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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4299-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN NOWICKI, a/k/a COMELLERI
CHARLES, MCGRATH SEAN, MOREIERY
SEAN, NOWICKI SEAN, COMELLERI
CHRLES AND MORIAIRTY SEAN,

Defendant-Appellant.

Submitted December 20, 2016 – Decided July 18, 2017

Before Judges Rothstadt and Sumners.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No.
13-09-2268.

Joseph E. Krakora, Public Defender, attorney
for appellant (Elizabeth C. Jarit, Assistant
Deputy Public Defender, of Counsel and on
the brief).

Christopher S. Porrino, Attorney General of
New Jersey, attorney for respondent (Emily
R. Anderson, Deputy Attorney General, of
Counsel and on the brief).

PER CURIAM

Defendant Shawn Nowicki appeals his conviction for second-
degree possession of a controlled dangerous substance (CDS),

oxycodone, with the intent to distribute, N.J.S.A. 2C:35-10(a)(1). He pled guilty to the offense following the trial court's denial of his motion to suppress evidence. Having considered the record and applicable law, we affirm.

I.

We discern the following relevant facts from the suppression hearing.¹ As the search in question was warrantless, the State sought to meet its burden to show that the search was legal through the testimony of the Lakewood Police Officer Christie Buble. See State v. Pineiro, 181 N.J. 13, 19 (2004). No witnesses were presented by the defense.

On April 29, 2013, at approximately 1:00 a.m., Buble testified that she and fellow officer Michael Delvalle were on foot patrol around a hotel located in a high crime area in Lakewood Township. While walking near the outside of hotel room "108", Buble stated she heard a female voice yell, "How am supposed to make my \$26,000 now? I'll have to sell more than \$[8000] of these pills to make some profit." The female continued stating, "she didn't trust the male because he was using too much of their supply, and kept berating him for being a fucking moron and junkie." The female then spoke about "bars

¹ Defendant filed a motion to suppress the seizure of illegal drugs, which co-defendant subsequently joined.

and 30s . . . and . . . blues[,] " which Buble explained, are slang terms for Xanax and Oxycodone pills, respectively. At that point, the officers had to leave the hotel parking lot to respond to another call.

After responding to the call, Buble and Delvalle returned at approximately 3:30 a.m. to conduct surveillance of the hotel from the hotel parking lot while stationed in their respective marked police cruisers. Buble subsequently witnessed a female exiting the hotel lobby, who matched a "Be on the look-out" (BOLO),² "put out from three days prior, [from] a [Lakewood] detective . . . [who] was investigating prescription fraud at a CVS [store.]" The BOLO was for a "white female approximately [thirty] years old with medium length brown hair and stocky build."

Buble and Delvalle stopped and questioned the female, later identified as co-defendant Tabitha Gudehus, thinking she matched the BOLO suspect. According to Buble, Gudehus "appeared to be very nervous, visibly shaking[,] had blue lips[,] and appeared a little agitated." Buble stated that Gudehus was detained because:

² A notification to police officers providing a physical description of a person who allegedly assaulted a police officer.

At this time[,] she matched the description of the BOLO. As I began to talk to her[,] I recognized that her voice sounded like that of the female that was yelling outside of room 108. She was walking towards the direction of the room. It was a high crime area known for CDS violations. And the female that was wanted from the BOLO was also wanted for prescription drug fraud, and I heard the conversation in the room referencing prescription drug fraud.

When Gudehus kept putting her hands into her hooded sweatshirt pockets, despite being told not to do so, she was subjected to a pat-down search. Buble explained that,

[t]his was a high crime area[,] there have [been] multiple arrests made there for weapons offenses[,] . . . [Gudehus] was potentially the female in the BOLO that had previously assaulted an officer just a few days before[,] the area wasn't exactly well lit[, a]nd the area [Gudehus] kept reaching in her pockets is a common area where weapons are placed[.]

During the pat-down on "the outside of [Gudehus's] clothes[,] " she continued to "put her hand back into her pocket[,] " while clenching an object in her hand. Buble then forcefully removed Gudehus's hand from her pocket revealing that she had three prescription pill bottles with the her name and the names of defendant and another person printed on each bottle. The bottle with defendant's name contained pills of different colors and sizes that were different from and more than identified on the prescription label.

Buble then contacted Detective Gregg,³ who issued the BOLO report, to determine if Gudehus was the BOLO suspect. Buble, however, could not confirm Gudehus as the suspect and requested her identification (ID). Gudehus replied that she left her ID in her hotel room, so Buble and Delvalle accompanied Gudehus to her hotel room. As the officers stood outside her hotel room doorway, Gudehus went inside the room to get her ID from her pocketbook. Through the unopened door, Buble observed "a male sleeping or laying in the bed" identified in-court as defendant. He immediately woke up, and "became very agitated and irate with [Gudehus] for bringing [Buble and Delvalle] there." Buble further testified that from the door, she "could see, in plain view, four pill bottles on the nightstand[,]" while standing in the doorway. Defendant called Buble "a pussy and told [her] to shut the fuck up and tried to get [Gudehus's] pocketbook . . . in order to obstruct [the officers'] investigation."

When defendant attempted to grab Gudehus's pocketbook again, Buble and Delvalle "entered the [hotel] room to place [defendant] under arrest for obstruction[,]" and removed him from the room. After viewing and sending a picture of Gudehus's driver's license to Gregg, Buble received confirmation from

³ The record does not mention his first name.

Gregg that Gudehus was not the BOLO suspect. The police then asked Gudehus for permission to search the room by providing her a "consent to search form" and advising her "that she had the right to refuse the search at any time; that she can stop the search at any time; and that she would be present while the search was happening." Gudehus signed the consent form, and the search revealed large amounts of prescription pills in four bottles, some with torn-off labels, and one with defendant's name on the label containing "30-milligram Oxycodone pills". Gudehus was arrested following the search.⁴

The motion judge reserved decision, and issued orders and a single written decision on July 29, 2014, denying defendant's and Gudehus's motions to suppress. In denying defendant's motion, the judge rejected the contention that Buble had no reasonable suspicion for detaining Gudehus, and that Buble exceeded the scope of the pat down search of Gudehus after it was apparent that Gudehus had no weapons. The judge found that

⁴ Defendant and Gudehus were jointly charged with third-degree possession of Oxycodone, N.J.S.A. 2C:35-10(b)(4), second-degree possession of Oxycodone with intent to distribute, N.J.S.A. 2C:35-5(b)(4), third-degree possession of Buprenorphine, N.J.S.A. 2C:35-10(a)(1), third-degree possession of Diazepam, N.J.S.A. 2C:35-10(a)(1), third-degree possession of Carisoprodol, N.J.S.A. 2C:35-10(a)(1), and third-degree possession of Alprazolam, N.J.S.A. 2C:35-10(a)(1). In addition, defendant was individually charged with fourth-degree obstruction, N.J.S.A. 2C:29-1.

under the totality of circumstances, there was reasonable suspicion to detain Gudehus and confirm her identification because she appeared to match the BOLO suspect description. In particular, the judge noted that Gudehus "appeared slightly disoriented and had blue-colored lips[,] it was a high-crime area, she continued to reach into her pockets, despite being advised not to do so, she was "visibly nervous, her body was shaking, and she would not make eye contact with the officers." The judge found that Buble's pat-down was proper under State v. Lund, 119 N.J. 35, 48 (1990), because based on Buble's training it became "immediately apparent" that Gudehus had contraband.

Next, the motion judge found no merit in defendant's argument that the police were unreasonable to investigate further once they found contraband on Gudehus. The judge reasoned that "[i]t was objectively reasonable for [the] officers to request identification from [Gudehus]" because she only provided her first name, the officers needed to dispel their suspicion that she was not the BOLO suspect, and it was routine for officers to request ID to ensure that Gudehus had no active warrants out for her arrest. Consequently, the judge determined that Buble and Delvalle had a legitimate reason to go with Gudehus to her hotel room so that she could obtain her ID.

The motion judge also rejected defendant's argument that the search was unlawful because defendant had a reasonable expectation of privacy in the hotel room, and did not consent to the search. The judge determined that, as a "guest," defendant did not have a reasonable expectation of privacy. Nevertheless, assuming defendant had a reasonable expectation of privacy, the judge found that the search of the hotel room did not offend defendant's right to privacy because Gudehus's consent was justified by the third party exception. Citing State v. Douglas, 204 N.J. Super. 265, 277 (App. Div. 1985), the judge found that Gudehus had the right to control access to the hotel room because she paid for and registered the room in her name. Moreover, the judge noted that once the officers noticed the prescription pill bottles on the nightstand, Gudehus voluntarily and without coercion consented to search the room.

Defendant subsequently pled guilty to second-degree possession of oxycodone with intent to distribute and resolved three other indictments, and was sentenced to an aggregate prison term of eight years with a forty-month period of parole ineligibility. This appeal followed.

II.

Defendant raises the following single-point argument for our consideration:

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE POLICE LACKED REASONABLE SUSPICION TO CONDUCT THE STOP, AND BECAUSE THE POLICE EXCEEDED THE SCOPE OF THE INVESTIGATORY STOP BY SEIZING AND EXAMINING THE PRESCRIPTION PILL BOTTLES AND BY ACCOMPANYING THE CO-DEFENDANT TO HER ROOM TO RETRIEVE HER IDENTIFICATION.⁵

In our consideration of a trial court's ruling on a motion to suppress evidence, "[w]e conduct [our] review with substantial deference to the trial court's factual findings, which we 'must uphold . . . so long as those findings are supported by sufficient credible evidence in the record.'" State v. Hinton, 216 N.J. 211, 228 (2013) (quoting State v. Handy, 206 N.J. 39, 44 (2011)). "When . . . we consider a ruling that applies legal principles to the factual findings of the trial court, we defer to those findings but review de novo the application of those principles to the factual findings." Ibid. (citing State v. Harris, 181 N.J. 391, 416 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005)). However, despite our deferential standard, "if the trial court's findings are so clearly mistaken 'that the interests of justice demand intervention and correction,' then the appellate court should review 'the record as if it were deciding the matter at inception and make its own findings and

⁵ We have omitted the sub-points in defendant's brief.

conclusions.'" State v. Mann, 203 N.J. 328, 337 (2010) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

Both the United States and New Jersey Constitutions protect individuals against unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Under the exclusionary rule, evidence obtained in violation of an individual's constitutional rights will be excluded as "fruit of the poisonous tree." State v. Faucette, 439 N.J. Super. 241, 266 (App. Div.), certif. denied, 221 N.J. 492 (2015). Because the search at issue was executed without a warrant, it is presumed facially invalid; to overcome this presumption, the State must show that the search falls within one of the well-recognized exceptions to the warrant requirement and there exists probable cause. State v. Moore, 181 N.J. 40, 44 (2004); State v. Valencia, 93 N.J. 126, 133 (1983). One such exception is found in the plain-view doctrine.⁶ The State bears the burden

⁶ For the plain view exception to apply, the State must prove that

(1) the officer was "lawfully in the viewing area," (2) the officer discovered the evidence "'inadvertently,' meaning that he did not know in advance where the evidence was located nor intend beforehand to seize it," and (3) it was "immediately apparent" that the items "were evidence of a crime, contraband, or otherwise subject to seizure."

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of demonstrating that the seizure was legal. Valencia, supra, 93 N.J. at 133.

An investigative stop, or a Terry stop, allows police to "detain an individual temporarily for questioning." State v. Maryland, 167 N.J. 471, 486 (2001) (citing Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)). To justify an investigative stop, the police must have "a 'particularized suspicion' based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing." State v. Davis, 104 N.J. 490, 504 (1986). Additionally, "[t]he 'articulable reasons' or 'particularized suspicion' of criminal activity must be based upon the law enforcement officer's assessment of the totality of circumstances" Ibid. "Reasonable suspicion necessary to justify an investigatory stop is a lower standard than the

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[State v. Earls, 214 N.J. 564, 592 (2013)
(quoting Mann, supra, 203 N.J. at 341).]

In State v. Gonzales, 227 N.J. 77 (2016), our Supreme Court held prospectively "that an inadvertent discovery of contraband or evidence of a crime is no longer a predicate for a plain view seizure." Id. at 82. This suppression motion pre-dated Gonzales, and therefore the element must be satisfied in this case.

probable cause necessary to sustain an arrest." State v. Stovall, 170 N.J. 346, 356 (2002) (citing State v. Citarella, 154 N.J. 272, 279 (1998)).

We evaluate the "totality of the circumstances surrounding the police-citizen encounter" when determining the reasonableness of the stop. State v. Privott, 203 N.J. 16, 25-26 (2010) (quoting Davis, supra, 104 N.J. at 504). We consider "a police officer's 'common and specialized experience,' and evidence concerning the high-crime reputation of an area." Moore, supra, 181 N.J. at 46 (citations omitted). While a high crime area alone is not a sufficient basis to justify the stop, "the location of the investigatory stop can reasonably elevate a police officer's suspicion that a suspect is armed." State v. Valentine, 134 N.J. 536, 547 (1994).

We begin by noting there is no dispute that Gudehus voluntarily signed a written consent-to-search form to allow the search of the hotel room registered in her name.⁷ Defendant,

⁷ The fact that the search in question occurred in a motel room is of no consequence. While "the reasonable privacy expectations in a hotel room differ from those in a residence[,]" United States v. Agapito, 620 F.2d 324, 331 (2d Cir.), cert. denied, 449 U.S. 834, 101 S. Ct. 107, 66 L. Ed. 2d 40 (1980), occupants of a hotel room are nevertheless entitled to the protection of the Fourth Amendment. See Hoffa v. United States, 385 U.S. 293, 301, 87 S. Ct. 408, 413, 17 L. Ed. 2d 374, 381 (1966); State v. Alvarez, 238 N.J. Super. 560, 571 (App. Div. 1990). "Under our constitutional jurisprudence, when it is (continued)

however, contends that, by virtue of fruit-of-the-poisonous-tree doctrine, evidence of his possession of a CDS was unlawfully obtained from the unlawful stop, search and seizure, and detention conducted on Gudehus. We disagree.

Here, the police officers were conducting an investigatory stop based upon several articulable and objective facts. Gudehus was in a high crime area and sounded like the female that the police had heard earlier that evening in the same vicinity who was discussing the plan to make illegal sales of prescription drugs. When stopped, Gudehus was nervous, shaking, and agitated. Moreover, she appeared to match the description of a BOLO suspect involved with prescription drug fraud. Because she refused the officers' command to stop putting her hands in her pockets due to the concern that she was concealing a weapon, a pat-down search was conducted. Finding that she was in possession of drugs prescribed to three individuals, the officers properly requested proof of her identification. When she responded that she had to retrieve her ID from her hotel room, the officers followed her to her room. Notably, the

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practicable to do so, the police are generally required to secure a warrant before conducting a search of certain places, . . . such as a hotel room." State v. Hathaway, 222 N.J. 453, 468 (2015).

officers did not enter the room until defendant became agitated and intervened by trying to prevent her from getting her ID.

Gudehus's ensuing written consent to search the room when other prescription drugs were seen in plain view resulted in the seizure of evidence that consequently led to defendant's plea. Thus, we conclude, as did the motion judge, that the motion to suppress should be denied as the totality of the circumstances justified the investigative stop, which led to a plain view observation of illegal prescription drugs and a consent to search.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION