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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5608-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GARY D. SMITH, JR.,

Defendant-Appellant.

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Argued March 22, 2017 – Decided July 27, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 13-06-0794.

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Lerer, of counsel and on the briefs).

Paula Jordao, Assistant Prosecutor, argued the cause for respondent (Fredric M. Knapp, Morris County Prosecutor, attorney; Ms. Jordao, on the brief).

PER CURIAM

Following the denial of his motions to suppress evidence obtained from a warrantless strip search and blood draw, defendant Gary D. Smith, Jr. pled guilty under Morris County Indictment No. 13-06-0794 to third-degree possession with intent to distribute a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5(b)(3). Defendant also pled guilty under Summons No. 1422-M-093858 to driving while intoxicated (DWI), N.J.S.A. 39:4-50, based on a 0.22 percent blood alcohol content revealed by the blood draw.[1]

The trial court sentenced defendant in accordance with the plea agreement to a seven-year term of imprisonment with a thirty-nine-month period of parole ineligibility on the CDS conviction.[2] Because this was defendant's first DWI conviction, the court imposed a seven-month driver's license suspension, concurrent to a two-year suspension for the CDS conviction, and twelve hours in the Intoxicated Driver's Resource Center program. The court also

[1] Defendant also pled guilty under Morris County Indictment No. 13-01-0011 to third-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(1), and under Morris County Indictment No. 13-06-0669 to third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7). The trial court sentenced him in accordance with the plea agreement to a concurrent four-year term of imprisonment. Defendant also pled guilty under Summons No. 1422-M-093858 to driving while suspended, N.J.S.A. 39:3-40, and was sentenced as a fourth-time offender. He does not appeal from these convictions.

[2] Defendant was eligible for an extended-term sentence pursuant to N.J.S.A. 2C:43-6(f) based on his prior CDS convictions.

ordered defendant to install an interlock ignition device during the suspension term and for one year after restoration of his license, and imposed the appropriate fines, costs, and penalties.

On appeal, defendant raises the following contentions:

POINT I

> BECAUSE THE REQUIREMENTS OF THE STATUTE GOVERNING STRIP SEARCHES, N.J.S.A. 2A:161A-1, WERE NOT MET, THE STRIP SEARCH WAS ILLEGAL AND THE PHYSICAL EVIDENCE FOUND MUST BE SUPPRESSED.
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> A. The Strip Search Was Not Authorized Under N.J.S.A. 2A:161A-1(b) Because There Was No Recognized Exception To The Warrant Requirement That Justified The Officers' Failure To Procure A Warrant.
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> B. The Strip Search Was Not Authorized Under N.J.S.A. 2A:161A-1(c) Because Defendant Was Not Lawfully Confined In A Detention Facility At The Time The Search Took Place.

POINT II

> RESULTS OF TESTS THAT WERE CONDUCTED ON DEFENDANT'S BLOOD, WHICH WAS DRAWN WITHOUT A WARRANT, MUST BE SUPPRESSED.

We affirm the denial of defendant's motion to suppress evidence obtained from the strip search, but reverse the denial of his motion to suppress evidence obtained from the blood draw, and remand for a new suppression hearing on that issue.

## The Strip Search

On September 29, 2012, Police Officer Timothy Thiel and Detective Ron Camacho of the Town of Dover Police Department (DPD) were in plain clothes monitoring local bars in the downtown area, known for drug dealing. While conducting surveillance near a bar, they saw defendant, Antoine Latta, and Gus Pallas talking in an alleyway next to a bar. Thiel knew defendant and that defendant and Latta had a history of dealing drugs. Thiel also knew that Pallas was a known drug user. While observing the three men, Thiel and Camacho saw Pallas hand something to defendant. Based on their prior dealings with defendant and Latta, the officers believed that defendant and Pallas were engaged in a drug transaction. When Latta saw the officers, he motioned to defendant and Pallas. The three men then split up with defendant and Latta walking together in one direction and Pallas in another direction.

Thiel and Camacho stopped and questioned Pallas, who told them he was looking to purchase marijuana. A consent search did not reveal any drugs on his person. Thiel and Camacho then found defendant and told him to stop based on their suspicion he was involved in a possible drug transaction and knowledge of a warrant for his arrest for unpaid child support, which the Morris County Sheriff's Department had issued approximately three weeks to one month earlier.

Defendant responded to Thiel and Camacho with profanity and clenched both of his fists around his chest area. Defendant was antagonistic, disruptive, aggressive, and loud, and ignored Thiel's command to stop this behavior. Thiel ordered defendant to place his hands on the unmarked patrol car, but defendant kept turning in an aggressive manner, continued his disruptive behavior and profanity, and refused to give Thiel his date of birth. Due to defendant's uncooperative and aggressive behavior, Thiel called for backup assistance.

After backup arrived, defendant was placed under arrest for disorderly conduct and obstruction. He was administered his Miranda[3] warnings, after which he said to Thiel, "You're lucky I didn't smoke you like last time," because defendant had run from Thiel before. Thiel conducted a pat-down search of defendant and found over $800 in mostly $20 bills folded in a wad, which Thiel believed, based on his training and experience, were the proceeds from the sale of drugs. Thiel also found a cellphone that was ringing nonstop from different numbers and contacts, which he believed was indicative of someone engaged in drug transactions.

Defendant was transported to police headquarters and placed in the processing room. Because defendant was swearing, talking

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

loudly, and being disruptive and antagonistic, Camacho and Thiel's supervisor, Sergeant Gonzalez, stood in the doorway while Thiel questioned defendant. Generally, persons charged with disorderly persons offenses by the DPD are processed, issued a summons, and released without bail. However, because of defendant's past history of dealing drugs, aggressive, uncooperative, disruptive, and antagonistic behavior, and the possibility of an active arrest warrant, Gonzalez decided defendant should be placed in a holding cell.

DPD policy required a more thorough search before placing an individual in a holding cell. While still in the processing room, and in the presence of Gonzalez and Camacho, Thiel had defendant remove his shoes and stand up. Thiel then removed defendant's handcuffs and ordered him to turn around, put his hands on the wall, and spread his legs. Defendant immediately became upset when Thiel asked if there was anything he should not have on his person. Without being asked to do so, defendant took off his socks and shirt, dropped his sweat pants, pulled down his basketball shorts, and stood in his boxers. Thiel told defendant to pull up his basketball shorts.

Thiel began a pat-down search after defendant pulled up his basketball shorts. While conducting the pat-down, Thiel noticed that defendant's buttocks were extremely clenched and told him to

spread his legs, but defendant kept his buttocks clenched. Thiel had conducted hundreds of pat-down searches and never before felt buttocks that tight. He believed that "something wasn't right with that" and defendant was intentionally tightening his buttocks to hold in something. Thiel put his open hand on the outside of defendant's basketball shorts and felt an abnormal bulge with small circular packages inside sticking out between defendant's buttocks, which Thiel suspected contained CDS. Defendant struck Thiel's hand and turned around.

Thiel advised Gonzalez that he felt suspected CDS between defendant's buttocks. Thiel then asked Camacho to pat-down defendant's buttocks area to confirm what he suspected. As Camacho attempted to do so, defendant lifted his leg in an attempt to kick Camacho and struck Camacho's hand. Defendant ignored repeated requests to remove the item himself, and remained uncooperative. A struggle ensued and that continued into the hallway, with defendant resisting the officers' efforts to handcuff him to prevent him from assaulting another officer.

Gonzalez, Camacho, and another police officer took defendant to the ground and handcuffed him. The decision was then made to conduct a strip search based on a reasonable suspicion that defendant had contraband between his buttocks. Pursuant to DPD policy, Thiel conducted the strip search in a room out of camera

view. While in that room, defendant was kicking and combative as two officers held him on the ground. Thiel pulled down defendant's basketball shorts and boxers half way, exposed defendant's buttocks, saw a plastic bag between defendant's buttocks, grabbed the tip of the bag, and pulled it out. The bag contained thirty-eight small plastic $20 bags of powder cocaine. Defendant remained uncooperative and resistant, and was placed in the holding cell, where he swore at the officers and challenged Camacho to a fight. Defendant was subsequently transported to the hospital after complaining of breathing problems, accompanied by Camacho. On the way, defendant remained aggressive and uncooperative. Sometime after the strip search, Thiel confirmed that defendant's arrest warrant for outstanding child support was active. Except for the actual strip search, a video camera captured defendant's interaction with the police in the processing room and hallway.

Defendant was charged with several drug-related offenses as well as third-degree aggravated assault on a police officer, N.J.S.A. 2C:12-1(b)(5)(a); third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3); and fourth-degree obstruction, N.J.S.A. 2C:29-1(a). He filed a motion to suppress the evidence obtained from the warrantless strip search.

In denying the motion, the motion judge reviewed the video and determined that the strip search was justified under N.J.S.A. 2A:161A-1(b) or (c), which provide as follows:

> A person who has been detained or arrested for commission of an offense other than a crime shall not be subjected to a strip search unless:
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> . . . .
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> b. The search is based on probable cause that a weapon, controlled dangerous substance, as defined by the "Comprehensive Drug Reform Act of 1987," [N.J.S.A. 2C:35-1 to -31], or evidence of a crime will be found and a recognized exception to the warrant requirement exists; or
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> c. The person is lawfully confined in a municipal detention facility or an adult county correctional facility and the search is based on a reasonable suspicion that a weapon, controlled dangerous substance, as defined by the "Comprehensive Drug Reform Act of 1987," [N.J.S.A. 2C:35-1 to -31], or contraband, as defined by the Department of Corrections, will be found, and the search is authorized pursuant to regulations promulgated by the Commissioner of the Department of Corrections.

The judge reasoned there was probable cause to believe defendant had a CDS on his person and defendant's actions in resisting the pat-down search at police headquarters created exigent circumstances justifying the warrantless strip search. The judge determined that under the circumstances where defendant strongly resisted such that it took three officers to restrain him, it was

not reasonable to expect the officers to hold defendant down and call for a search warrant.

Alternatively, the judge found the warrantless strip search was justified under N.J.S.A. 2A:161A-1(c), and authorized by N.J.A.C. 10A:34-3.5 (a). Lastly, the judge distinguished State v. Harris, 384 N.J. Super. 29 (App. Div.), certif. denied, 188 N.J. 357 (2006), on which defendant relied. The judge found that unlike in Harris, there was probable cause to believe defendant had a CDS on his person; defendant failed to cooperate at headquarters and was subject to placement in a holding cell; defendant had to be searched before being placed in a holding cell; defendant had an outstanding arrest warrant and was subject to a custodial detention until brought before a judge; and the search was conducted above defendant's clothing and gave strong probable cause to believe that he had CDS secreted on his person. The judge reiterated that defendant's own actions in resisting the pat-down search at police headquarters created exigent circumstances that created an exception to the warrant requirement.

On appeal, defendant does not dispute that the police had probable cause to believe a CDS would be found on him. Rather, he contends that the strip search was not justified under N.J.S.A. 2A:161A-1(b) because there was no recognized exception to the

warrant requirement. Relying on State v. Hayes, 327 N.J. Super. 373 (App. Div. 2000), he argues that the exigency inherent in his arrest cannot satisfy the statutory requirement under N.J.S.A. 2A:161A-1(b).[4] Relying on both Hayes and State v. Evans, 449 N.J. Super. 66 (App. Div.), certif. granted, ___ N.J. ___ (2017), he argues that the search-incident-to-arrest exception to the warrant requirement cannot be used to justify a strip search under the statute.[5] Again relying on Hayes, supra, 327 N.J. Super. at 382-83, defendant contends that the strip search was not justified under N.J.S.A. 2A:161A-1(c).

Our Supreme Court has established the standard of review applicable to consideration of a trial judge's ruling on a motion to suppress:

> We are bound to uphold a trial court's factual findings in a motion to suppress provided those findings are supported by sufficient credible evidence in the record. Deference to those findings is particularly appropriate when the trial court has the opportunity to hear and see the witnesses and to have the

[4] Defendant also relies on State v. Jean, No. A-2100-12 (App. Div. May 6, 2015) in support of this argument. However, that opinion does not constitute precedent or bind us. R. 1:36-3; Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001).

[5] In Evans, we held that the record did not support an application of the plain feel exception to the warrant requirement to justify the strip search of the defendant under N.J.S.A. 2A:161A-1(b). Evans, supra, 449 N.J. Super. at 84-85. Here, the State did not argue before the trial court or on appeal that the plain feel exception applied.

> feel of the case, which a reviewing court cannot enjoy. Nevertheless, we are not required to accept findings that are clearly mistaken based on our independent review of the record. Moreover, we need not defer to a trial . . . court's interpretation of the law because [l]egal issues are reviewed de novo.
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> [State v. Watts, 223 N.J. 503, 516 (2015) (alteration in original) (citations omitted).]

We owe deference to a trial court's factfindings based on video or documentary evidence. State v. S.S., ___ N.J. ___, ___ (2017) (slip op. at 32-33).

Applying these standards, we discern no reason to reverse the denial of defendant's motion to suppress evidence obtained during the warrantless strip search. "In the absence of a warrant or consent, [N.J.S.A. 2A:161A-1(b)] prohibits a strip search of a person who has been 'detained or arrested for commission of an offense other than a crime' unless the search is based on probable cause and 'a recognized exception to the warrant requirement.'" Evans, supra, 449 N.J. Super. at 72 (quoting N.J.S.A. 2A:161A-1(b)). Since it is undisputed that Thiel had probable cause to believe that a CDS would be found on defendant, the question is "whether a recognized exception to the warrant requirement applied and whether it was objectively reasonable to conduct a strip search under the circumstances here." Id. at 81.

The record, notably the video, supports the judge's conclusion that there were exigent circumstances to conduct the warrantless strip search. We agree with the judge that defendant's actions in resisting the pat-down search at police headquarters created exigent circumstances justifying the warrantless strip search, and under the circumstances where defendant strongly resisted and it took three officers to restrain him, it was not reasonable to expect the officers to hold him down and call for a search warrant. Accordingly, the warrantless strip search was justified under N.J.S.A. 2A:161A-1(b). Having reached this conclusion, we need not address defendant's contention that the strip search was not justified under N.J.S.A. 2A:161A-1(c).

The Blood Draw

At approximately 3:08 a.m. on May 12, 2012, Police Officer Jason Lawlor of the Morris Township Police Department was dispatched to the scene of a motor vehicle accident on Sussex Avenue. Upon arriving, Lawlor saw a car facing in an easterly direction on the westbound side of the roadway that had run off the road and struck a tree. Lawlor approached the passenger's side and saw the air bag was deployed, defendant was alone sitting in the driver's seat using his cell phone, and there was a "starring or a webbing" on the windshield on the driver's side. When defendant lowered the passenger's side window and began

speaking, Lawlor detected an odor of alcohol coming from the car's interior. Lawlor also saw a knife on the front passenger seat and an open beer bottle on the front passenger floorboard. Lawlor walked to the driver's side door and opened it. Between the driver's seat and the running board, Lawlor saw a plastic bag that contained smaller plastic bags with a white powdery substance, which he suspected was cocaine.

Defendant initially told Lawlor he was not injured, but then said that someone had hit him on the head and placed him in the car. When defendant attempted to exit the car, Lawlor saw that his right ankle was very swollen and bleeding and he had lacerations on his forehead. The officer also detected the odor of alcohol emanating from defendant's breath. Lawlor did not administer any field sobriety tests due to defendant's injuries, or place defendant under arrest.

Police Officer Bryan Markt arrived at the scene and saw Lawlor at the driver's side of defendant's car. Markt went to the passenger's side and saw that defendant was lethargic, his movements were slow, his eyes were barely open, and he was basically "completely out of it." Markt detected the odor of an alcoholic beverage coming from the car and believed that defendant was intoxicated. Markt also saw the knife and beer bottle inside

the car, and Lawlor showed him the plastic bag containing the white powdery substance.

Emergency personnel removed defendant from the car, placed him on a backboard, and transported him to the hospital, accompanied by Markt. Defendant was screaming during the transport. Markt saw that defendant's right foot was facing the opposite direction and believed the injury was severe. Markt believed defendant was in custody at the hospital, but he never advised defendant he was under arrest and never gave defendant Miranda warnings.

At the hospital, Markt personally witnessed hospital staff draw blood from defendant and complete the necessary paperwork. He then took two vials of defendant's blood to headquarters and secured them in a refrigerator.

Markt did not ask defendant for his consent to the blood draw or attempt to obtain a search warrant. He testified at the suppression hearing that the procedure he followed for defendant's blood draw was consistent with the procedure in effect on May 12, 2012, and he was aware of a procedure for obtaining a telephonic warrant in May 2012, but had no authority to apply for one. He also testified that he knew the procedure he used in May 2012 was no longer the proper procedure, and that the new procedure required a search warrant.

The motion judge addressed whether there were exigent circumstances justifying the warrantless blood draw, or whether the exclusionary rule applied to suppress the blood sample. Citing Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), and State v. Ravotto, 169 N.J. 227 (2001), the judge noted that the police are permitted to obtain a warrantless blood sample from a driver if there was probable cause to believe the driver was intoxicated and on the presumption that the dissipation of alcohol in a suspect's blood stream created exigent circumstances. The Ravotto Court noted that "consistent with Schmerber and our analogous case law, the dissipating nature of the alcohol content in the defendant's blood presented an exigency that required prompt action by the police." Ravotto, supra, 169 N.J. at 250.

The judge acknowledged that Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 186 L. Ed. 2d 696 (2013) changed the law for blood draws by holding there was no per se rule of exigency in DWI cases based on the dissipation of alcohol, and that the need to obtain a search warrant must be determined on a case-by-case basis using the totality of the circumstances analysis. However, citing State v. Adkins (Adkins I), 433 N.J. Super. 479, 484 (App. Div. 2013), the judge declined to apply McNeely retroactively. The judge found there was probable cause to believe defendant was

intoxicated, but "there are not sufficient facts to establish if there were exigent circumstances justifying a warrantless blood sample." The judge declined to apply the exclusionary rule, finding defendant's blood sample was taken in accordance with the legal precedent for obtaining warrantless blood samples prior to McNeely. The judge entered an order on March 17, 2014, denying the motion.

After the judge's decision, on May 4, 2015, our Supreme Court reversed Adkins I and gave the McNeely totality of the circumstances analysis pipeline retroactivity to all blood draws from suspected drunk drivers. State v. Adkins, 221 N.J. 300, 317 (2015). The Court further held as follows:

> [L]aw enforcement should be permitted on remand in these pipeline cases to present to the court their basis for believing that exigency was present in the facts surrounding the evidence's potential dissipation and police response under the circumstances to the events involved in the arrest. Further, the exigency in these circumstances should be assessed in a manner that permits the court to ascribe substantial weight to the perceived dissipation that an officer reasonably faced. Reasonableness of officers must be assessed in light of the existence of the McNeely opinion. But, in reexamining pipeline cases when police may have believed that they did not have to evaluate whether a warrant could be obtained, based on prior guidance from our Court that did not dwell on such an obligation, we direct reviewing courts to focus on the objective exigency of the

> circumstances that the officer faced in the situation.
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> [Ibid.]

Because McNeely has retroactive application here, we are compelled to reverse the denial of defendant's motion to suppress the blood draw, and remand for a new hearing to further develop the record to determine whether, under the totality of the circumstances, there was sufficient exigency to justify the warrantless blood draw. Id. at 312, 314.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION