SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4376-16T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

RAFAEL CAMEY,

Defendant-Respondent.

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Submitted October 30, 2017 – Decided December 28, 2017

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 14-11-0923.

Camelia M. Valdes, Passaic County Prosecutor, attorney for appellant (Tom Dominic Osadnik, Assistant Prosecutor, of counsel and on the brief).

Sutnick and Sutnick, LLC, attorneys for respondent (Laura C. Sutnick, on the brief).

PER CURIAM

Upon leave granted, the State appeals from an April 26, 2017 order of the trial court denying its motion to admit defendant's DNA evidence under the inevitable discovery rule, denying its

motion to compel a buccal swab, and granting the defense motion allowing certain personnel records to be admissible at trial. We affirm.

I.

On Monday, September 30, 2013, the Passaic Police Department received a call reporting a dead woman near a bank of the Passaic River. The 911 call came from T.M.,[1] who had previously provided police with information. On October 1, 2013, the police brought T.M., who appeared to be under the influence of narcotics, to the police station to give a formal statement. There, she identified the deceased as "the new girl on the block," whom she had last seen the prior evening at around 11:00 p.m. with a "violent Mexican male." T.M. asserted the man had previously attacked both her and another woman, A.M.H. T.M could not identify anyone from the police database, but agreed to contact the police if she saw the individual again.

On October 4, 2013, the police spoke with A.M.H., who identified her previous attacker as E.M., who is not defendant. The police interviewed E.M. and took a buccal swab. That same day, T.M. was interviewed a second time, again appearing to be under the influence of narcotics. She reasserted that she had

[1] To protect the identity of the informant and others not a party to this appeal, we use initials.

seen the victim in the company of a "violent Mexican male" the night before police found her body. Later that day, police interviewed and took buccal swabs from approximately sixteen homeless men in the area.

On October 18, 2013, police interviewed T.M. a third time, and she again stated she last saw the deceased with a "violent Mexican male." On October 20, 2013, T.M. called the police to report she had seen the "violent Mexican male" and shortly thereafter, made an on-scene identification of defendant.

Defendant, who speaks Spanish and attended only two years of primary school in Guatemala, was confronted by police and removed from a bar where he was drinking. The police informed defendant they wanted to speak with him, patted him down, and transported him to the police station in the back of a police vehicle. There, a Spanish-speaking detective read defendant a Miranda[2] form, asking throughout if he understood what he was being told. Defendant nodded his head repeatedly but indicated multiple times, "I don't understand," or "I don't know." At one point, he stated "No, it's ok. If I get paid in check and I go to the bank." Defendant was then directed to sign the form, and after doing so, he gave a statement.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

The police informed defendant they were going to take his DNA with a buccal swab. He responded, "No, no, no exactly. There is no problem. I don't know who . . . said that. Who because I cannot be in the street." The police gave him the buccal swab consent form, written in English, with no accompanying explanation of the form or of his right to refuse to give the sample. He subsequently signed the form, and the police took a buccal swab. The police did not enter the specimen information into the police computer until November 17, 2013 and did not take it to the lab until January 13, 2014.

Six months after her initial statement, on March 18, 2014, T.M. again spoke to the police, reasserting she last saw the deceased with the "violent Mexican male" and identified defendant from a photo lineup made up of photographs of people the police had investigated up to that point.

Defendant was again brought to the police station for questioning on April 8, 2014. Like before, defendant was confronted by the police, this time at a laundromat, informed that the police wanted to speak with him, patted down, and transported to the police station in the back of a police vehicle. Once at the station, a detective read him his Miranda rights in Spanish. As before, defendant demonstrated a lack of understanding of his rights. He nodded his head throughout the explanation, but stated,

"I don't understand," or "I don't know." Additionally, he made comments that he either did not know any attorneys or could not afford to pay an attorney. Eventually, defendant signed the Miranda form and gave a second statement.

On June 25, 2014, the police received DNA results from swabs taken from the deceased's body. Defendant's DNA tested as a positive match. That same day, the police conducted a third interview with defendant. Again, a detective read him his Miranda rights from the Spanish form, which defendant signed. Defendant then gave a third statement.

After conducting Miranda hearings, the Honorable Marilyn C. Clark, J.S.C., suppressed defendant's consent to take the buccal swab as well as all three statements in their entirety, ruling such evidence inadmissible for any purpose. The judge found each time defendant was brought to the police station, he was subjected to an illegal detention because he was taken into custody without probable cause and without a warrant. The subsequent custodial interrogation required effective Miranda warnings. The warnings given by the police prior to each statement were not effective because defendant did not understand his rights and did not make a knowing and voluntary waiver. The judge found defendant's limited education, his consumption of alcohol before at least one of the statements, and the deficiencies in his understandings of

the proceedings notable. She found the police conduct "offensive to due process," and demonstrated blatant disregard for the most basic of constitutional safeguards.

The judge suppressed the results of the buccal swab as the product of an illegal detention and invalid consent because the consent form was in English and was never translated for defendant. He was never informed that he had the right to refuse and that the swab would be used in a criminal investigation.

The State thereafter moved to admit the buccal swab evidence under the theory of inevitable discovery, and the judge conducted further hearings. Detective Sergeant Bordamonte (Bordamonte) testified that had defendant not consented to give a buccal swab, he would have eventually sought a search warrant. He further testified the buccal swab was not sent to the lab for DNA testing until January 13, 2014 because they had "other investigations" and he intended to take the swab to the lab when he had "downtime."

During the same hearing, the judge considered defendant's motion for admission of Bordamonte's personnel records regarding an Internal Affairs (IA) investigation. The records established Bordamonte's prior violations of police department rules, including instances of bias against perceived undocumented immigrants and generally unprofessional conduct, including alleged instances of dishonesty to his superiors.

In a detailed and well-reasoned oral decision, Judge Clark denied the State's motion to admit defendant's DNA evidence under the theory of inevitable discovery, using the standard set forth in State v. Sugar, 100 N.J. 214, 238 (1985). Further, the judge denied the State's motion to compel defendant to give a buccal swab and granted the defense motion permitting Bordamonte's personnel records to be used at trial.

In declining to allow the DNA evidence under the theory of inevitable discovery, Judge Clark stated, "under all of the circumstances and . . . after much thought I am not convinced that [Bordamonte] would have applied for a search warrant for [defendant's] DNA." The judge emphasized Bordamonte's long police history, his correspondingly low number of search warrant applications,[3] and his minimization of the actions leading to and the results of the IA investigation. The judge opined, assuming Bordamonte applied for a search warrant, she "would have been very concerned about whether the application met the standard required" to obtain defendant's DNA. She stated, "many important basic and

[3] Bordamonte testified that in twenty-three years as a detective, and being involved in "100 homicides and 1,000 street crimes," he had sought between twenty and twenty-five search warrants. Further, he did not testify that he had ever applied for a search warrant to obtain DNA. Moreover, though buccal swabs were taken from approximately twenty males involved in the case besides defendant, no search warrants were obtained.

potentially fruitful investigative steps including those involving legal processes were not taken nor apparently even considered during this investigation. Conversely, a number of investigatory steps that were taken . . . [were] in blatant disregard for constitutional safeguards."

Next, Judge Clark denied the State's motion to compel the buccal swab under the same inevitable discovery standard. The judge recognized "a person arrested for murder and/or sexual assault must submit to a DNA sample upon arrest." Defendant, however, was arrested because of an invalid DNA consent and the previously suppressed statements. Moreover, the judge rejected the suggestion an affidavit reporting T.M.'s identification of defendant would have been sufficiently trustworthy to meet the standard required to support a search warrant given her criminal history, narcotics impairment, and inconsistent statements; were the judge presented with such an affidavit she would have required T.M. to appear and give testimony to assess her credibility.

The judge found Bordamonte's personnel records admissible pursuant to proper limiting instructions, stating "[i]f this matter goes to trial [Bordamonte's] angry and threatening remarks about illegal immigrants and other remarks to the people in that cited episode . . . are relevant to his credibility in this case, particularly because [defendant] is an illegal immigrant."

We granted the State's motion for leave to appeal the judge's order. On appeal, the State argues:

> POINT I: THE TRIAL COURT ERRED IN DENYING THE STATE'S MOTION FOR BUCCAL SWAB UNDER THE INEVITABLE DISCOVERY DOCTRINE.
>
> POINT II: THE TRIAL COURT ERRED IN ALLOWING REFERENCE TO INTERNAL AFFAIRS RECORDS REGARDING THE STATE'S LEAD DETECTIVE.

II.

The State contends defendant's DNA sample would have been inevitably discovered, notwithstanding the invalid consent, and the judge erred in denying its motion. We disagree.

"Appellate courts reviewing a grant or denial of a motion to suppress 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. Hubbard, 222 N.J. 249, 262 (2015) (citations omitted). "In the typical scenario of a hearing with live testimony, appellate courts defer to the trial court's factual findings because the trial court has the 'opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.'" State v. S.S., 229 N.J. 360, 374 (2017) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). We disregard those findings only when a trial court's findings of fact are clearly mistaken. Hubbard, 222 N.J. at 262. However, the

trial court's legal interpretations will be reviewed de novo. Id. at 263.

Both the United States and New Jersey Constitution protect individuals against unreasonable searches and seizures. U.S. Const., amend IV; N.J. Const., art. I, ¶ 7. "Warrantless seizures and searches are presumptively invalid as contrary to the United States and the New Jersey Constitutions." State v. Pineiro, 181 N.J. 13, 19 (2004) (citation omitted). Where evidence is obtained as a result of a constitutional violation, the exclusionary rule applies based on the "fruit of the poisonous tree" doctrine. State v. James, 346 N.J. Super. 441, 453 (App. Div. 2002).

In State v. Sugar (Sugar II), 100 N.J. 214, 237 (1985), our Supreme Court adopted the doctrine of inevitable discovery, which instructs consideration of whether the evidence in question "would have been obtained lawfully and properly without the misconduct," as an exception to the fruit of the poisonous tree doctrine. See Nix v. Williams, 467 U.S. 431, 448 (1984). The Sugar II court held the State was

> required . . . to show that (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures

> would have occurred wholly independently of the discovery of such evidence by unlawful means.
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> [Id. at 238.]

Subsequently, in State v. Sugar (Sugar III), 108 N.J. 151, 157 (1987), the Court set the State's burden of proof at "clear and convincing."

Through that lens, Judge Clark correctly considered the relevant inquiry was not whether Bordamonte could have obtained a search warrant, but whether he would have. See Sugar II, 100 N.J. at 238. The judge found the State did not demonstrate the police would have sought a search warrant after evaluating the entirety of the investigation, including the apparent lack of urgency, dearth of search warrants for DNA swabs taken from other suspects, and the blatant disregard for basic police procedures that should have been utilized during defendant's interviews. Furthermore, the judge considered Bordamonte's testimony, his history of obtaining search warrants, and the conduct depicted in the IA records, and was "not convinced that [Bordamonte] would have applied for a search warrant for [defendant's] DNA. The most I can say is that he certainly could have and possibly would have." On that basis, the judge determined the State did not meet the first element of inevitable discovery.

When a trial judge makes credibility determinations, even without specifically articulating detailed findings of credibility, we are not free to make our own credibility determination. State v. Locurto, 157 N.J. 463, 472-75 (1999). Here, it was integral to the judge's determination that she did not find Bordamonte to be a credible witness. We do not find her determination to be an abuse of discretion.

Additionally, the judge determined the State did not satisfy the second element - whether "the pursuit of those procedures would have inevitably resulted in the discovery of the evidence." The judge was not satisfied any search warrant application the police would have brought based on the evidence presented would have met the standard required for an investigative detention under Rule 3:5A-1, let alone the more stringent standard for a search warrant.

Were we to disagree with the judge's factual and credibility determinations, we would not disturb those findings merely because "'[we] might have reached a different conclusion were [we] the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case." Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)); see S.S., 229 N.J. at 374.

In light of the record and the judge's detailed conclusions, we cannot say the trial judge abused her discretion in denying the State's motion to admit the evidence as an inevitable discovery and to compel a buccal swab.

III.

We reject the assertion that the judge's consideration of Bordamonte's IA investigation is unduly prejudicial and lacks relevance or probative value. We review the trial judge's evidentiary rulings under the abuse of discretion standard. State v. Erazo, 126 N.J. 112, 131 (1991); State v. Ramseur, 106 N.J. 123, 265-66 (1987).

The State asserts the admission of the report was impermissible under several rules of evidence, including N.J.R.E. 404(b) and 403. At the outset, we note that "hearsay is permissible in a suppression hearing subject to N.J.R.E. 104(a)" and the rules of evidence, except Rule 403 and rules of privilege, do not apply. State v. Bivins, 226 N.J. 1, 14 (2014) (citing State v. Watts, 223 N.J. 503, 519 n.4 (2015)).

Under Rule 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of," among other things, undue prejudice to the defendant. Here, the judge stated clearly that the records were relevant to Bordamonte's

credibility, and the state has not asserted that the risk of prejudice substantially outweighs the relevance.

Moreover, we do not find any error present as a result of the judge's consideration of these records fatal to her conclusions. Indeed, the judge appears to have considered the IA record only as an afterthought, after considering the police investigation and the conduct of the officers, Bordamonte's testimony, and his inconsequent history of utilizing search warrants, stating "[i]n addition to all of this I am significantly disturbed by [Bordamonte's] responses . . . [w]hen questioned about his personnel records."

However, in the event this matter proceeds to trial, Bordamonte's records may only be used for proper purposes as provided under N.J.R.E. 404(b), or as otherwise allowed in the rules of evidence. Additionally, appropriate limiting instructions must be given to the jury where necessary. See State v. G.S., 145 N.J. 460, 473-74 (1996).

Affirmed.