SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0159-17T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DAKENS EXANTUS,

Defendant-Respondent.

Submitted February 15, 2018 – Decided April 13, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 16-02-0428.

Damon G. Tyner, Atlantic County Prosecutor, attorney for appellant (John J. Santoliquido, Assistant Prosecutor, of counsel and on the brief).

Law Office of Matthew V. Portella, LLC, attorneys for respondent (Matthew V. Portella, on the brief).

PER CURIAM

Upon leave granted, the State appeals from the Law Division's July 18, 2017 order that granted in part defendant Dakens Exantus' motion to suppress evidence. We affirm.

The facts developed before the motion judge during the suppression hearing are summarized as follows. Defendant was charged in a six count indictment with various offenses related to his possession of controlled dangerous substances (CDS) that a police officer discovered hidden in defendant's pants when he searched defendant for the second time. Before finding the CDS, the officer stopped defendant for traffic violations, searched defendant's vehicle, conducted a pat-down for weapons, and had the vehicle subjected to an exterior canine search.

When Pleasantville police officer Walter Matthew Laielli approached defendant after lawfully stopping his vehicle, he requested defendant's motor vehicle documents and engaged defendant in a conversation about where he was going to and coming from before he was stopped. During the encounter, defendant "was shaking, his breathing pattern was very heavy[,] [h]e refused to make eye contact with [the officer,]" and gave imprecise information about where he was travelling to at the time. Based on his training and experience, the officer observed that "this heightened nervousness from a grown adult" was common with criminal activity, and it "heighten[ed his]

suspicion that criminal activity" was occurring "or had just occurred" because defendant was overtly nervous and did not directly answer his questions.

Shortly after Laielli stopped defendant, Officer Searle and Canine Officer Brandon Stocks arrived on the scene.[1] Searle immediately recognized defendant when Laielli "show[ed] him [defendant's] ID." Searle advised Laielli that defendant had family ties with the "Haitian mob [and] had been involved in" prior drug arrests "for distribution and weapons offenses," although Laielli later confirmed that Searle told him that defendant and some members of his family had prior convictions for only drug possession and sales, not weapons possession.

Laielli "believe[d] there was some type of criminal activity inside the vehicle." He requested that defendant exit the vehicle so that he could "conduct[] a pat-down for [his] safety" and to allow Stocks to use his canine, Ciko, to conduct an "open air sniff around the outside of the vehicle."

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[1] Another officer who arrived on the scene that night testified at the suppression hearing. Sergeant Stocks corroborated most of Laielli's testimony, specifically that when he arrived on the scene of the traffic stop, Laielli informed him that defendant was nervous and that he "believed he [had] . . . something further than just a motor vehicle violation." However, Stocks admitted that Laielli did not tell him that he smelled drugs or whether he believed defendant was armed and dangerous. Notably, Stocks confirmed that he did not smell any drugs or see any weapons in the car when he conducted the open air sniff test.

The pat down did not reveal any weapons, but Laielli "felt a large bulge of money" in defendant's pockets. Based on the officer's experience, the money suggested there was a presence of "narcotic sales and trafficking."

The officers walked defendant to the patrol vehicle where he stood while the canine sniff test occurred. The dog alerted the officers to the "driver's side door," but their search of the vehicle revealed only "bags of rubber bands, which [Laielli stated] is often seen with the packaging of . . . heroin," and more cash located "in the center console." Laielli testified that there was "no narcotics located inside the vehicle," but because the dog alerted to the "odor of narcotics" the search had to "expand[] to the driver that was just inside the vehicle."

As Laielli searched defendant for a second time, he "confirmed that there were large amounts of money in [defendant's] . . . pockets[,]" but he also noticed a "bulge" inconsistent with the male anatomy in the "lower portion of [defendant's] pants." Based on his experience and training as an officer, Laielli believed it was narcotics. Laielli spotted "the tip of [a] plastic bag" as he searched defendant's waistband, which he pulled out and found inside "a large amount of heroin." However, Laielli admitted that "the amount of

narcotics [that were discovered] should have been found on [the] initial pat-down[,]" but he failed to pat down defendant's groin area, which was "a poor pat-down for safety at that point."

After considering the evidence adduced at the suppression hearing, Judge Donna M. Taylor denied the motion to suppress the rubber bands and cash found in defendant's vehicle, but granted defendant's motion to suppress the heroin and cocaine police found during the second search of defendant. As explained in her written decision, the judge concluded that the "initial traffic stop . . . was lawful" because, based on Laielli's credible testimony, he observed defendant's vehicle "turn without using a turn signal and fail[] to stop at a traffic light." The judge also found that Laielli "reasonably believed [that] [d]efendant [was] . . . armed and dangerous" because he had a "reasonable and articulable suspicion" that defendant "may present a danger to the officers on the scene[,]" since he was "overly nervous and could not provide consistent answers to any of [his] questions." Moreover, defendant's alleged ties to the Haitian mob also heightened Laielli's suspicions. Thus, the court held that based upon the facts asserted by Laielli, the "pat down of the [d]efendant's person was lawful."

With respect to the open air dog sniff, Judge Taylor found that Laielli "did have reasonable suspicion of drug possession,

thus making the [dog] sniff . . . constitutional." Relying on Rodriquez v. United States, 575 U.S. ___, ____ 135 S. Ct. 1609, 1615-16 (2015) and Illinois v. Caballes, 543 U.S. 405 (2005), the judge reasoned that "[e]ven if the totality of the circumstances did not provide him with reasonable suspicion, ... [a] dog sniff is lawful if conducted during the course of a lawful motor vehicle stop."

Judge Taylor also found that the officer had probable cause to search defendant's vehicle based on the totality of the circumstances and investigation that occurred that night. Specifically, the court noted that the "[d]efendant's suspicious behavior in conjunction with the positive identification by K-9 Officer Ciko" provided the officers with sufficient suspicion "that a crime ha[d] been or [was] being committed." Thus, the search of defendant's vehicle was valid, which "uncovered more cash . . . in the center console and a package of rubber bands."[2]

Nonetheless, the judge ultimately held that the second search of defendant was unconstitutional because after both the

[2] Judge Taylor noted in her decision that "[t]he [d]efendant and the State provide contradictory statements regarding the cash located on the [d]efendant." According to the court, it is unclear whether the cash found in the center console and on defendant were removed after the drugs were located or immediately after the initial pat down of defendant.

Terry[3] search and search of the defendant's car "yielded no drugs or weapons, the only other option for the [o]fficers was to either obtain a warrant or arrest the [d]efendant[,]" neither of which occurred. The judge further explained that the only items recovered from the search were money and rubber bands, which "alone cannot serve as the requisite basis to expand the search to the [d]efendant." Thus, the officers did not have "the requisite probable cause . . . to search [defendant] again." Judge Taylor ruled that the "State failed to meet its burden to show probable cause to substantiate the second search[,]" and thus, the search of the defendant that "yielded the heroin and cocaine was unconstitutional and [must be] suppressed."

On July 18, 2017, Judge Taylor issued an order on the motion. We granted the State's motion for leave to appeal.

On appeal, the State argues:

> POINT I
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> THE LAW DIVISION ERRED IN SUPPRESSING THE DRUGS, AS THE POLICE HAD PROBABLE CAUSE TO SEARCH AND ARREST DEFENDANT FOR POSSESSION OF NARCOTICS, AND THEY RECOVERED THE DRUGS PURSUANT TO A LAWFUL SEARCH INCIDENT TO ARREST.

[3] Terry v. Ohio, 392 U.S. 1 (1968).

The State argues that the court erred in suppressing the drugs found on defendant's person following a lawful search incident to arrest. It contends that "[t]he facts that the police learned during [their] investigation" of the lawful vehicle stop "furnished the police with probable cause to believe that defendant was in possession of narcotics." We disagree.

"When reviewing a trial court's decision to grant or deny a suppression motion, [we] '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. Dunbar, 229 N.J. 521, 538 (2017) (quoting State v. Hubbard, 222 N.J. 249, 262 (2015)). We "will set aside a trial court's findings of fact only" if the findings "are clearly mistaken." Ibid. (quoting Hubbard, 222 N.J. at 262). "We accord no deference, however, to a trial court's interpretation of law, which we review de novo." Ibid. (quoting State v. Hathaway, 222 N.J. 453, 467 (2015)).

Here, the facts are not disputed, nor are there any challenges to the initial motor vehicle stop, defendant's first pat down, search of the vehicle, or exterior canine search of the car. The only question is whether the police had any grounds to conduct a second search of defendant without arresting him or obtaining a warrant.

Whether the police were justified in conducting the second search without a warrant or arrest must be measured against the protections afforded by our constitutions. "The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution protect individuals against 'unreasonable searches and seizures,'" requiring police to follow "carefully delineated standards of police conduct that strike a balance between individual privacy expectations and government interests." State v. Hummel, __ N.J. __, __ (2018) (slip op. at 20-21) (quoting U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7). In striking that balance, our Supreme Court has "expresse[d] a clear preference for government officials to obtain a warrant issued by a neutral and detached judicial officer before executing a search." Id. at 21 (quoting State v. Edmonds, 211 N.J. 117, 129 (2012)). "[A] warrantless search is presumptively invalid.'" Ibid. (quoting Edmonds, 211 N.J. at 130). "The State bears the burden to demonstrate that a warrantless search is reasonable because it fits within a recognized exception to the warrant requirement." Id. at 21 (quoting State v. Davila, 203 N.J. 97, 111-12 (2010)).

One exception to the warrant requirement is a search of an individual during the course of a Terry, investigatory stop. "In limited circumstances, police may conduct a protective

search of a suspect without probable cause." State v. Smith, 155 N.J. 83, 91 (1998). "When a police officer forms a reasonable and articulable suspicion to justify an investigatory stop, the officer may also conduct a [pat-down] or frisk of the outer clothing of such persons in an attempt to discover weapons." State v. Gamble, 218 N.J. 412, 430 (2014). Police are permitted to pat down or frisk a citizen's outer clothing during a Terry stop when the officer perceives a risk to his or her safety and has reason to believe that the individual is armed and dangerous. State v. Diloreto, 180 N.J. 264, 276 (2004). "Since '[t]he sole justification of the search . . . is the protection of the police officer and others nearby . . . it must . . . be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.'" State v. Thomas, 110 N.J. 673, 682-83 (1988) (quoting Terry, 392 U.S. at 29).

The intention behind "this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." Id. at 683 (quoting Adams v. Williams, 407 U.S. 143, 146 (1972)). "A protective search does not entail a general search of the person for evidence of crime; rather it is 'designed to discover

weapons that could be used to assault the officer.'" Smith, 155 N.J. at 91 (quoting State v. Arthur, 149 N.J. 1, 14 (1997)). "[A] generalized cursory search of defendant . . . is not condoned." State v. Privott, 203 N.J. 16, 31 (2010). Once a police officer completes a pat-down for weapons, a further intrusive search for evidence cannot be sustained. Ibid. (finding invalid the discovery of evidence when a "police officer lifted defendant's tee-shirt to expose defendant's stomach, and in doing so, observed a plastic bag with suspected drugs in the waistband of defendant's pants"). "Nothing in Terry can be understood to allow . . . any search whatever for anything but weapons." Thomas, 110 N.J. at 679 (quoting Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979)).

Another exception to the warrant requirement is a search incident to a defendant's arrest. "Under the search incident to arrest exception, the legal seizure of the arrestee automatically justifies the warrantless search of his person and the area within his immediate grasp." State v. Pena-Flores, 198 N.J. 6, 19 (2009)(citing Chimel v. California, 395 U.S. 752, 762-63 (1969)). "So long as there is probable cause to arrest, the ensuing search is valid even if there is no particular reason to believe that it will reveal evidence, contraband, or weapons. The justification for the search of an arrestee is to

preclude him from accessing a weapon or destroying evidence." Ibid. (citations omitted).

Although the arrest and search are usually contemporaneous, see, e.g., State v. O'Neal, 190 N.J. 601, 634 (2007), "a search incident to an arrest may be valid under some circumstances even though it is not conducted contemporaneously with the arrest." State v. Oyenusi, 387 N.J. Super. 146, 156 (App. Div. 2006). "When the police search an individual before placing him under arrest 'as part of a single uninterrupted transaction, it does not matter whether the arrest precedes the search.'" O'Neal, 190 N.J. at 614 (quoting State v. Bell, 195 N.J. Super. 49, 58 (1984)). "As long as the right to arrest pre-existed the search, and the 'arrest is valid independently of, and is not made to depend on, the search or its result,' the search will not be invalidated 'simply because in precise point of time the arrest does not precede the search.'" Id. at 614-15 (quoting State v. Doyle, 42 N.J. 334, 343 (1964) (addressing a search prior to arrest where, after observing suspected drug transactions, a pat-down of defendant revealed a bulge that defendant told the officer was cocaine before the officer removed the package from defendant's sock)). In other words, the right to arrest must have existed at the time of the initial stop, before the challenged search. Id. at 614.

In order to conduct a search incident to an arrest there must be an intent to arrest and probable cause for the arrest. "[P]robable cause to arrest is the functional equivalent of probable cause to search, [however,] the test for determining probable cause must still be met." Smith, 155 N.J. at 92. "Probable cause exists where the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." State v. Harris, 384 N.J. Super. 29, 47 (App. Div. 2006) (citing State v. Moore, 181 N.J. 40, 46 (2004)). "[A]ll the definitions of probable cause [include] a reasonable ground for belief of guilt." Ibid. (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003)).

"Neither 'inarticulate hunches' nor an arresting officer's subjective good faith can justify an infringement of a citizen's constitutionally guaranteed rights. Rather, the officer 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'" Harris, 384 N.J. Super. at 46 (quoting State v. Pineiro, 181 N.J. 13, 21 (2004)). The basic

issue, therefore, was whether there was probable cause to justify the second search of defendant.

Applying these guiding principles, we conclude that Judge Taylor correctly determined that the CDS found on defendant during the second search had to be suppressed. At the time the officer stopped defendant, he did not have the right to arrest defendant or even an intent to do so. His decision to effectuate an arrest only occurred after the canine alerted to the outside of the car and he again searched defendant's clothing. Neither the discovery of the cash or rubber bands, see Harris, 384 N.J. Super. at 48-49 (suppressing evidence discovered in a strip search after a pat-down), or the alert from the canine gave rise to probable cause that a crime had been committed by defendant. At best, the positive canine alert gave the officer probable cause to believe that the vehicle contained contraband, which required the police to obtain a search warrant once their search of defendant's vehicle did not yield any evidence, see Florida v. Harris, 568 U.S. 237, 247 (2013), instead of searching defendant a second time. See Pena-Flores, 198 N.J. at 28. We affirm therefore essentially for the reasons expressed by Judge Taylor in her cogent written decision.

Affirmed.