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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2047-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MELVIN R. DOUGLAS,
A/K/A MELVIN DENNIS,
MELVIN DOUGLAS,
FUQUON HALL,

Defendant-Appellant.

Submitted May 10, 2017 - Decided July 18, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
14-04-1146.

Joseph E. Krakora, Public Defender, attorney
for appellant (Alyssa Aiello, Assistant Deputy
Public Defender, of counsel and on the
briefs).

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

PER CURIAM

Defendant Melvin R. Douglas appeals from a November 2, 2015 conviction, entered following his guilty plea to fourth-degree possession of a controlled dangerous substance (CDS), marijuana, with intent to distribute, N.J.S.A. 2C:35-5(a)(1), and third-degree distribution of a CDS within 1000 feet of school property, N.J.S.A. 2C:35-7. The trial judge sentenced defendant to five years in state prison, with a two-year period of parole ineligibility.

On appeal, defendant argues the judge erroneously denied his motion to suppress drug evidence discovered following an illegal arrest. More specifically, defendant asserts:

POINT I

[DEFENDANT'S] ARREST FOR LOITERING IN VIOLATION OF N.J.S.A. 2C:33-2.1 WAS INVALID BECAUSE THAT STATUTE IS UNCONSTITUTIONAL. BECAUSE THE INVALID ARREST RENDERS THE SEARCH INCIDENT THERETO CONSTITUTIONALLY DEFECTIVE, THE MARIJUANA SEIZED FROM [DEFENDANT'S] PERSON SHOULD HAVE BEEN SUPPRESSED (Not raised below).

- A. New Jersey's Drug-Loitering Statute is Unconstitutionally Vague and Overbroad.
- B. New Jersey's Drug-Loitering Statute Violates the Fourth Amendment Because it Allows Police to Arrest an Individual on Less Than Probable Cause.
- C. [Defendant's] Invalid Arrest, Made Pursuant to an Unconstitutional Statute, Renders the Subsequent Search of his Person Constitutionally Defective.

POINT II

THE POLICE DID NOT HAVE PROBABLE CAUSE TO BELIEVE THAT [DEFENDANT] COMMITTED A VIOLATION OF N.J.S.A. 2C:33-2.1. THEREFORE, THE MARIJUANA FOUND ON [DEFENDANT'S] PERSON WAS THE PRODUCT OF AN UNLAWFUL ARREST AND MUST BE SUPPRESSED.

POINT III

OFFICER RAMIREZ ABUSED HIS DISCRETION BY SUBJECTING [DEFENDANT] TO A FULL CUSTODIAL ARREST FOR COMMITTING A DISORDERLY PERSONS OFFENSE.

We reject these arguments and affirm.

These facts were presented during the suppression hearing, to support defendant's December 24, 2013 arrest. The State presented testimony from the arresting officer, Hector Ramirez, and Officer Robert Fesi, of the Camden County Police Department, who monitored a series of live feed surveillance video streams, while stationed at the Real Time Tactical Operations and Information Center (Tactical Information Center).

At approximately 1 p.m., Officer Fesi turned a strategically placed "Eye in the Sky" camera toward the intersection of Filmore and Viola Streets, known as a "narcotics distribution area[]." He confirmed the cameras were working properly. Officer Fesi monitored the activity of defendant and another individual, later identified as Keith Council, in real time. Over the course of an

hour, Officer Fesi watched the two men, whom he believed, based upon his training and experience, engaged in seven to eight "street level narcotics distribution[s]." More specifically, Officer Fesi testified:

[V]ehicles would pull over to the side of the road. One male would approach the vehicle, have a short transaction, conversation with the vehicle. The vehicle would pull off. After numerous times -- about seven or eight times I saw this, this was consistent with CDS transaction[s].

. . . .

The vehicle would pull up -- somebody would waive [sic] the vehicle over, they would pull up, he would walk up to the driver's side of the vehicle, an interaction would take place, and then the vehicle would drive off.

Officer Fesi stated the activity he observed was consistent with street drug sales. He radioed command, who dispatched Officer Ramirez and his partner Jay Rivera, to the area. Officer Ramirez established radio contact with Officer Fesi, who related a description of the two men, based on their clothing. Officers Ramirez and Rivera arrived on the scene; Officer Ramirez stopped defendant and Officer Rivera stopped Council. Officer Fesi watched the events as they occurred. Officer Ramirez relayed a physical description of defendant and Council to Officer Fesi, and Officer Fesi confirmed defendant and Council were the individuals he

observed engaging in the transactions. Officer Ramirez placed defendant and Council under arrest.

On cross-examination, the defense challenged the limited training and experience of Officer Fesi, who worked for the Tactical Information Center for one-year prior to defendant's arrest. Officer Fesi confirmed he could not identify the suspects' faces because of the video quality, and based his identification only on their clothing.

During the hearing, Officer Fesi was asked to narrate events shown on the video taken from the Eye in the Sky camera. He stated: "the white truck pulled up, stopped, . . . one of the males went up to the window, and then the male ran away, returned with something, and the truck drove off." When the red car drove up he observed "the exact same thing."

Officer Fesi could not state which of the two men shown on the video was defendant. Additionally, he admitted, he never saw an actual exchange of money for an object between the vehicle's occupants and defendant, because a tree blocked the camera's view.

After the defense played the first fifteen-minute segment of the un-redacted one-hour video recording, the State objected. After a lengthy colloquy, the defense declined to continue showing the video. In the course of redirect, based on the State's question, this colloquy occurred:

THE COURT: What actions did you actually observe individuals engaging in that you concluded were drug transactions? What did you actually see?

[OFFICER FESI]: What I actually saw?

THE COURT: Based on the tree, and the arguments of counsel, I want to know exactly what you physically saw with respect to the actions.

[OFFICER FESI]: What I saw was a man standing on the corner, vehicle pull up, the man engage in short conversation with the vehicle, and then walk away and the vehicle drove away numerous times, and based on my training and experience we look at the totality of the circumstances, and that is street level narcotics distribution in a designated high CDS area.

THE COURT: All right. Did you . . . see the individual who walked up to the vehicle have anything in that individual's hand?

[OFFICER FESI]: No, not from the video, I couldn't see --

THE COURT: Did you see anything exchanged by either?

[OFFICER FESI]: No.

Next, Officer Ramirez testified. He acknowledged he received clothing descriptions of two suspects from Officer Fesi and was directed to their location. When Officer Fesi confirmed Officer Ramirez had stopped the suspect he observed, Officer Ramirez placed defendant under arrest and patted him down. Officer Rivera was directed to, and arrested Council. On cross-examination, Officer

Ramirez stated, based on the information provided by Officer Fesi, he initially arrested defendant for loitering to commit a drug offense.

During processing at the police station, defendant removed his jacket and a package of marijuana fell from his sleeve. Officer Ramirez recovered "15-20" bags of marijuana. Consequently, the charges to which defendant pled were issued.

In an oral opinion, rendered on January 28, 2015, the judge concluded Officer Ramirez had probable cause to arrest defendant based upon the observations Officer Fesi communicated directly to him. A reasonable belief defendant was engaged in criminal activity was supported by the testimony of Officers Fesi and Ramirez, which was found credible. The officers related their respective personal knowledge, training and experience in drug distribution activity, and each separately characterized the specific area of defendant's arrest as an area known for street drug sales.

Although Officer Fesi could not identify facial features, see the exact exchange or hear conversation between defendant, Council, and the drivers, he saw seven or eight vehicles stop in the area where defendant and Council stood. He also explained the same repeated pattern of activity: one of the two men went to the driver's side window, ran away then returned to the driver's side

window with an object, then the vehicle drove away. Officer Fesi saw this happen "exactly the same" way, over the course of the hour, which led him to conclude defendant was engaged in drug distribution. The portion of the video played during Officer Fesi's testimony corroborated his stated observations.

The clothing description of the suspects, as provided by Officer Fesi, enabled Officer Ramirez to spot defendant and place him under arrest. Officer Fesi verified the man in custody was the man he observed engaged in the suspected drug activity. After reviewing the elements of the charged offenses, the judge concluded Officer Fesi's observations provided a well-grounded suspicion defendant was engaged in the charged drug distribution offenses.

For the first time on appeal, defendant challenges the constitutionality of N.J.S.A. 2C:33-2.1, which criminalizes loitering for the purpose of distributing drugs, the basis upon which defendant was arrested.¹ Defendant argues because the

¹ This court has noted:

Interestingly, the word "loitering" is contained only in the statute's title as appearing in New Jersey Statutes Annotated – "Loitering for purpose of illegally using, possessing or selling controlled substance" – and appears nowhere in the actual text of the statute, which prohibits, when coupled with other conduct, the "wander[ing], remain[ing]

statute is overbroad his arrest was invalid. Recognizing he failed to raise the issue before the trial judge, defendant maintains freedom from constitutionally defective arrests is a matter of great public concern, which affects fundamental due process rights. See Spiegle v. Seaman, 160 N.J. Super. 471, 481 (App. Div. 1978) (finding it "necessary to determine propositions not raised below in order to protect the fundamental rights of a party").

"Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012); see also State v. Walker, 385 N.J. Super. 388, 410 (App. Div.), certif. denied, 187 N.J. 83 (2006). Two well-established exceptions to the overarching rule allow review of issues regarding challenges to the court's jurisdiction, and to "matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). We nonetheless conclude the statute passes constitutional scrutiny.

or prowl[ing]" in a public place. N.J.S.A. 2C:33-2.1(b)(1).

[State v. Gibson, 425 N.J. Super. 523, 529 n.4 (App. Div. 2012), rev'd on other grounds, 218 N.J. 277 (2014).]

General loitering statutes have successfully been challenged as overbroad. When the prohibited conduct is vague, such statutes will not withstand due process scrutiny. See Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S. Ct. 518, 520, 15 L. Ed. 2d 447 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits"). The United State Supreme Court recognized

the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Williams v. Fears, 179 U.S. 270, 274, 21 S. Ct. 128, 45 L. Ed. 186 (1900); see also Papachristou v. Jacksonville, 405 U.S. 156, 164, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage," Kent v. Dulles, 357 U.S. 116, 126, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

[City of Chi. v. Morales, 527 U.S. 41, 53-54, 119 S. Ct. 1849, 1857-58, 144 L. Ed. 2d 67, 78-79 (1999) (footnotes omitted).]

New Jersey has no general anti-loitering laws. See State v. Crawley, 90 N.J. 241, 247 (1982) ("In view of this legislative history, we conclude that the absence of a loitering proscription from the Code reflects a state policy to decriminalize such activity.").

Applying these standards, we examine the challenged criminal statute to determine whether the prohibited conduct is sufficiently described. See State v. Galloway, 133 N.J. 631, 658-59 (1993) (holding courts must "construe penal statutes strictly"). Defendant's arrest was based on N.J.S.A. 2C:33-2.1(b), which provides:

[a] person . . . commits a disorderly persons offense if (1) he wanders, remains or prowls in a public place with the purpose of unlawfully . . . distributing a controlled dangerous substance . . . ; and (2) engages in conduct that, under the circumstances, manifests a purpose to . . . distribute a controlled dangerous substance.

Subsection (c) lists "[c]onduct that may, where warranted under the circumstances, be deemed adequate to manifest a purpose to obtain or distribute a controlled dangerous substance or controlled substance analog" to include, but is not limited to:

(1) Repeatedly beckoning to or stopping pedestrians or motorists in a public place;

(2) Repeatedly passing objects to or receiving objects from pedestrians or motorists in a public place;

(3) Repeatedly circling in a public place in a motor vehicle and on one or more occasions passing any object to or receiving any object from a person in a public place.

Subsection (d) of the statute further instructs the activity used to satisfy element (1) may not be used to satisfy element (2). N.J.S.A. 2C:33-2.1(d). Therefore, the State must prove a defendant (a) was wandering, remaining, or prowling (b) in a public place, (c) with the purpose of unlawfully distributing CDS, and (d) engaged in activities tending to manifest the purpose to unlawfully distribute CDS. Ibid.

On its face, N.J.S.A. 2C:33-2.1 is not directed to general loitering. "It is apparent . . . the statute was enacted to protect the quality of life in public places by interdicting persons who linger or circulate there for the specific purpose of engaging in drug transactions." State v. Kazanes, 318 N.J. Super. 421, 425 (App. Div. 1999). "In too many neighborhoods in New Jersey, drug dealers and drug buyers have transformed street corners into open-air drug markets. Meanwhile, residents and legitimate merchants see their neighborhoods filled with the decay and violence that inevitably accompany the drug trade." Id. at 425 n.1 (quoting Governor Florio's statement to Legislature regarding P.L. 1991, c. 383).

The Supreme Court has made clear the standards governing arrest for the criminal conduct described therein.

The right to walk freely on the streets of a city without fear of arbitrary arrest is one of the guarantees protected by the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution. A person cannot be arrested unless there is probable cause to believe that he has committed or is committing an offense. An arrest without probable cause is an unreasonable seizure in violation of both the Federal and State Constitutions.

[State v. Gibson, 218 N.J. 277, 281 (2014).]

The non-exhaustive examples of behavior that may be consistent with someone attempting to buy drugs includes some form of contact with other people or motorists, including passing objects or beckoning to pedestrians. The identified conduct is specific and cannot be described as "mere loitering."² Unlike general statutory prohibitions, N.J.S.A. 2C:33-2.1 defines conduct with a purpose and intent not simply hanging around in a place for no apparent reason. Accordingly, a police officer cannot arrest an individual unless that individual's behavior is corroborative of some illegal activity.

² "As commonly understood, loitering suggests remaining or lingering in a location for some indefinite period for no apparent purpose." Gibson, supra, 218 N.J. at 289-90 (citing various dictionary definitions of the word "loiter").

We reject defendant's vagueness challenges. We conclude the statute sufficiently provides standards that inform the public of the nature of prohibited conduct.³ Despite defendant's arguments to the contrary, our review of the record of the suppression hearing satisfies us the State proved not only reasonable suspicion, but also probable cause to stop and arrest defendant for violating N.J.S.A. 2C:33-2.1.

Generally, probable cause "means less than legal evidence necessary to convict though more than mere naked suspicion." State v. Daniels, 393 N.J. Super. 476, 486 (App. Div. 2007) (quoting State v. Mark, 46 N.J. 262, 271 (1966)). "Probable cause has been characterized 'as a common-sense, practical standard.'" Ibid. (quoting State v. Novembrino, 105 N.J. 95, 120 (1987)). "Probable cause exists if at the time of the police action there is 'a well grounded suspicion that a crime has been or is being committed.'" Ibid. (quoting State v. Waltz, 61 N.J. 83, 87 (1972)). The standard is objective and considers the totality of all facts and

³ Recently, the New Jersey Supreme Court discussed N.J.S.A. 2C:33-2.1, without triggering constitutionality questions. See State v. Miles, __ N.J. __ (2017) (vacating successive prosecutions for loitering for the purpose of distributing drugs and then distribution of drugs in a school-zone because the former included the same elements of proof established by the same evidence, making it the same offense, barred by double jeopardy). In Gibson, the Court cited N.J.S.A. 2C:33-2.1 with approval as providing a satisfactory description of conduct amounting to loitering. Gibson, supra, 218 N.J. at 290.

circumstances. "Although several factors considered in isolation may not be enough, cumulatively those pieces of information may 'become sufficient to demonstrate probable cause.'" Ibid. (quoting State v. Zutic, 155 N.J. 103, 113 (1998)).

Here, for an hour, police surveilled an area known for open-air drug transactions. Defendant moved about the block, as he and Council approached seven or eight motorists who pulled over. Defendant or Council spoke to each driver, left briefly, then returned to the stopped car with an object. After an interaction, the driver pulled away. Although Officer Fesi acknowledged he could not see an actual transfer of money for small objects because of a tree blocking the camera view, the repeated conduct was consistent with the examples of conduct deemed to manifest a purpose to distribute drugs. While in a public place defendant repeatedly met stopped motorists to whom he passed objects. Officer Ramirez relied on Officer Fesi's information and clothing description, see State v. Crawley, 187 N.J. 440, 457 (permitting police to rely on information transmitted by one officer to another), cert. denied, 549 U.S. 1078, 127 S. Ct. 740, 166 L. Ed. 2d 563 (2006), to arrest defendant.

Considering all of the facts recited above, we conclude the officers had "a 'well grounded' suspicion that a crime . . . [was] being committed." Waltz, supra, 61 N.J. at 87. Consequently,

probable cause existed to arrest defendant for the disorderly persons offense of wandering, in violation of N.J.S.A. 2C:33-2.1. Daniels, supra, 393 N.J. Super. at 485.

Next, the fact defendant was initially arrested for wandering, in violation of N.J.S.A. 2C:33-2.1, is immaterial. Subsequent discovery of twenty-one bags of marijuana in his jacket sleeve, during the search incident to arrest, provided the basis to charge him with fourth-degree intent to distribute, N.J.S.A. 2C:35-5(a)(1), and third-degree intent to distribute in a school zone, N.J.S.A. 2C:35-7, the drug offenses to which he pled guilty. The initial arrest on the lesser charge did not invalidate the arrest or the final charges.

Following review of defendant's remaining arguments, we reject them as lacking merit. We reject, as invited error, the claim regarding the judge's failure to view the entire one-hour video. See State v. Simon, 79 N.J. 191, 205 (1979) (stating that errors originating with a defendant generally cannot serve as a basis for reversal on appeal). Defendant was given numerous opportunities to present the video evidence in its entirety, and specifically informed the judge it was not necessary.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION