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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1525-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD J. ROGERS,

Defendant-Appellant.

Argued May 23, 2017 – Decided December 15, 2017

Before Judges Messano and Suter.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 14-05-1645.

Tamar Lerer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Tamar Lerer, of counsel and on the brief).

Linda A. Shashoua, Assistant Prosecutor, argued the cause of respondent (Mary Eva Colalillo, Camden County Prosecutor, attorney; Linda A. Shashoua, of counsel and on the brief).

The opinion of the court was delivered by

SUTER, J.A.D.

Defendant Donald J. Rogers appeals his August 5, 2015 judgment of conviction on the ground that the trial court erred by denying his motion to suppress evidence seized in a warrantless search. We affirm.

I.

In May 2015, defendant pled guilty to amended count three of an indictment that charged him with second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). He was sentenced to five years in prison with a forty-two month period of parole ineligibility, fines and penalties. Defendant's plea preserved his right to appeal.[1] See R. 3:5-7(d) (preserving right to appeal denial of motion to suppress notwithstanding guilty plea).

Prior to this, defendant filed a motion to suppress a handgun, shotgun, ammunition and shotgun case that were seized by the police in a search. In two days of hearings, Judge Michele M. Fox heard testimony from State Trooper Jeffrey Mazzoni and from defendant's girlfriend, Marquita A. McLaughlin. Their testimony varied on key factual issues.

Defendant's motion to suppress evidence was denied by Judge Fox on May 1, 2015. In her comprehensive oral opinion, the Judge made detailed findings of fact based on her evaluation of the

[1] The transcript of the plea indicates the State agreed it would not reinstate the original charges in the event of an appeal.

witnesses' credibility, concluding that McLaughlin had authority to consent to the search, her consent was knowing and voluntary and her consent did not impose limits on the scope of the search. Defendant's appeal challenges the suppression order.

Judge Fox found Mazzoni's testimony to be credible because he "was neither hesitant nor evasive," he testified "consistent with his investigative report" and where he "did not know an answer or was unsure . . . he so indicated." The judge found McLaughlin's testimony lacked credibility. She "admitted under oath to using an address . . . fraudulently." McLaughlin was "an interested witness" who testified she did "not want anything bad" to happen to defendant. Defendant's testimony, explaining why she had consented to the search, was not consistent. The court found her "not credible in many instances and . . . rehearsed in some instances."

Based on these credibility determinations, Judge Fox found that on October 18, 2013, when the State Police and a SWAT Team executed a search warrant at an address in Camden, Mazzoni was advised by an informant that he "sold a firearm to a black male, approximately six feet in height who lived at [a specific address on] Tulip Street."[2] The informant took the police to the house.

[2] The opinion will simply refer to this residence as "the house."

With more than fifteen police present, "when [the Trooper] knocked on the door of [the house], the defendant, McLaughlin and a young child answered the door." This was around 7 a.m. The police advised both McLaughlin and defendant "of the report of a handgun sold by [the informant]." Although it was cold and the residents were all dressed in night clothes, the police "ordered McLaughlin, the defendant, and the daughter onto the porch . . . where they remained for a short period of time." The SWAT Team, consisting of six to eight members, "conducted a sweep of [the house] that took a couple of minutes."

As this was happening, defendant "admitted there was a gun in the laundry room of the house." He also told police there was a shotgun in a bedroom closet. McLaughlin then "told Trooper Mazzoni that she owned [the house]." There was evidence submitted at the suppression hearing that McLaughlin did not reside at the house and she testified to this effect. However, on the morning of October 18:

> Trooper Mazzoni did not attempt to corroborate whether McLaughlin owned [the house] and was not aware at the time of McLaughlin's consent of the existence or the contents of any of the . . . documents which . . . indicate[d] that McLaughlin maintained her own separate home[,] . . . only stay[ed there] six to eight . . . nights per month, and only received mail at that address related to her child's Catholic school in Camden.

Because McLaughlin claimed she owned the property, Mazzoni asked McLaughlin for her consent to search the residence. The court found that the Trooper "read [McLaughlin] the contents of [the consent to search] form in its entirety." On the form "she knowingly gave her written consent to a complete search." "[S]he further indicated that she was advised by Trooper Mazzoni of her right to refuse consent that she could withdraw her consent at any time, and . . . had the right to be present during the search." She was not under arrest; she was "very cooperative;" and she did "not refuse consent multiple times." When she signed the consent form, she "indicat[ed] she resided at [the house]."

Defendant was present when McLaughlin was asked for consent to search. The court found based on Mazzoni's testimony that "[d]efedant made no objection to [McLaughlin's] assertion of ownership over the property or consenting to a search of that property."

The consent form "authorized troopers to conduct a complete [search] of [the house]." The officers found "weapons and ammunition in the laundry room . . . and in a front bedroom closet."

Based on these facts, Judge Fox found that Mazzoni "reasonably believed that [McLaughlin] owned [the house] and that she had . . . sufficient control over that residence." Further, she found

McLaughlin "possessed authority to consent to a search," "knowingly consented to a search," and the "consent to search [the house] was voluntary." The court found "McLaughlin authorized a complete search of [the house] and [that] the weapons and ammunition were located in accordance with that search."

McLaughlin testified that she was coerced into signing the consent form by threats to arrest defendant, by denying her ability to see her child, and by keeping her out in the cold. She said the defendant expressly refused to sign the consent form. She testified that the officers had their guns pointed at them when they answered the door. When the SWAT team went into the house, she claimed they were there for over forty minutes.

Judge Fox found "the atmosphere surrounding the consent was not inherently coercive." Based on her assessment of the witnesses' credibility, she found "[t]here was no indication that . . . Trooper Mazzoni threatened to send the defendant to jail if McLaughlin did not sign the consent to search form." He did not "repeatedly exhort[] McLaughlin to sign the form." "McLaughlin was not subjected to frigid temperatures for an extended period of time." Although the court found that "several officers including SWAT Team members [were] holding weapons," these weapons "were not pointed at anyone." Further, the court said McLaughlin contradicted herself about the presence of her daughter. "Defense

counsel had to ask McLaughlin four times why she eventually signed the consent to search form before she finally testified that she signed it because she wanted to see her daughter." Later she admitted she signed the consent form after she was inside with her daughter. The court specifically found McLaughlin did not "testify that she signed the form because she was intimidated by the number of the officers at the scene, the presence of the SWAT team or the presence of weapons."

In addition, the court found that had McLaughlin not consented to the search that the police would have pursued a search warrant and that the weapons would have been discovered.

On appeal, defendant raises these issues:

POINT I

> THE WARRANTLESS ENTRIES INTO AND SEARCH OF THE HOUSE WERE UNCONSTITITUIONAL. ALL THE EVIDENCE FOUND IN THE HOUSE MUST BE SUPPRESSED.
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> . . . .
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> B. The Officers' Initial Entry Into The House Was Unconstitutional. All Evidence Found Thereafter Must Be Suppressed As Fruit Of This Unlawful Search.
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> C. The Consent Obtained From Defendant's Girlfriend Was Not Sufficient to Allow The Officers' Re-Entry Into the Home.
>
> i. Defendant's Girlfriend Could Not Voluntarily Consent To the Search Of The Home Due To The Inherently

Coercive Atmosphere Created By Police Action Prior To Being Asked For Consent.

ii. It Is Unconstitutional To Purposefully Bypass A Defendant, Who Is Present On the Scene And Is The Party Suspected Of Wrongdoing, By Seeking Consent From Another Occupant Of The Home.

D. The Inevitable Discovery Doctrine Does Not Repair The Constitutional Violations In This Case Because There Is No Indication That the Officers Had Any Plan To Secure A Warrant And Because There Was No Probable Cause At The Time Of Their Warrantless Entry.

II.

"When reviewing a trial court's decision to grant or deny a suppression motion, [we] 'must defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record.'" State v. Dunbar, 229 N.J. 521, 538 (2017) (quoting State v. Hubbard, 222 N.J. 249, 262 (2015). "We will set aside a trial court's findings of fact only when such findings 'are clearly mistaken.'" Ibid. "We accord no deference, however, to a trial court's interpretation of law, which we review de novo." Ibid. (citation omitted) (quoting State v. Hathaway, 222 N.J. 453, 467 (2015)).

Both the federal and State constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "[A] warrantless search is

presumptively invalid," Brown v. State, 230 N.J. 84, 100 (2017) (citation omitted) (quoting State v. Gonzales, 227 N.J. 77, 90 (2016)), "unless [the search] falls within one of the few well-delineated exceptions to the warrant requirement." Ibid. (alteration in original) (citations omitted) (quoting State v. Maryland, 167 N.J. 471, 482 (2001)). The consent to search is a well-recognized exception. State v. Domicz, 188 N.J. 285, 305 (2006).

A.

The police conducted a protective sweep through the house after defendant and McLaughlin were ordered to go outside. "[A] 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." State v. Davila, 203 N.J. 97, 113 (2010) (adopting Maryland v. Buie, 494 U.S. 325, 327 (1990)). The sweep is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Ibid. (quoting Buie, 494 U.S. at 327). Here, the court found that the sweep lasted only a few minutes.

Defendant contends for the first time on appeal that the protective sweep was "unlawful," "tainted everything that followed" and forms the basis to suppress evidence that was seized based on McLaughlin's subsequent consent. Generally, we will not

consider issues, even constitutional ones, which were not raised before the trial court. See State v. Galicia, 210 N.J. 364, 383 (2012); Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973). We decline to address the merits of this claim because resolution of the constitutional issue would not change our decision that the suppression motion was properly denied based upon McLaughlin's consent.

The fruit of the poisonous tree doctrine "excludes evidence seized as a direct consequence of unlawful police activity, as well as evidence subsequently discovered as a result of the illegality." Byrnes, New Jersey Arrest, Search & Seizure, 33.1-1 (2017-2018). Exceptions are "applied narrowly." Id. at 33:3.

Here, defendant does not contend, nor was there testimony, that the seized weapons were identified or located during the brief protective sweep. The weapons were found based on McLaughlin's consent to search after defendant told the police where they were located. Therefore, they were not seized directly or indirectly arising from any unlawful police activity. Under these facts, the fruit of the poisonous tree doctrine simply does not apply to bar evidence found in the subsequent lawful search.

The case is factually dissimilar from State v. Jefferson, 413 N.J. Super. 344, 362 (App. Div. 2010), cited by defendant. There the defendant consented to the search after being barred for hours

from reentry into the apartment, was under arrest when she consented, and the apartment already was subjected to more than one improper search, all of which supported the inference that her will was overborne. Here, McLaughlin consented to the search shortly after the police arrived, she was not under arrest, the protective sweep was brief and she was allowed back in the house.

B.

To satisfy our Constitution, "any consent given by an individual to a police officer to conduct a warrantless search must be given knowingly and voluntarily." State v. Carty, 170 N.J. 632, 639 (2002) (citing State v. Johnson, 68 N.J. 349, 354 (1975)). Our Supreme Court has held that in order for a search "[t]o be voluntary the consent must be 'unequivocal and specific' and 'freely and intelligently given.'" State v. King, 44 N.J. 346, 352 (1965) (quoting Judd v. United States, 190 F. 2d 649, 651 (D.C. Cir. 1951)). "The burden is on the State to show that the individual giving consent knew that he or she 'had a choice in the matter.'" Carty, 170 N.J. at 639 (quoting Johnson, 68 N.J. at 354). "[T]he scope of a consent search is limited by the terms of its authorization." State v. Santana, 215 N.J. Super. 63, 72 (App. Div. 1987). "Consent is . . . a factual question to be determined from the relevant circumstances." State v. Koedatich, 112 N.J. 225, 264 (1988).

Defendant contends that McLaughlin's consent was not voluntary but was the product of the "inherently coercive atmosphere" created by the police prior to being asked for consent. He argues that because of the number of police, the fact that some had their guns drawn, that McLaughlin and he were ordered to go outside and that the police entered the home, demonstrated to McLaughlin that she had no ability to deny entry. This argument overlooks the court's finding, which is supported by the record, that McLaughlin never testified she was intimidated by the number of the officers at the scene, the presence of the SWAT team or the presence of weapons. Her testimony, found by the court not to be credible, was that she was coerced because the police threatened to arrest defendant and she wanted to see her daughter.

Notably, defendant does not challenge the court's findings that McLaughlin signed the consent form after the Trooper read it to her, that she was advised she had the right to refuse to consent, could withdraw her consent, and had the right to be present for the search. In analyzing the factors set forth in King, 44 N.J. at 352-53, Judge Fox found McLaughlin was not coerced. Defendant does not challenge the findings that McLaughlin was not under arrest, was very cooperative with the police, was not threatened with defendant's arrest, was only outside briefly, the officers' weapons were not pointed at any one, or that she

opted to be present during the search. We discern no basis to disturb these specific findings based on the judge's assessment of credibility, or that McLaughlin's consent to search the house was knowing and voluntary under all these circumstances.

We disagree with defendant that the outcome in this case is controlled by Bumper v. North Carolina, 391 U.S. 543 (1968), where a family member consented to a search of her home based on a misrepresentation by the police that they had a search warrant. Here, there is nothing in the record to support that any misrepresentations were made.

C.

Consent to search "may be obtained from the person whose property is to be searched, from a third party who possesses common authority over the property, or from a third party whom the police reasonably believe has authority to consent." State v. Maristany, 133 N.J. 299, 305-06 (1993) (citations omitted) (concluding that the warrantless search depended "largely" on whether the trooper "had a reasonable basis for believing . . . [a person] had the authority to consent to a search").

Defendant argues that McLaughlin's consent to search was invalid because police deliberately bypassed defendant when they asked McLaughlin for consent to search. There was no evidence, however, that defendant was bypassed at all. Based on Mazzoni's

testimony, the court found defendant was present when McLaughlin represented to the police that she owned the house and then consented to the search. He did not raise an objection to this or tell the police he was the owner. Defendant and McLaughlin's conduct provided a reasonable basis for the police to believe McLaughlin had authority to consent and to rely on these representations.

D.

Given our opinion that the weapons were lawfully seized based on McLaughlin's consent to search, we have no need to address the defendant's other argument that the court erred in validating the search based on the doctrine of inevitable discovery. See State v. Sugar, 100 N.J. 214, 238 (1985) (allowing an exception to the exclusionary rule where "proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; . . . pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and . . . discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means"). We conclude that defendant's further arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.
CLERK OF THE APPELLATE DIVISION