SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4552-14T1
A-0593-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent/
Cross-Appellant,

v.

CARLOS M. LOPEZ,

Defendant-Appellant/
Cross-Respondent.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

CARLOS M. LOPEZ,

Defendant-Respondent.

Submitted (A-4552-14) and Argued (A-0593-16)
March 13, 2017 - Decided April 11, 2017

Before Judges Nugent, Haas and Currier.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 13-04-0511.

Joseph E. Krakora, Public Defender, attorney for appellant/cross-respondent in A-4552-14 (James K. Smith, Jr., Assistant Deputy Public Defender, of counsel and on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent/cross-appellant in A-4552-14 (Jason M. Boudwin, Assistant Prosecutor, on the brief).

Jason M. Boudwin, Assistant Prosecutor, argued the cause for appellant in A-0593-16 (Andrew C. Carey, Middlesex County Prosecutor, attorney; Mr. Boudwin, of counsel and on the briefs).

James K. Smith, Jr., Assistant Deputy Public Defender, argued the cause for respondent in A-0593-16 (Joseph E. Krakora, Public Defender, attorney; Mr. Smith, of counsel and on the briefs).

PER CURIAM

Indicted on four counts of armed robbery and related offenses for robbing four gas stations — Lukoil, Fuel One, Raceway, and Delta — defendant Carlos M. Lopez was tried by a jury for the Lukoil robbery, convicted, and sentenced to an aggregate twenty-seven year prison term. The court denied the State's motion to impose a life sentence without parole. Defendant appeals (Docket No. A-4552-14) from the judgment of conviction, and the State cross-appeals from the denial of its sentencing motion.

While his appeal of the Lukoil conviction was pending, defendant was facing trial on the Fuel One robbery. Unlike defense

counsel in the Lukoil case, new defense counsel filed a motion seeking to suppress evidence seized during a warrantless search of defendant's home. The trial court granted the motion. On leave granted in the Fuel One case (Docket No. A-0593-16), the State appeals from the order suppressing the evidence.

We have consolidated the Lukoil and Fuel One appeals for purposes of this opinion. In the Lukoil case, defendant raises the following points:

> POINT I
>
> DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO MOVE FOR SUPPRESSION OF ITEMS FOUND IN A CONSENT SEARCH, WHERE THE POLICE DID NOT OBTAIN DEFENDANT'S CONSENT UNTIL AFTER HE HAD INVOKED HIS RIGHT TO COUNSEL.
>
> A. The Motion To Suppress The Statement.
>
> B. The Fifth Amendment Right To Have Counsel Present.
>
> C. The Failure Of The Police To Advise Defendant Of His Right To Refuse Consent.
>
> D. The Sixth Amendment Right To The Effective Assistance Of Counsel.
>
> POINT II
>
> THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO PRECLUDE THE VICTIM FROM MAKING AN IN-COURT IDENTIFICATION BASED UPON THE PROSECUTOR'S IMPROPER ACTIONS IN SHOWING THE VICTIM MUGSHOT PHOTOS OF THE DEFENDANT

PRIOR TO THE TRIAL FOR THE PURPOSE OF CONFIRMING HIS IDENTIFICATION.

On its cross-appeal, the State argues:

AS A LIFE SENTENCE WAS MANDATORY UPON THE STATE'S APPLICATION, THE 20-YEAR SENTENCE IMPOSED FOR ARMED ROBBERY WAS ILLEGAL.

On its interlocutory appeal in the Fuel One case, the State argues:

POINT I

POLICE LAWFULLY SEIZED THE CLOTHING FROM DEFENDANT'S DINING ROOM. THERE WAS AMPLE PROBABLE CAUSE FOR OFFICERS TO BELIEVE THE GRAY SWEATSHIRT WAS RELATED TO THE ARMED ROBBERIES, AND IF DEFENDANT DID NOT CONSENT TO THE SEARCH OF HIS HOME, POLICE WOULD HAVE INEVITABLY SOUGHT AND OBTAINED A SEARCH WARRANT.

A. The gray sweatshirt was admissible pursuant to the plain view exception to the warrant requirement.

B. Defendant consented to the subsequent search of his home.

C. The gray, hooded sweatshirt, the black knit hat, and the rain jackets would all have been inevitably discovered during the execution of a search warrant had defendant not consented to the search of his home and car.

For the reasons that follow, we affirm in its entirety the judgment of conviction in the Lukoil case and reverse the suppression order in the Fuel One case.

I.

A.

In April 2013, a Middlesex County grand jury charged defendant in a multi-count indictment with four counts of first-degree armed robbery, N.J.S.A. 2C:15-1; four counts of second-degree possession of a BB handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a); four counts of fourth-degree possession of an imitation firearm for an unlawful purpose, N.J.S.A. 2C:39-4(e); two counts of third-degree theft, N.J.S.A. 2C:20-3(a); two counts of fourth-degree theft, N.J.S.A. 2C:20-3(a); one count of third-degree terroristic threats, N.J.S.A. 2C:12-3(b); and one count of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2). In a separate indictment, the grand jury charged defendant with second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1).

During pre-trial motion practice, the trial court initially denied defendant's motion to sever the charges for trial, but the State later agreed to try the robberies separately. In addition to the severance motion, defendant filed a motion to suppress a statement he had given to detectives. The court denied the motion. Defendant did not file a motion to suppress evidence that the police had seized during a warrantless search of his home.

The State tried defendant twice on the Lukoil robbery. The court declared the first trial a mistrial when the jury was unable to reach a unanimous verdict. The jury in the second trial found defendant guilty of armed robbery, possession of a weapon for an unlawful purpose, theft, terroristic threats, and the lesser-included offense of fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(3). In a subsequent trial, the jury found defendant guilty of certain persons not to possess weapons.

On May 8, 2015, after defendant unsuccessfully moved for a new trial, and after the court denied the State's motion to sentence defendant to life imprisonment under N.J.S.A. 2C:43-7.1(a), the "three strikes" statute, the court sentenced defendant to a twenty-year custodial term subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the first-degree armed robbery count. The court merged the remaining counts related to the Lukoil robbery. On the certain persons indictment, the court imposed a consecutive seven-year custodial sentence with five years of parole ineligibility.[1]

[1] The court also sentenced defendant to two, three-year custodial terms on theft offenses charged in unrelated indictments, concurrent with each another but consecutive to the sentences on the robbery and certain persons offenses. In total, the court sentenced defendant to a thirty-year prison term with a twenty-two-year period of parole ineligibility.

Defendant appealed from his judgment of conviction. The State cross-appealed from the order denying its motion to sentence defendant to life imprisonment without parole. While these appeals were pending, and with the trial on the Fuel One robbery looming, defendant filed a motion on November 12, 2015, to suppress the evidence police had seized during the warrantless search of his residence. On January 7, 2016, the court granted defendant's suppression motion in part, memorializing its decision in an order and accompanying memorandum. Following the court's decision, the State unsuccessfully moved for reconsideration. On leave granted, the State appealed.

B.

We begin our factual recitation with the suppression hearing that preceded the Fuel One trial, because the court's ruling on the suppression motion is the subject of the first point raised by each party on appeal. The State presented the testimony of two law enforcement officers: Jeffrey Tierney, a detective with the Edison Township Police Department when the Raceway robbery occurred on December 17, 2012, and when the Fuel One robbery occurred on December 29, 2012; and John Sachau, Jr., a detective with the Borough of Highland Park Police Department when the Lukoil robbery occurred on January 27, 2013.

Detective Tierney testified that on December 17, 2012, he responded to a report of a Raceway gas station robbery in Edison Township. The attendant explained he had been working in the booth located in the gas island when the perpetrator approached him, placed a gun to his neck, and demanded money. After taking the money, the perpetrator fled. The attendant described the perpetrator as a Hispanic male, wearing white or light gray pants, a blue or dark-colored knit skull cap, a blue or dark-colored sweater, and dark sunglasses.

Two weeks later, on December 30, 2012, Detective Tierney was assigned to investigate a robbery of a Fuel One gas station that had occurred the previous day. The Fuel One attendant told the detective the robber was a "black male in . . . a black sweater and a . . . black-knit skull cap." The gas station's surveillance video captured a portion of the incident. The court played the video at the suppression hearing.

Detective Tierney described the video as the prosecutor played and paused it for the court. The video depicted the perpetrator wearing a black "windbreaker-style jacket, a black-knit hat, dark glasses . . . a gray hooded sweatshirt," and black gloves. The perpetrator was talking as he followed the attendant into the office. The perpetrator "then pulls out a small black

pistol, points it at the [back of the attendant's head and neck], and then they move" out of the camera's view. The video captured the perpetrator searching the attendant's pockets and waving a customer away while concealing the gun.

After Detective Tierney spoke to the attendant and obtained the surveillance video, he issued a "TRAK alert" to surrounding law enforcement agencies to determine whether they had any information regarding the robberies. The alert contained a basic summary of the Raceway and Fuel One robberies, including the locations, dates, and times of the incidents, as well as a description of the robber.

Detective Sachau testified to the events culminating in defendant's arrest for the Lukoil robbery. The Lukoil robbery occurred on January 27, 2013. The next day, Detective Sachau drove to the scene and interviewed the victim, an attendant at the Lukoil gas station. The attendant described the robber as approximately forty-five to fifty years old, approximately five feet ten inches or five feet eleven inches tall, with medium brown skin and a mustache. The attendant said the robber was wearing a gray hooded sweatshirt and dark sunglasses.

The attendant said he could easily identify the robber, as the robber had come to the station and tried to sell a bicycle

approximately three days before the robbery. Additionally, the robber had previously tried to sell the attendant raincoats or ponchos. On those occasions, the robber drove a green Dodge minivan. Detective Sachau recalled that during an investigation the previous year, he had encountered defendant, who had a box of raincoats in his green Dodge minivan.

Detective Sachau had the Sheriff's Department prepare a photo array, which included defendant's photograph as well as "five filler photos comprised of individuals with . . . similar characteristics." After an assistant prosecutor approved the array, the Lukoil attendant made an appointment with another detective — who had nothing to do with the investigation — to view the photo array. On January 30, 2013, the victim viewed the photo array and identified defendant as the man who had robbed him. Detective Sachau conferred with an assistant prosecutor and obtained an arrest warrant from a municipal court judge.

Defendant lived in Edison Township. For that reason, and based on the TRAK alert, Detective Sachau's Sergeant, Ilan Lancry, contacted Edison Detective Tierney for assistance in executing the warrant. Detective Lancry gave Detective Tierney defendant's address and mentioned defendant had previously been involved in an Edison tire theft investigation.

Detective Tierney searched defendant's name in the police computer system, viewed his old booking photos, and "immediately thought this strongly resembled the person in the . . . video footage" from the Fuel One robbery. He also noted defendant lived close to the Raceway and Fuel One gas stations.

Detective Sachau and three other Highland Park officers, joined by Detective Tierney and two other Edison Township officers, drove to defendant's Edison Township home on January 31, 2013. As other officers surrounded the house, Detective Sachau knocked on the door and defendant answered. The detective advised defendant he was under arrest and handcuffed him without incident.

After being handcuffed, defendant asked if he could re-enter his home to tell his wife what was happening. Detective Sachau agreed, with the stipulation that he and other officers would escort defendant into the residence. The detective did so to prevent defendant from escaping or grabbing a weapon. Other officers "did a quick check of the area to make sure that there was nobody waiting in the wings or that sort of thing." According to Detective Sachau, defendant "had no problem with" the officers entering his home.

Defendant walked through the house to the back bedroom to speak to his wife. As Detective Sachau accompanied defendant, the

detective noticed a gray hooded sweatshirt draped over a dining room chair. Although there was nothing particularly unique about the gray hooded sweatshirt, Detective Sachau immediately believed defendant had worn the sweatshirt in the Lukoil robbery.

Detective Tierney also noticed the sweatshirt and believed the suspect was wearing the same sweatshirt in one of the Edison robberies. Detective Tierney believed the sweatshirt's color and style matched that of the sweatshirt worn by the Fuel One robber.

After viewing the sweatshirt, the detectives had the house secured to ensure nothing was removed while they sought defendant's consent to search the home. They also had defendant transported to the Edison police headquarters for interrogation. According to Detective Sachau, the detectives spoke with defendant to determine whether he would consent to a search of his residence or whether a search warrant was needed. The interrogation was recorded on video.

After informing defendant of his Miranda[2] rights, the detectives confronted him about the Lukoil robbery. Detective Sachau told defendant, "I got you dead to rights, . . . I want to

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

hear it from you though." After the detective pressed defendant further, defendant pushed back:

> Yeah but that doesn't mean I'm gonna go commit armed robbery bro, that's not, I don't even own a gun, I don't own knives nothing in the house, I mean. Tear the whole house up . . . . My landlord upstairs will tell you. She sees, I go outside, smoke a cigarette, that's it.

After several intervening questions and answers, Detective Sachau had the following exchange with defendant:

> [Detective Sachau:] Do you give us consent to look in the house?
>
> [Defendant:] Yeah.
>
> [Detective Sachau:] Your house how about the cars?
>
> [Defendant:] Go ahead feel free.
> [Detective Sachau:] I'm just checking, you're okay with that?
>
> [Defendant:] Oh yeah, yeah.
>
> [Detective Sachau:] Search the house, cars, alright.
>
> [Defendant:] Yeah whatever gets me —

Later in the interrogation, defendant asserted his right to counsel:

> [Defendant:] I apologize, I apologize but I'm, can I, can I get a lawyer at least to talk to me and help, you know help me out here cause —

[Detective Sachau:] Okay.

[Defendant:] Please don't get mad at me —

[Detective Sachau:] Yeah no —

[Defendant:] Just take this, take this —

[Detective Sachau:] Well listen you, you, you gave us your consent to check the house?

[Defendant:] Yeah.

[Detective Sachau:] Okay and the cars?

[Defendant:] And the cars.

Despite defendant's request for a lawyer, Detective Sachau asked defendant to sign and date a consent-to-search form. Defendant signed the form, which stated:

> I, [defendant] having been informed of my constitutional rights; first, that I may require that a search warrant be obtained prior to any search being made; second, that I may refuse to consent to any search; third, that anything which may be found as a result of this search which is subject to seizure can and will be seized and used against me in a criminal prosecution; fourth, that I may revoke my consent to search at any time; fifth, that I may consult with anyone of my choosing before I make a decision to waive my rights. By consenting to this search, I hereby authorize Highland Park PD and Edison to conduct a complete search of the premises or items under my control described as [defendant's address]. This written permission is given by me voluntarily and without threats or promises of any kind being made to me.

Defendant also checked a box on the form that stated, "I hereby expressly waive my right to be physically present during the execution of this search." After defendant signed the form, the detectives returned to defendant's residence and conducted a search of defendant's house and car.

The detectives discovered no evidence in defendant's car. In the dining room, the detectives found a "[g]ray hooded sweatshirt; a black windbreaker-styled jacket . . . draped over another chair-back"; and a black watch cap, or hat.

A friend of defendant's wife also resided in the house. The detectives contacted the friend, who consented to a search of his room and signed a consent-to-search form. During the search of the friend's bedroom, the detectives discovered and seized a black BB gun, several "air-soft pellet-gun-type weapons," and a stun gun.

Following the suppression hearing, the court granted defendant's motion in part. The court explained that because defendant clearly invoked his right to counsel, the consent form he subsequently signed was invalid. The court further explained that "[o]nce a defendant invokes his or her right to an attorney during a custodial interrogation all questioning must cease until either counsel is provided or the defendant initiates

communication with the police." "An exception would have occurred if [defendant] re-initiated the communication," but he did not.

Next, the court rejected the State's argument that the seizure of the sweatshirt fell within the plain view exception to the warrant requirement. The court determined that "the sweatshirt in plain view does not give rise to sufficient probable cause given the totality of the circumstances surrounding the [o]fficers' conduct" because the sweatshirt appears to be generic. Moreover, the officers did not remove the sweatshirt until after obtaining defendant's tainted consent.

Lastly, the court determined defendant's friend's consent was valid, "not bootstrapped to the tainted consent" of defendant, and fell under inevitable discovery. The court held the officers obtained the friend's knowing and voluntary consent through proper procedures, which resulted in the discovery of evidence and "which would have occurred wholly independently of the tainted search of the rest of the house."

C.

As we noted previously, defendant did not move to suppress the evidence seized from his home before his trial on the Lukoil robbery, but he did object to any in-court identification by the Lukoil gas station attendant. Defendant contended that as part

of the State's trial preparation, a prosecutor showed the attendant defendant's mugshot and a video of defendant at a Rite Aid to confirm defendant was the robber. Defendant believed this procedure constituted impermissible confirmation bias. After conducting an N.J.R.E. 104 hearing, the court permitted the attendant to make an in-court identification.

The court found the initial photographic arrays shown to the attendant were administered shortly after the incident and in conformity with Attorney General guidelines. The court commented, "it is standard and appropriate procedure to prep a case, and I don't know of any better way [to do so than] by showing the witness . . . his previous identification." With respect to confirmation bias, the court conceded it would have been better had the photos not been shown "because it does lead to a certain degree of confirmation." After observing the witness' testimony, however, the judge believed the attendant was "candid and honest" in identifying defendant. At trial, the attendant identified defendant as the robber.

The State developed the following proofs at defendant's trial on the Lukoil charges. On the night of January 27, 2013, an attendant was working alone at a Highland Park, Lukoil gas station. He observed a man, later identified as defendant, approach the gas

station wearing sunglasses, a gray sweatshirt, and a black jacket. Defendant asked where the attendant's boss was and the attendant replied his boss was at home. Defendant said, "I know your boss," and then walked into the gas station convenience store.

Inside, defendant picked up Dutch cigars and put them on the counter. As the attendant entered the store, defendant pointed a black gun at him and demanded money. The attendant gave defendant between $700 and $800 from his jacket pocket. Unsatisfied with that amount, defendant demanded money from the safe, but the attendant did not have the key. The attendant tried to grab defendant's gun. In doing so, he removed a piece of plastic from the gun, which he returned when defendant demanded he give it back. Defendant ordered the attendant to sit down and face the store's back wall and then he fled.

A customer who had pulled up to the gas pumps witnessed the robbery. As the customer waited in his car, he looked into the kiosk and observed an olive-skinned individual wearing a beige sweatshirt, holding what appeared to be a black handgun. The customer drove away and called the police. Later, the customer returned and provided the suspect's description to an officer.

Highland Park police officer Norman Brown arrived shortly after the robbery and spoke with the attendant, who described the

robber as a medium brown-skinned man wearing a gray sweatshirt and sunglasses. Officer Brown radioed the description to other officers and drove in the direction defendant fled. Officers canvassing the area observed a young man wearing a gray sweatshirt who appeared to match the description. While the officers detained the young man, Officer Brown returned to the gas station and spoke with the attendant to get a better description of the perpetrator. The attendant described the robber as either a Hispanic or Middle Eastern man with brown skin and a moustache, just under six feet tall. He also said the robber was between forty and fifty years old. Based on this information, officers released the young man.

The State's proofs concerning Detective Sachau's investigation of the Lukoil robbery, the attendant's recognition of defendant, the attendant's identification of defendant from the photo array, and Detective Sachau's arrest of defendant are essentially the same as those the State later presented at the suppression hearing, which we have previously recounted and need not repeat. At the police station, defendant waived his Miranda rights and gave a statement denying responsibility for the Lukoil robbery. He admitted, however, to selling raincoats out of his van at gas stations. He also signed a consent-to-search form permitting police to search his minivan and house. The State

introduced into evidence the items the detectives seized from defendant's home, including items from the friend's bedroom.

The friend testified. He said he and defendant drove to a Rite Aid on the night of the Lukoil robbery. After defendant bought medicine for his children at Rite Aid, the two drove to Quick Chek where the friend bought cigarettes. Before arriving, however, defendant asked the friend to park in front of a house on a street that was near the Lukoil gas station. Defendant said he "would be right back" before stepping out of the car and walking towards the street. Minutes later, defendant returned and said he had just robbed a gas station. Although the friend was "a little worried," he ignored defendant's statement because he believed defendant was drunk. The friend did not see defendant holding a BB or airsoft gun, but noticed "something was bothering" defendant toward his waist. The friend purchased cigarettes at Quick Chek and then drove home.

Defendant declined to testify and presented no evidence. The jury convicted him of all counts, the court sentenced defendant, and defendant filed this appeal.

II.

We first review the State's argument on interlocutory appeal that the trial court erred by suppressing some of the evidence

seized from defendant's home. Our resolution of that issue informs our decision on defendant's ineffective-assistance-of-counsel argument.

When reviewing a trial court's decision suppressing evidence following a hearing, "we accord deference to the factual findings of the trial court." State v. Scriven, 226 N.J. 20, 32 (2016). That is particularly so as "to those findings of the trial judge which are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Johnson, 42 N.J. 146, 161 (1964). If we determine the trial court's findings could reasonably have been reached on sufficient, credible evidence present in the record, our task is complete and we will not disturb the result. Id. at 162. Our review of a trial court's legal conclusions is plenary. State v. Rockford, 213 N.J. 424, 440 (2013) (citations omitted).

The State offers three reasons why the evidence seized from defendant's home should not have been suppressed: the evidence was properly seized under the plain view exception to the warrant requirement; defendant knowingly and voluntarily consented to the search; and the evidence would have inevitably been seized lawfully even if defendant had not consented to the search. The first two

arguments require little discussion. We agree with the third argument and therefore reverse the order suppressing the evidence.

The plain view exception has three elements:

> (1) "the police officer must be lawfully in the viewing area"; (2) "the officer has to discover the evidence 'inadvertently,' meaning that he did not know in advance where evidence was located nor intend beforehand to seize it"; and (3) "it has to be 'immediately apparent' to the police that the items in plain view were evidence of a crime, contraband, or otherwise subject to seizure."[3]
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> [State v. Reininger, 430 N.J. Super. 517, 535-36, (App. Div.) (quoting State v. Bruzzese, 94 N.J. 210, 236 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984)), certif. denied, 216 N.J. 367 (2013).]

Here, the State argues the detectives were lawfully in the viewing area — defendant's home — when they seized the sweatshirt, because defendant consented to the search. The argument is unavailing because defendant's consent was not knowingly and voluntarily given.

Indisputably, a consent search is a "well-established exception" to the warrant requirement. State v. Maristany, 133

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[3] On November 15, 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." State v. Gonzales, 227 N.J. 77, 82 (2016).

N.J. 299, 305 (1993). "To justify a search on the basis of consent, the State must prove . . . the consent was voluntary and . . . the consenting party understood his or her right to refuse consent." Ibid. (citing State v. Johnson, 68 N.J. 349, 353-54 (1975)). The State must "prove voluntariness by clear and positive testimony," State v. Chapman, 32 N.J. Super. 452, 466 (App. Div. 2000), and "show that the individual giving consent knew that he or she 'had a choice in the matter.'" State v. Carty, 170 N.J. 632, 639, modified on other grounds, 174 N.J. 351 (2002) (citation omitted).

In the case before us, the police did not seize defendant's gray sweatshirt when they arrested him at his home. Rather, they returned to defendant's home after defendant had undergone custodial interrogation. Nothing in the record suggests defendant had been informed of his right to refuse consent or knew he could do so when he first purportedly consented to the search. Consequently, his initial verbal consent to the search of his home and vehicle was invalid. Maristany, supra, 133 N.J. at 305.

The detectives informed defendant of his right to refuse and had him sign a consent form only after he invoked his right to counsel. "[A] suspect who invokes his right to counsel under Miranda may not thereafter be subjected to further interrogation

outside the presence of counsel without violating the constitutional privilege itself, unless the suspect personally and specifically initiates the conversation." State v. Burris, 145 N.J. 509, 519 (1996) (citation omitted).

In this case, the State does not dispute the detectives were prohibited from questioning defendant further after he invoked his Miranda rights. Rather, the State asserts that "the State's burden of demonstrating a knowing waiver only applies when the consent is a response to a police request to conduct such a search." The State relies upon State v. McGivern, 167 N.J. Super. 86, 89 (App. Div. 1979) and State v. Humanik, 199 N.J. Super. 283 (App. Div.), certif. denied, 101 N.J. 266 (1985) as support for this proposition. From this proposition, the State argues the defendant's initial consent was voluntary. We disagree.

In McGivern, a trooper stopped a motorist and asked if he had luggage in the car. Supra, 167 N.J. Super. at 87-88. The motorist said he did. Id. at 88. Though the trooper made no request to see the luggage, the motorist opened his trunk. Ibid. When he did, the trooper smelled a strong odor of marijuana, which led to the motorist's arrest. Ibid.

In reversing the trial court's suppression of evidence seized by the trooper, we noted "[t]he issue of a knowing consent, or for

that matter any consent, is not involved in the case at bar." Id. at 89. We explained: "If a person chooses to disclose contraband or evidence thereof as to which he ordinarily would be protected by virtue of his constitutional rights, without that course being initiated by the police, he does so at his peril." Ibid. If police do not expressly or implicitly "request to see or enter[,]" there can be no question of consent. Id. at 90.

Similarly, in Humanik, consent was not an issue. There, the defendant's sister gave the police an inculpatory letter the defendant had written. Supra, 199 N.J. Super. at 304. Again, the issue of consent was not involved because the sister provided the police with the defendant's letter without instigation by the officers. Ibid.

In the case before us, defendant did not open a trunk, hand the police a letter, or voluntarily surrender evidence of a crime. Rather, during custodial interrogation, which included a specific question from a detective about whether the police could search defendant's home and vehicle, defendant assented, but without being informed of his right to refuse. Unlike McGivern and Humanik, where consent was not at issue, here consent is a central issue; the State attempts to justify the warrantless search of defendant's home and seizure of evidence based on defendant's

alleged consent. The attempt fails, however, because as we have pointed out, defendant's consent was not knowingly and voluntarily given.

The State next contends that even if the consent and plain view doctrines are inapplicable, the sweatshirt and other items seized from defendant's home were admissible under the doctrine of inevitable discovery, and the trial court erred by finding to the contrary. We agree.

The doctrine of inevitable discovery is an "exception to the judicially-created exclusionary rule applicable to an unreasonable search and seizure." State v. Worthy, 141 N.J. 368, 389-90 (1995). Under the doctrine, "[e]vidence is admissible even though it was the product of an illegal search, 'when . . . the evidence in question would inevitably have been discovered without reference to the police error or misconduct, [for] there is no nexus sufficient to provide a taint.'" State v. Sugar, 108 N.J. 151, 156 (1987) (citations omitted). The inevitable discovery doctrine applies when:

> (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.
>
> [State v. Maltese, 222 N.J. 525, 552 (2015) (quoting State v. Johnson, 120 N.J. 263, 289 (1990)).]

"[U]nder this standard, 'the State . . . need only present facts sufficient to persuade the court, by a clear and convincing standard, that the [evidence] would be discovered.'" Ibid. (quoting Sugar, supra, 108 N.J. at 158).

Detective Sauchau testified that after observing the gray sweatshirt while arresting defendant, he intended to interrogate defendant to determine whether defendant would consent to a search. If defendant would not consent, Detective Sauchau intended to obtain a search warrant. Thus, the issue is whether a judge would have approved a search warrant based on the facts known to detectives at the time. We conclude a search warrant would have been approved.

"Probable cause for the issuance of search warrant requires 'a fair probability that contraband or evidence of a crime will be found in a particular case.'" State v. Chippero, 201 N.J. 14, 28 (2009) (quoting United States v. Jones, 994 F.2d 1051, 1056 (3d Cir. 1993)). Defendant does not dispute the police had probable cause for his arrest. Indeed, the robbery victim with whom

defendant had previous dealings had identified him as the robber. Defendant instead relies on the trial court's finding that a "generic gray sweatshirt" did not provide probable cause to believe that evidence of the gas station robberies would be found in his home.[4] Thus, defendant's argument is based on the contention that a search warrant would not have been issued because the gray sweatshirt was too generic to be linked to the robbery.[5] That proposition may be true in the absence of any other evidence linking generic items of clothing to a crime, but such is not the case here.

Here, the detectives were not operating in a vacuum when they first observed the sweatshirt. The victim had identified defendant as the perpetrator of one robbery, and he resembled the surveillance video depiction of the perpetrator of a second

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[4] It appears the trial judge made the observation about the generic nature of the gray sweatshirt in the context of his analysis of the plain view doctrine.

[5] Although defendant asserts the gray sweatshirt is too generic to be linked to the robbery, he appears to take a contrary position in the ineffective-assistance argument he makes on the appeal from his conviction. There, he asserts: "Certainly, the gray hooded sweatshirt and the black windbreaker were vitally important pieces of evidence against the defendant. Indeed, because there was no physical evidence connecting defendant to the crime, if it were not for the sweatshirt and the windbreaker, the State's case would have been based solely on the questionable identification made by [the Lukoil attendant]."

robbery. The robber in both instances wore a gray sweatshirt. Thus, the police had more than ample reason to believe defendant committed two robberies while wearing a gray sweatshirt.

As our Supreme Court explained in Chippero, when deciding whether to issue a search warrant, a magistrate is required to "assess the connection of the item sought to be seized 1) to the crime being investigated, and 2) to the location to be searched as its likely present location." Id. at 29 (citation omitted). The connection of the gray sweatshirt to the robbery was established through the victim's testimony that the robber wore a gray sweatshirt, the videotaped surveillance of the robber wearing a gray sweatshirt, and the Lukoil victim's identification of defendant as the robber. This was not merely a generic gray sweatshirt; it was a gray sweatshirt in the home of the robber who had worn a gray sweatshirt when robbing the Lukoil gas station. These facts connected the sweatshirt to the robbery and to the place to be searched. Stated differently, under the totality of these circumstances, there was a "fair probability" that the gray sweatshirt was evidence of the robberies." Id. at 28 (citations omitted).

For these reasons, we reverse that part of the trial court's order suppressing the gray sweatshirt and certain other items

found in defendant's home. We turn to defendant's argument that his attorney was ineffective.

In view of our conclusion that the gray sweatshirt and other evidence should not have been suppressed, defendant's ineffective-assistance-of-counsel argument fails. Defendant cannot satisfy the Strickland two-part test by demonstrating "counsel's performance was deficient," and "there is a reasonable probability but for counsel's unprofessional errors, the result of the proceeding may have been different." Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); accord, State v. Fritz, 105 N.J. 42, 58 (1987). Here, even if defense counsel in the Lukoil case had moved to suppress the evidence seized from defendant's home, the motion should have been denied. Because the evidence was properly admitted at the Lukoil trial, the trial outcome was not altered by defense counsel's failure to file a motion to suppress the gray sweatshirt and other evidence.

III.

Defendant next argues the prosecutor's showing the Lukoil attendant a mugshot of defendant during pre-trial preparation resulted in improper confirmation bias under State v. Henderson,

208 N.J. 208 (2011), and tainted the victim's in-court identification.

On August 28, 2014, nineteen months after the Lukoil robbery, the Lukoil attendant went to the Middlesex County Prosecutor's office and reviewed the same photographs he had seen when presented with the array in the January 2013. He again identified defendant as the robber with "[one-hundred] percent" certainty. Next, a detective showed the attendant a mugshot of defendant and footage from a Rite Aid surveillance camera. The attendant identified defendant as the robber.

The court allowed the attendant to identify defendant in court because it believed the attendant was candid and honest in his identification. In addition, the court found the initial photographic arrays were administered in accordance with Attorney General guidelines, though the court agreed it would have been better had the mugshot and video not been shown.

We agree the prosecutor's trial preparation procedure did not create "a very substantial likelihood of irreparable misidentification" as required by Henderson. Supra, 208 N.J. at 289. In Henderson, the Supreme Court cautioned a court should only suppress an identification if it finds "from the totality of the circumstances that defendant has demonstrated a very

substantial likelihood of irreparable misidentification[.]" Ibid. "[R]eliability [of the identification] is the linchpin" in making such a determination. Id. at 293 (citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977)). Henderson cautioned against the "suppression of reliable evidence any time a law enforcement officer makes a mistake." Id. at 303. Ultimately, "in the vast majority of cases, identification evidence will likely be presented to the jury. The threshold for suppression remains high." Id. at 219, 303.

Here, defendant did not demonstrate the existence of "a very substantial likelihood of irreparable misidentification." Id. at 289 (citations omitted). The Lukoil attendant identified defendant with complete certainty from an unchallenged photo array a few days after the robbery. Nineteen months later, as part of trial preparation, the attendant made the same identification with the same level of certainty. That the attendant was shown a mugshot of defendant — after identifying defendant from an array — as part of trial preparation did not render his in-court identification inadmissible.

Moreover, the trial court charged the jury as follows:

> In this case, it is alleged that the [Lukoil attendant] was shown a single photograph of the defendant during trial preparation. And you should determine what

> [e]ffect, if any, that would have on the witness's ultimate ability to identify the defendant in court.

Thus, the jury reached the same determination as the trial court and concluded the attendant's in-court identification of defendant was not tainted.

In any event, the error, if it exists, was harmless. R. 2:10-2. The Lukoil attendant identified defendant during the week following the robbery based on having seen defendant both the previous week and on at least one occasion during the previous year. The items police seized from defendant's home provided substantial corroborating evidence. Further, defendant admitted committing the robbery.

IV.

On its cross-appeal in the Lukoil case, the State challenges the denial of its motion to have defendant sentenced to life imprisonment without parole under N.J.S.A. 2C:43-7.1. The statute states in pertinent part:

> A person convicted of a crime under any of the following: N.J.S.[A.] 2C:11-3; subsection a. of N.J.S.[A.] 2C:11-4; a crime of the first degree under . . . N.J.S.[A.] 2C:15-1 . . . who has been convicted of two or more crimes that were committed on prior and separate occasions, regardless of the dates of the convictions, under any of the foregoing sections or under any similar statute of the United States, this State, or any other state

> for a crime that is substantially equivalent to a crime under any of the foregoing sections, shall be sentenced to a term of life imprisonment by the court, with no eligibility for parole.
>
> [(emphasis added).]

The record reveals that in 1991, a New York jury convicted defendant of second-degree attempted murder and another New York jury convicted defendant of first-degree armed robbery. A judge sentenced defendant for both crimes on the same date, but each conviction stemmed from separate offenses committed at different times.

Although the State argued to the trial court that attempted murder in New York, N.Y. Penal Law § 110 and 125.25(1), is "substantially equivalent" to New Jersey's attempt statute, N.J.S.A. 2C:5-1, this argument is irrelevant, because crimes of attempt are not predicate acts under the three strikes statute. N.J.S.A. 2C:43-7.1 specifies only the substantive offense of murder, N.J.S.A. 2C:11-3, not attempted murder, as a predicate offense. Moreover, N.J.S.A. 2C:11-3 omits any reference to attempt in its definition of murder, which requires the actor to actually cause the death of another. See State v. Lee, 411 N.J. Super. 349, 353 (App. Div. 2010) ("attempted murder is not a crime in Chapter 11 of the Code"). In Lee, we noted our

"Legislature has expressly included attempts for purposes of a sentencing provision when it desires to do so." Ibid. (citations omitted). Because the Legislature did not include any crime of attempt in the three strikes statute, defendant's New York attempted murder conviction does not qualify as a "strike" for purposes of that Act. Accordingly, the trial court's denial of the State's motion is affirmed.

Affirmed as to the conviction and sentence in the Lukoil matter (A-4552-14); reversed and remanded as to the suppression ruling in the Fuel One matter (A-0593-16).