SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1530-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHON BRYANT,
a/k/a TERRELL A. BRYANT,

Defendant-Appellant.

Submitted September 26, 2017 – Decided October 26, 2017

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-09-2366.

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

Robert D. Laurino, Acting Essex County Prosecutor, attorney for respondent (Kayla Elizabeth Rowe, Special Deputy Attorney General/Acting Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Rashon Bryant challenges a June 15, 2015 order denying his motion to suppress evidence. We affirm.

Defendant waived an evidentiary hearing, adopting the facts stated in a police report.[1] On February 24, 2014, Newark police approached a group of individuals standing on a sidewalk. As police approached, defendant uttered "Oh shit," and dropped a cloth bag from his hand onto the sidewalk, which made a metallic sound upon impact. Police grabbed defendant while he was still standing next to the bag. Police searched the bag and discovered an unregistered firearm.

Defendant was indicted on a single count of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). Defendant filed a motion to suppress, which the trial court denied. The judge found defendant released the bag directly after noticing the police and uttering an expletive. The judge determined this sequence of events provided police with reasonable suspicion to approach defendant. The judge stated it was logical to conclude defendant had disclaimed and abandoned the contents of the bag given it contained an illegal firearm.

[1] The parties have not provided the police report to us, however the transcript of the motion hearing reflects the trial court read directly from the report.

After the judge adjudicated the motion, defendant pled guilty to the indictment. He was sentenced to a five year term of imprisonment subject to a forty-two month period of parole ineligibility. On appeal from a September 24, 2015 judgment of conviction, defendant raises the following argument:

> POINT I — THE MOTION COURT ERRED IN DENYING THE SUPPRESSION MOTION BECAUSE MR. BRYANT DID NOT ENGAGE IN THE REQUISITE OVERT ACT TO CONSTITUTE ABANDONMENT.

Defendant argues "the doctrine of abandonment does not justify the search and seizure of the evidence in this matter." He argues he did not abandon the bag by "placing [it] down next to him or dropping it."

Defendant also argues the trial court had no basis to conclude he attempted to leave the scene or move away from the bag because he was immediately apprehended. Rather, defendant asserts the police officers created the separation between him and the bag by apprehending him.

Additionally, defendant asserts the uttering of an expletive has no bearing on the issue of abandonment. He argues he could have made the statement because he dropped the bag or because he was uncomfortable in police presence.

Our standard of review on a motion to suppress is limited. 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. Elders, 192 N.J. 224, 243 (2007). "A trial court's findings should not be disturbed simply because an appellate court 'might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side.'" State v. Mann, 203 N.J. 328, 336 (2010) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). We will reverse only if convinced that the motion judge's factual findings "are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Elders, supra, 192 N.J. at 244 (quoting Johnson, supra, 42 N.J. at 162).

"Both the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in almost identical language, guarantee '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" State v. Johnson, 193 N.J. 528, 541 (2008) (quoting U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7). However, "if the State can show that property was abandoned, a defendant will have no right to challenge the search or seizure of that property." Ibid. "[A]bandonment [of property] has been defined as '[t]he relinquishing of a right or interest

with the intention of never again claiming it.'" Id. at 548 (quoting Black's Law Dictionary 2 (8th ed. 2004)).

The State's burden to demonstrate abandonment is by the preponderance of the evidence. Id. at 548 n.4. "In determining whether a defendant voluntarily and knowingly relinquished a possessory or ownership interest in property in response to police questioning, a court should apply a totality-of-the-circumstances analysis." State v. Carvajal, 202 N.J. 214, 227 (2010).

Defendant argues that mere relinquishment of property does not constitute abandonment. He points to Rios v. United States, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960), to support this proposition. In Rios the United States Supreme Court reversed a district court's denial of defendant's motion to suppress where police followed a defendant who had entered a taxi, and then stopped the cab and opened its door without probable cause, and then the defendant "dropped a recognizable package of narcotics to the floor of the vehicle." Id. at 254-56, 80 S. Ct. at 1432-34, 4 L. Ed. 2d at 1690-91. The Supreme Court held the stop of the cab was an unlawful arrest, and that nothing that happened thereafter could make it lawful. Id. at 262, 80 S. Ct. at 1437, 4 L. Ed. 2d at 1694. Here, by contrast, defendant dropped the bag before the police seized or arrested him.

The Court added that if defendant had voluntarily revealed the package of narcotics to police a lawful arrest could have occurred. Id. at 261-62, 80 S. Ct. at 1436, 4 L. Ed. 2d at 1694. The Court noted: "A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have 'abandoned' it. An occupied taxicab is not to be compared to an open field or vacated hotel room." Id. at 262 n.6, 80 S. Ct. at 1437 n.6, 80 L. Ed. 2d at 1694 n.6 (citations omitted). Here, defendant dropped the bag outside, in the middle of a crowd where it could have been taken by numerous people. He thus voluntarily relinquished his possessory interest in it, unlike Rios, who still had the package with him in the cab's backseat, which he alone occupied. Defendant also relies upon State v. Tucker, 136 N.J. 158 (1994), and argues objects jettisoned during a police pursuit initiated without probable cause cannot be deemed abandoned. Id. at 172. In Tucker the Court affirmed our reversal of the trial court's denial of defendant's suppression motion. Id. at 173. In that case, the defendant was sitting on a curb, and when he noticed a police vehicle approaching, fled. Id. at 161. The police gave chase, defendant was eventually cornered, and in the process dropped a bag containing cocaine. Ibid. The Tucker Court held the seizure was unreasonable because the only reason the police pursued defendant was because he fled. Id. at 168-73. Tucker did

not hold that fleeing was a prerequisite to abandonment. See ibid. Therefore, even though the Court found defendant had dropped the bag of cocaine, it could not be considered abandoned because it was the product of an unreasonable search that lacked probable cause. Ibid.

Here, the search occurred because defendant dropped the bag, which made a metallic sound, shortly after uttering an expletive intimating his alarm at the police presence. These facts are distinguishable from Tucker and Rios because in both cases the defendant abandoned the property after the police took illegal action to stop or pursue him. Here, defendant dropped and abandoned the bag before the police took any action to seize him. Moreover, we disagree with defendant's argument that an individual "must take an overt action, such as fleeing from the location of the abandoned property, to demonstrate an intent to relinquish ownership of the property." Indeed, Tucker demonstrates the opposite, and that the totality of circumstances dictate whether a defendant has abandoned an object thereby subjecting it to a search.

Here, defendant saw the police approaching, uttered "Oh shit," and dropped the bag, which made a metallic clank, suggesting under the circumstances it contained a gun. That gave the officers a valid indication defendant was trying to abandon the gun before

they could find it in his possession. Those indicia of abandonment were not eliminated because the officers seized him before he could flee or move away.

The trial court's findings demonstrate consideration of the totality of the circumstances. The trial judge stated:

> The court does not find or has not been given any competent evidence to find that there was a significant time interval between the defendant's sighting of the police, dropping of the bag, seizure of the defendant by the police, to adopt the substance of the argument [] put forth by the defendant that the defendant steadfastly stood by the bag and its contents and did not disclaim ownership of the above.
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> . . . .
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> The court does conclude that there's sufficient credible evidence to conclude that the defendant abandoned the contraband and thus relinquished any expectations of privacy in it[.]

The trial court's determination that defendant voluntarily relinquished possession of the bag is grounded in the court's assessment of the totality of the circumstances. Having considered the record and the applicable legal standards, the order denying the motion to suppress was not an abuse of discretion.

Affirmed.