 (1990) (inevitable discovery applied where detective was in process of preparing affidavit in support of search warrant based on information independent of tainted source); State v. Sugar, 108 N.J. 151, 157 (1987) (Sugar III) (body buried in shallow

ground behind house would have inevitably been discovered); State v. Finesmith, 406 N.J. Super. 510, 523-24, (App. Div. 2009) (laptop computer admissible under inevitable discovery exception).

"[T]he central question to be addressed in invoking the 'inevitable discovery' rule 'is whether that very item of evidence would inevitably have been discovered, not merely whether evidence roughly comparable would have been so discovered.'" State v. Worthy, 141 N.J. 368, 390 (1995) (quoting Wayne LaFave, Search and Seizure, § 11.4(a), at 380 (1987)). However, "the State [does] not have to prove clearly and convincingly 'under what precise circumstances the [evidence] would have been inevitably discovered.'" Smith, supra, 212 N.J. at 392 (quoting Sugar III, supra, 108 N.J. at 158). "A number of possibilities may cumulatively constitute clear and convincing evidence that the evidence would be discovered." Sugar III, supra, 108 N.J. at 159.

In applying the undisputed facts established at the suppression hearing, we find that the State proved by clear and convincing evidence the three elements of the inevitable discovery doctrine.

Defendant acknowledged ownership of the pouch and that the pouch contained "dope." At a minimum, the pouch would have been seized for further examination either through the execution of a search warrant based upon probable cause or pursuant to an

inventory after the vehicle was impounded pursuant to the normal police procedure. See Sugar II, supra, 100 N.J. at 238.[3]

Alternatively, the State presented clear and convincing evidence that defendant would have been arrested, independent of the discovery of the heroin by unlawful means. Defendant's admission that she possessed "the dope" and that the "dope" was in the pouch in combination with the observations by LaBarre of the syringe cap and syringe needle provided a sufficient basis for probable cause to arrest.

It is well established that the search incident to arrest exception to the warrant requirement permits the police to seize and search a container found in an arrestee's possession. State v. Minitee, 210 N.J. 307, 318 (2012); see also State v. Oyenusi, 387 N.J. Super. 146, 154 (App. Div. 2006) (authority to search arrestee and area within immediate control includes authority to search a container found in arrestee's possession), certif. denied, 189 N.J. 426 (2007).

[3] Predicated upon defendant's statement to LaBarre about the pouch's contents, there was a "fair probability that contraband or evidence of a crime" would be found in the pouch, thus satisfying probable cause for the purpose of the issuance of a search warrant. Gates, supra, 462 U.S. at 238-39, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548.

As such, the heroin would have been discovered in defendant's possession during a search incident to arrest as the pouch was in her immediate control if not in her actual possession.

We are satisfied that the heroin seized from within the pouch, obtained by an unlawful consent search, would inevitably have been discovered without the police misconduct. The evidence was therefore admissible and the motion to suppress was properly denied.

Affirmed.