SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0737-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRYAN J. BLACK, a/k/a
RICARDO ROOTER,

Defendant-Appellant.

Argued May 2, 2017 – Decided August 10, 2017

Before Judges Koblitz and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 14-04-0311.

Stephen P. Hunter, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Hunter, of counsel and on the brief).

Kimberly L. Donnelly, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Grace H. Park, Acting Union County Prosecutor, attorney; Bryan S. Tiscia, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After the trial court denied his motion to suppress evidence found during his arrest and when the police later searched his girlfriend's apartment, defendant Bryan J. Black pled guilty to third-degree possession of a controlled dangerous substance (CDS) with intent to distribute in a school zone, N.J.S.A. 2C:35-7. The court sentenced defendant in accordance with his plea agreement to five years imprisonment with a thirty-month period of parole ineligibility.

On appeal, defendant challenges the denial of his suppression motion and the imposition of the thirty-month parole ineligibility period. Specifically, he argues:

> POINT I
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> THE DRUGS AND OTHER ITEMS FOUND IN THE APARTMENT SHOULD HAVE BEEN SUPPRESSED BECAUSE THE CONSENT OF DEFENDANT'S GIRLFRIEND TO SEARCH THE APARTMENT COULD NOT REASONABLY EXTEND TO CONTAINERS THAT DID NOT BELONG TO HER. STATE V. SUAZO, 133 N.J. 315, 320 (1993). U.S. CONST. AMEND. IV, XIV; N.J. CONST. ART. I, ¶¶ 1, 7.
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> POINT II
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> THE DRUGS SEIZED FOLLOWING THE ARREST SHOULD HAVE BEEN SUPPRESSED BECAUSE THE STATE FAILED TO ESTABLISH A SIGNIFICANT ATTENUATION BETWEEN THE UNCONSTITUTIONAL STOP OF DEFENDANT AND THE SEIZURE OF THE DRUGS HE DISCARDED FOLLOWING THAT STOP. STATE V. WILLIAMS, 410 N.J. Super. 549 (APP. DIV. 2009). U.S. CONST. AMEND. IV, XIV; N.J. CONST. ART. I, ¶¶ 1, 7.

POINT III

BECAUSE DEFENDANT WAS INCORRECTLY INFORMED THAT THE THIRTY-MONTH PAROLE INELIGIBILITY TERM WAS MANDATORY, THIS MATTER SHOULD BE REMANDED FOR A RESENTENCING PURSUANT TO STATE V. KOVACK, 91 N.J. 476, 485 (1982).

We have considered defendant's arguments in light of our review of the record and the applicable legal principles. We reverse, affirming the denial of his suppression motion as to the CDS seized at the scene of his arrest, but reversing as to the CDS and other items discovered in his girlfriend's apartment.

After a grand jury indicted defendant,[1] he filed a motion to suppress, arguing that the police did not have reasonable and articulable grounds to conduct an investigatory stop of defendant, challenging the admission of the CDS he discarded when he attempted to flee, and contending that he had a reasonable expectation of privacy in his girlfriend's apartment and the alleged consent to search she gave to the police was not valid. Two police officers from the Plainfield Police Department, Detectives Elias Muhammad

[1] A Union County Grand Jury returned Indictment No. 14-04-0311, charging defendant with fourth-degree possession of CDS, N.J.S.A. 2C:35-10.3(a)(c); third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3); fourth-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(12); and third-degree possession of CDS with intent to distribute in a school zone, N.J.S.A. 2C:35-7.

and Troy Alston, who were involved with defendant's arrest and the discovery of the evidence seized at the scene of his arrest and his girlfriend's apartment, were the only witnesses to testify at the suppression hearing. The facts adduced at the hearing are summarized as follows.[2]

On November 6, 2013, Muhammad and Alston were patrolling in an unmarked police car in a known high-crime, high-narcotic area. They observed two males standing in front of a house that Muhammad was familiar with from being previously involved with the execution of a search warrant at that location, "which resulted in multiple arrests and the seizure of [CDS]." Muhammad saw a third man, Mark Jackson, who was known to the detective from prior CDS related encounters, approaching the other two men, and simultaneously observed one of them looking down at an object in his hand. As Jackson approached, one of the men noticed the detectives approaching them "and said, oh, the narcs." The defendant and the other unknown man turned and began jogging toward the rear of the yard.

[2] The trial court made findings, especially with regard to the search of defendant's girlfriend's apartment, based upon police reports that were marked for identification, used to refresh the witnesses recollections, but not admitted into evidence. Despite the fact that the documents were not admitted, both parties adopted those findings on appeal and, for that reason, so do we.

Alston — who was now outside the car — "yelled, stop, police. I want to talk to you." Both men began running south toward the rear of the property. A chase ensued and both men jumped a chain link fence and separated. Muhammad pursued defendant as he ran, while Alston returned to the police vehicle. Muhammad continued to pursue defendant on foot, defendant eventually fell to the ground, and as he did so, he pulled a small plastic bag from his waistband and threw it away. It landed only about three feet away from him. Alston and Muhammad secured defendant, and Muhammad retrieved the bag from the ground, which the police later determined contained CDS and contraband related to its sale.

Later the same day at headquarters, defendant's girlfriend, Kindrins McLeanor, asked Alston for assistance. She explained that she had locked her house keys inside her apartment and that defendant had another set of keys, and asked if she could retrieve the second set of keys from his property inventory. Alston asked when defendant lived with her, and she explained that he "stayed with her from time to time." McLeanor asked why defendant was arrested, and when Alston explained it was for narcotics, McLeanor "appeared shocked and upset [and told Alston] she was in school and didn't need this in her life right now." Alston then asked "if she would sign a permission to search form to allow the officers to search her apartment." Although she refused to sign

the form, she agreed to allow officers to go to her apartment and search it.

McLeanor and several officers returned to her apartment, and once inside, "she pointed to one closet in the hallway and another closet in her bedroom and stated that all of [defendant's] things were in those two places." Inside the closets, the officers found CDS in closed bags[3] and two identification cards bearing defendant's name.

After considering the evidence, the trial court denied defendant's motion[4] reasoning that the officers had a "particularized suspicion that the [d]defendant had or was about to engage in criminal wrongdoing and [the officer] was therefore justified in initiating an investigatory stop." Citing to State v. Citarella, 154 N.J. 272, 279 (1998), the court relied upon the

[3] The officer's report contained more specific information about the location of the CDS and what was recovered. It stated, and the trial court found, some of the CDS was located in a "hallway closet" inside a "black leather pouch" containing plastic bags and the rest was discovered in a bedroom closet inside a brown box containing CDS and additional plastic bags that also contained CDS. Neither the reports nor the court stated whether the "pouch," the plastic bags, or the box were open. At oral argument, the State candidly stipulated that the CDS was located in closed bags and that the box and CDS discovered in the bedroom closet were located inside a blue colored plastic bag, as stated in the police report.

[4] There is no order in the record memorializing the trial court's decision denying defendant's motion to suppress.

officers' "experience, expertise and training," including their involvement in the execution of a narcotics search warrant that had been issued for the location where they observed defendant and with Mark Jackson in prior drug related encounters. It also cited to the fact that defendant ran away when he either recognized or was informed that the officers — "narcs" — were present.

The court found defendant did not have standing to challenge the admission of the narcotics he threw away because he "attempt[ed] to discard the bag away from his person when he fell to the ground" and "[a]ny privacy interest [defendant] had in the bag was diminished when he discarded the bag." As to whether defendant's girlfriend gave valid consent to search her apartment and his personal belongings, the court found that because the apartment belonged to the girlfriend, only her consent was needed and she gave knowing and voluntary consent to search it. Finally, the court concluded that defendant did not have a privacy interest in the apartment because it was not his apartment, and "[h]e simply kept things in her apartment from time to time."

After the court denied defendant's motion, he pled guilty to one count of the indictment, preserving his right to appeal the motion's denial, and the court dismissed the other four counts. The court later sentenced defendant and this appeal followed.

Our review of the denial of a suppression motion is limited. See State v. Handy, 206 N.J. 39, 44 (2011). We review a motion judge's factual findings in a suppression hearing with great deference. State v. Gonzales, 227 N.J. 77, 101 (2016). We "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. Gamble, 218 N.J. 412, 424 (2014); see also State v. Scriven, 226 N.J. 20, 32-33 (2016). We defer "to those findings of the trial judge which are substantially influenced by [the] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). We owe no deference, however, to the trial court's legal conclusions or interpretation of the legal consequences that flow from established facts. Our review in that regard is de novo. State v. Watts, 223 N.J. 503, 516 (2015); State v. Vargas, 213 N.J. 301, 327 (2013).

Applying this standard, we turn first to defendant's contention that the police were not entitled to rely on his girlfriend's consent to search her home and the bags in which the CDS was discovered. Quoting State v. Suazo, 133 N.J. 315, 320 (1993), defendant contends a "third party who possesses the authority to consent to a search of the premises generally,

however, may lack the authority to consent to a search of specific containers found on those premises." We agree.

At the outset, we concur with the trial court's determination that the police were justified in relying upon McLeanor's consent to search her apartment for CDS belonging to defendant. While defendant, as an overnight guest in his girlfriend's apartment, enjoyed the privacy protections provided to her under both the United States and New Jersey Constitutions, see State v. Stott, 171 N.J. 343, 357 (2002) ("overnight guests have the same or similar expectation of privacy in the homes of their hosts as do the hosts or owners" (citing Minnesota v. Olson, 495 U.S. 91, 98, 110 S. Ct. 1684, 1689, 109 L. Ed. 2d 85, 94 (1990))), McLeanor was authorized to give a consent to search her home. See State v. Cushing, 226 N.J. 187, 198-99, 201 (2016).

A third party's consent to search, however, is not without limits. McLeanor's consent was all that was required to conduct a search of the entire house, to the extent she did not withhold consent as to areas that were under defendant's exclusive use or control, if any, see ibid.; see also United States v. Matlock, 415 U.S. 164, 170-71, 94 S. Ct. 988, 992-93, 39 L. Ed. 2d 242, 249-50 (1974), or she disclaimed ownership of an item located within the area searched. As the Court explained in Suazo,

> [a] third party who possesses the authority to consent to a search of premises generally, however, may lack the authority to consent to a search of specific containers found on those premises. [The] consent does not extend to containers in which the consenting party has disclaimed ownership[, or] to property within the exclusive use and control of another.
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> [Suazo, supra, 133 N.J. at 320 (citations omitted).]

Here, based on Alston's reporting of McLeanor's consent and the ensuing search, she disavowed ownership of any of defendant's belongings. As a result, once the police discovered closed bags belonging only to defendant, the officers were obligated to secure McLeanor's apartment from the outside, see Brown v. State, __ N.J. __, __ (2017) (slip op. at 35-37), and seek a warrant to seize and search those bags, unless they could demonstrate that "the consent was obtained from a person with a sufficient relationship to the container." State v. Lee, 245 N.J. Super. 441, 446 (App. Div. 1991), overruled on other grounds, State v. Johnson, 193 N.J. 528, 548-49 (2008). As we explained in Lee,

> [a] third person's consent "cannot validate a warrantless search when the circumstances provide no basis for a reasonable belief that shared or exclusive authority to permit inspection exists in the third person. . . ." United States v. Block, 590 F.2d 535, 540 (4th Cir. 1978). A consent to search especially lacks validity where the third person actually disclaims any right of access. Ibid. Even where a third party has authority to consent to a search of the premises, that authority

> does not extend to a container in which the third party denies ownership, because the police are left with "no misapprehension as to the limit of [the third party's] authority to consent." People v. Egan, 250 Cal. App. 2d 433, 58 Cal. Rptr. 627 (Cal. Ct. App. 1967).
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> [Lee, supra, 245 N.J. Super. at 447 (second and third alterations in original).]

Once police had knowledge that defendant, and not McLeanor, had a protected privacy interest in the containers, they should not have conducted a warrantless search of the "pouch" or plastic bags. See Suazo, supra, 133 N.J. at 321-22; see also State v. Maristany, 133 N.J. 299, 306-07 (1993).

We reach a different conclusion as to the CDS thrown away by defendant while Muhammad was chasing him. According to defendant, because the police officers were not justified in stopping him, there was insufficient "attenuation between the unconstitutional stop" and the seizure of the drugs. The trial court, he argues, incorrectly determined that he voluntarily abandoned the CDS and therefore had no standing to challenge the constitutionality of the seizure of that evidence. We find no merit to defendant's argument.

We conclude from our review, that Muhammad was in the process of attempting to conduct a permissible investigatory stop when defendant discarded the CDS. We reject defendant's argument about

attenuation[5] and affirm the denial of the suppression motion, substantially for the reasons stated by the trial court in its oral decision. We add the following comments.

An investigatory stop "occurs during a police encounter when 'an objectively reasonable person' would feel 'that his or her right to move has been restricted.'" State v. Rosario, __ N.J. __, __ (2017) (slip op. at 18) (quoting State v. Rodriquez, 172 N.J. 117, 126 (2002)). An investigatory stop "must be based on an officer's 'reasonable and particularized suspicion . . . that an individual has just engaged in, or was about to engage in, criminal activity.'" Id. at 18-19 (alteration in original) (quoting State v. Stovall, 170 N.J. 346, 356 (2002)).

When reviewing whether the State has established a valid basis for an investigatory stop, 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.'" Citarella, supra, 154 N.J. at 279 (quoting State v. Arthur, 149 N.J. 1, 10-11 (1997)). Facts

[5] Defendant's reliance on State v. Williams, 410 N.J. Super. 549, 552 (App. Div. 2009) (addressing "whether flight from an unconstitutional investigatory stop that could justify an arrest for obstruction automatically justifies the admission of any evidence revealed during the course of that flight"), certif. denied, 201 N.J. 440, is inapposite in light of our conclusion that Muhammad's stop of defendant was not unconstitutional.

that might seem innocent when viewed in isolation may sustain a finding of reasonable suspicion when considered in the aggregate. Stovall, supra, 170 N.J. at 368 (citing Citarella, supra, 154 N.J. at 279-80) ("[A] group of innocent circumstances in the aggregate can support a finding of reasonable suspicion.").

Applying these principles, we conclude, as did the trial court, that Muhammad formed a reasonable and particularized suspicion defendant had engaged in, or was about to engage in, criminal activity based upon the aggregate of his observations of defendant's conduct involving a known drug offender in a known high-crime location where Muhammad had prior experience dealing with illicit sales of CDS. See State v. Pineiro, 181 N.J. 13, 26 (2004) (considering an area's reputation for crime a relevant factor when assessing reasonable suspicion). Based on the totality of these circumstances, Muhammad was justified in conducting an investigatory stop, even before defendant ran away. Defendant's flight provided "an additional factor that heighten[s] the level of reasonable articulable suspicion already engendered by [defendant's] antecedent actions." Citarella, supra, 154 N.J. at 281; see also State v. Tucker, 136 N.J. 158, 168 (1994) (concluding flight, when combined with other evidence of criminal activity, can justify a suspect's detention or arrest).

The detective's reasonable suspicion that defendant was engaging in a drug transaction, coupled with defendant's flight, justified the seizure of the CDS that defendant discarded during his flight. State v. Ramos, 282 N.J. Super. 19, 20-23 (App. Div. 1995). When a defendant abandons property during flight, he or she "will have no right to challenge the search or seizure of that property." Johnson, supra, 193 N.J. at 548. The denial of defendant's suppression motion as to the discarded CDS was supported by sufficient credible evidence, and it was legally correct.

Because we conclude that the denial of the suppression motion as to the CDS discovered in McLeanor's apartment must be reversed, and his conviction therefore vacated, we need not address defendant's arguments about his sentence.

Defendant's conviction is reversed. The motion to suppress is affirmed in part and reversed in part. We remand for further proceedings consistent with our opinion. We do not retain jurisdiction.