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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4773-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREW JAMES,

Defendant-Appellant,

Submitted July 27, 2016 – Decided March 3, 2017

Before Judges Leone and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 14-05-1173.

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

James P. McClain, Atlantic County Prosecutor, attorney for respondent (Mario C. Formica, Chief Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

O'CONNOR, J.A.D.

After the court denied his motion to suppress, defendant Andrew James pled guilty to second-degree certain persons not to

have weapons, N.J.S.A. 2C:39-7, and was subsequently sentenced to a five-year term of imprisonment without parole eligibility. Defendant now appeals from his judgment of conviction, challenging the denial of his motion to suppress. We affirm.

I

At the suppression hearing, police officer Brian Hambrecht testified as follows. During the afternoon of March 4, 2014, he and fellow officer Nicholas Berardis were on patrol in a high-crime area of Atlantic City. Both officers were in a marked police car and in uniform. Hambrecht noticed a man, later identified as defendant, walking down the sidewalk. After looking over at the patrol car, defendant bent over, "clinched" his chest, and appeared to be choking or dry heaving.

Concerned for his well-being, Hambrecht stopped the patrol car and asked defendant, who was on the opposite sidewalk, if he needed medical attention. Defendant did not respond. When Hambrecht repeated his question, defendant replied he had been choking on a cigarette.

Defendant then abruptly stood up and quickly walked down the sidewalk. As he did so, he "bladed"[1] his body away from the patrol car, held his right hand against his jacket in the area of his waist, and continuously looked over his right shoulder at

[1] Hambrecht explained "blading" occurs when a person turns his body away from the police.

the patrol car. Hambrecht then noticed there was a large bulge on the right side of defendant's jacket. Defendant gripped the bulge with his right hand, while his left hand was "swinging" as he walked.

The officers were suspicious defendant was concealing a firearm. Officer Berardis jumped out of the patrol car and instructed defendant to stop. Defendant turned around, looked at Berardis, adjusted his waistband, and ran. Berardis ran after defendant, and managed to catch up to him and bring him to the ground. Hambrecht exited the patrol car and assisted in placing defendant into custody.

When searched, the police discovered defendant was carrying a loaded, approximately two-foot-long, semi-automatic rifle. The barrel was tucked into defendant's pants, and the rest of the rifle extended up the right side of his body over his clothes but under his jacket. The police also noticed defendant's left forearm was wrapped in an ace bandage. They subsequently learned defendant had fractured his arm approximately nine weeks before.

Berardis's testimony was consistent with Hambrecht's. He, too, believed defendant was concealing a weapon because, after defendant recovered from what caused him to bend over, Berardis could see a bulge in defendant's jacket after he stood up and

walked away. Berardis also noticed defendant clutched the right side of his body, bladed his body away from the police, and continuously looked over his shoulder at them as we walked away from them at a fast pace. When Berardis got out of the patrol car and ordered him to stop, defendant ran.

Berardis added that, as defendant was running away, he gave defendant additional orders to stop, but to no avail. Defendant looked back at Berardis as he ran, and, at one point when defendant turned, Berardis noticed a large-capacity magazine protruding out from the bottom of defendant's jacket. After Berardis caught up to and brought defendant to the ground, he discovered defendant had a high-powered, semi-automatic rifle in his possession; attached to the rifle was a high-capacity magazine.

Defendant also testified. He admitted he was carrying a loaded, concealed rifle for which he did not have a permit. He was afraid the police might find the weapon in his home and was moving it to another location when stopped by the police. Defendant claimed he did not do anything to attract the police officers' attention.

Specifically, he maintained he never appeared to require medical attention, and the weapon was concealed in such a way that no part of the rifle should have alerted the police he was

carrying a weapon. Finally, he claimed he had fractured his left forearm nine weeks before and was still wearing a hard splint on his left arm. He asserted he could not have been swinging his left arm as he walked because the splint extended above his elbow and restricted his movements.

According to defendant, the officers slowly drove down the street, staying parallel to him as he walked down the sidewalk, and stared at him. When defendant inquired what it was the police wanted, they asked him what he was doing. Defendant replied he was smoking a cigarette, and kept walking. The police continued to creep alongside him in the patrol car as defendant walked down the sidewalk. Then, when the passenger door of the patrol car opened, defendant crossed the street and ran down the sidewalk. However, Berardis caught up to and tackled defendant to the ground.

The trial court credited the police officers' testimony, rejecting and characterizing as "patently incredible" defendant's assertion a full-sized, semi-automatic weapon that was partly inserted into his pants was not readily observable. The court concluded that, because the officers had a reasonable, articulable suspicion defendant was illegally concealing a firearm, they were justified in conducting an investigatory stop.

Further, the trial court found that, when defendant failed to abide by Berardis's command to stop and instead fled, there was probable cause to arrest defendant both for weapons offenses and obstruction. During a search incident to that arrest, the police found the weapon defendant sought to suppress. Because the evidence was seized pursuant to a lawful arrest and search, the trial court denied defendant's suppression motion.

II

Defendant makes the following argument on appeal:

> POINT I - THE SEARCH OF THE DEFENDANT AND THE CONSEQUENT SEIZURE OF THE GUN WERE UNLAWFUL, NECESSITATING SUPPRESSION. U.S. CONST., AMENDS IV. XIV; N.J. CONST. (1947) ART. 1, PAR. 7.

Defendant concedes if the investigatory stop was constitutionally valid, the subsequent search and seizure of the weapon incident to his arrest was also legitimate. However, for the following reasons, defendant contends the trial court erred when it found the investigatory stop valid.

First, defendant contends all of the officers' testimony should have been discredited, because it was not credible defendant's left arm was "swinging" when the splint precluded such movement. Second, defendant asserts he had a right to ignore the officers' questions during the field inquiry about his well-being. Third, he claims none of the officers' actions

can be justified under the community-caretaking doctrine, see State v. Cassidy, 179 N.J. 150, 161 (2004), because defendant was free to reject medical assistance.

In short, defendant argues the officers merely conducted a field inquiry or engaged in an act under the community caretaking doctrine and neither act justified a search and seizure of the weapon. Defendant's arguments miss the mark. The police did not engage in a search and seizure while conducting a field inquiry or providing care under the community caretaking doctrine. Defendant fails to address the fact the police could search defendant to protect themselves and as part of a search incident to an arrest.

"Appellate review of a motion judge's factual findings in a suppression hearing is highly deferential." State v. Gonzales, 227 N.J. 77, 101 (2016). "[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009) (alteration in original)). "Thus, appellate courts should reverse only when the trial court's determination is 'so clearly mistaken "that the interests of justice demand intervention and correction."'"

State v. Gamble, 218 N.J. 412, 425 (2014) (quoting State v. Elders, 192 N.J. 224, 244 (2007)).

"[U]nder both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of our State Constitution, searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." Elders, supra, 192 N.J. at 246. "[T]he State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure 'falls within one of the few well-delineated exceptions to the warrant requirement.'" Ibid. (quoting State v. Pineiro, 181 N.J. 13, 19-20 (2004)).

Here, the trial court explicitly found the officers' testimony more credible than defendant's in the "very few instances where the officers' and [d]efendant's recollection of events diverged." We accept, as we must, the officers' account of what occurred. Moreover, the difference between the officers' and defendant's testimony about the extent to which he could move his left arm or whether it appeared he needed medical assistance is immaterial. In the final analysis, the issue is whether there was a lawful investigatory stop and a search conducted for the officers' protection during that stop, or whether there was a search incident to an arrest.

Here, the totality of the circumstances gave rise to reasonable suspicion justifying an investigatory stop. An investigatory stop, otherwise known as a Terry stop,[2] "is valid if it is based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity." State v. Mann, 203 N.J. 328, 338 (2010) (quoting Pineiro, supra, 181 N.J. at 20). "The totality of the circumstances must be considered in evaluating whether an officer had a reasonable suspicion to conduct a brief investigatory stop. An officer's experience and knowledge are factors courts should consider in applying the totality of the circumstances test." Pineiro, supra, 181 N.J. at 22 (citation omitted).

Here, reasonable suspicion defendant was illegally carrying a firearm was manifest. First, both officers saw a bulge under defendant's jacket, which defendant was gripping as he walked and then ran from the police after Berardis ordered him to stop. "The bulge . . . permitted the officer to conclude that [defendant] was armed and thus posed a serious and present danger to the safety of the officer." Pennsylvania v. Mimms, 434 U.S. 106, 112, 98 S. Ct. 330, 334, 54 L. Ed. 2d 331, 338 (1977).

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[2] See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Second, the concern defendant might be carrying a firearm was amplified by his movements, which suggested he was concealing something from the officers. He stood up abruptly, quickly walked away, and turned his body away from the officers. Thus, based on the totality of the circumstances, there were specific and particularized reasons to conduct an investigatory stop.

During an investigatory stop, a police officer may conduct a protective search, also known as a pat-down or frisk, "where he has reason to believe that he is dealing with an armed and dangerous individual." Terry, supra, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909. If that basis exists, the officer may "conduct a carefully limited search of the outer clothing of such person[] in an attempt to discover weapons which might be used to assault him." Id. at 30, 88 S.Ct. at 1885, 20 L. Ed. 2d at 911.

Here, given the bulge and the magazine that was in full view, the officers clearly were "authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." United States v. Hensley, 469 U.S. 221, 235, 105 S. Ct. 675, 683-84, 83 L. Ed. 2d 604, 616 (1985). "Indeed, a bulge alone has been held sufficient to validate a protective pat-down."

State v. Smith, 134 N.J. 599, 621 (1994). Thus, removing the rifle from defendant's possession was reasonable to protect the officers' safety.

More importantly, the officers could seize the firearm as part of a search incident to arrest. After Berardis ordered defendant to stop, defendant looked at Berardis, adjusted his waistband, and ran, adding to the suspicion that he was carrying a firearm. That was confirmed when Berardis saw a large-capacity magazine sticking out of defendant's jacket. At this point, Berardis plainly had probably cause to arrest defendant for unlawfully carrying a firearm and an illegal large-capacity magazine. See N.J.S.A. 2C:39-3(j), -5(b). Police officers are permitted to search an individual incident to an arrest. See State v. Moore, 181 N.J. 40, 45 (2004). That was itself sufficient basis to search defendant and seize the gun.

Moreover, a person who flees from an investigatory stop may be convicted of obstruction under N.J.S.A. 2C:29-1, even if the stop is later found to have been unconstitutional. See State v. Crawley, 187 N.J. 440, 460-61, cert. denied, 549 U.S. 1078, 127 S. Ct. 740, 166 L. Ed. 2d 563 (2006). Here, defendant was arrested and charged with N.J.S.A. 2C:29-1. Even if the magazine was not evident, the police would have been authorized to search defendant incident to arrest for obstruction, and this

weapon would have been discovered. Accordingly, the trial court properly denied defendant's motion to suppress.

To the extent any arguments defendant raised have not been explicitly addressed in this opinion, it is because we are satisfied the arguments lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

Affirmed.