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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0408-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHIDA THOMPSON,

Defendant-Appellant.

Submitted November 13, 2017 - Decided January 22, 2018

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
15-10-1383.

Joseph E. Krakora, Public Defender, attorney
for appellant (Theresa Y. Kyles, Assistant
Deputy Public Defender, of counsel and on the
brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Frances Tapia Mateo,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Rashida Thompson appeals from a judgment of
conviction following her guilty plea to third-degree unlawful

possession of a controlled dangerous substance. Defendant claims the court erred by denying her motion to suppress evidence seized during a search incident to her arrest because the warrant for her arrest was issued without probable cause. Based on our review of the record, we are convinced the information presented to the judge did not establish probable cause to arrest defendant, and reverse.

I.

The warrant for defendant's arrest was on a complaint charging her with unlawful possession of a Hi Point semi-automatic handgun,¹ N.J.S.A. 2C:39-5(b). During the search incident to her arrest, defendant was found in possession of a controlled dangerous substance (CDS), 3,4-methylenedioxyamphetamine. She was subsequently charged in an indictment with third-degree unlawful possession of CDS, N.J.S.A. 2C:35-10(a)(1), third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 5(b)(3), and second-degree unlawful possession of CDS with intent to distribute within 500 feet of public property, N.J.S.A. 2C:35-7.1. She was not indicted for unlawful possession of a handgun.

¹ In the record before the motion court, the gun is referred to as both a "Hi Point semi-automatic" and "High Point semi-automatic."

Defendant moved to suppress the CDS, claiming there was insufficient evidence supporting the court's finding of probable cause for the arrest warrant. The judge who issued the arrest warrant also decided the suppression motion.

The motion record shows the State supported its request for the arrest warrant with a four-page report prepared by Jersey City Police Detective T. McVicar that he swore to the judge was accurate and true. The report describes the investigation of a music video recording posted on a website, and states defendant and eleven other "members of the Moneycello Line of the NHB Set of the Bloods Street Gang" are present in the video. A thirteenth person appearing in the video is not identified in the report.

McVicar's report describes the video as "ostensibly an amateur music video," and explains that during six separate seconds in the video three different individuals are seen handling, brandishing or pointing a Hi Point handgun, and during four other seconds individuals are in possession of a silver handgun of an unknown make or model. For example, the report states that "[a]t approximately [the] 00:00:46 mark of the video" one of the individuals "is observed brandishing" the Hi Point handgun, "at approximately [the] 00:01:06 mark" a different individual is seen "brandishing" the handgun, and "at approximately [the] 00:02:28 mark" a third individual possesses the handgun. The report

includes additional notations for each instance an individual is seen in possession of one of the guns. Defendant is not identified as ever possessing either gun.

Other than its description of the individuals possessing the guns, McVicar's report is devoid of any details about what the individuals in the video otherwise do or say.² With respect to defendant, the report states only that she was "present in the video." The report also explains that members of the Jersey City Police Department's major crimes and street crimes units examined the video and determined it was made for the purpose of promoting the gang and threatening the gang's opponents.

The report describes a firearm expert's analysis of the video and determination the Hi Point semi-automatic handgun is a real firearm. The expert's analysis was inconclusive as to whether the other gun depicted, a silver semi-automatic handgun, was real. Because the investigation revealed that the Hi Point handgun was real, the State sought an arrest warrant for defendant's alleged unlawful possession of the Hi Point handgun.

² The report, however, provides one detail not relevant here. The report states that the unidentified thirteenth person seen in the video is in possession of currency and a cup containing plastic bags filled with suspected marijuana.

The State chose not to provide the judge with the video when it applied for defendant's arrest warrant, and the judge never reviewed the recording. In its application for the warrant, the State submitted only McVicar's report to the judge.³ McVicar appeared before the judge, provided sworn testimony that his report was truthful, and answered the judge's additional questions.

At the suppression hearing, defendant argued McVicar's report did not establish probable cause to arrest defendant for unlawful possession of the Hi Point handgun because it described the possession of the Hi Point handgun only by others. Defense counsel argued the report did not state that defendant was present when the other individuals possessed the gun and even if it did, defendant's mere presence while others possessed the gun is insufficient to support a finding of probable cause she unlawfully possessed the gun in violation of N.J.S.A. 2C:39-5(b).

³ During the suppression hearing, defense counsel said the State informed her it also provided the judge with photographs in support of the arrest warrant application. In its brief here, the State represents that the judge was presented with photographs when the request for the warrant was made. The record on appeal does not include any photographs and, in his denial of the suppression motion, the judge did not rely on his review of any photographs to support his finding there was probable cause for the arrest warrant. We therefore do not consider whether any photographs supported probable cause for the warrant. See Cmty. Hosp. Grp. v. Blume Goldfaden, 381 N.J. Super. 119, 127 (App. Div. 2005) (stating an appellate court is not "obliged to attempt review of an issue when the relevant portions of the record are not included").

The judge recalled that when he was presented with the arrest warrant request, he asked McVicar if "everybody on these warrants were seen with a gun in the video," and McVicar said they were. The judge said he signed the arrest warrant based on McVicar's response. This suggests the judge understood McVicar testified defendant was in actual possession of one of the guns in the video, but the colloquy during the suppression motion confirmed she was not. Indeed, the report does not identify defendant as being in actual possession of either gun and the State does not argue the video showed defendant in actual possession of either gun. As a result, the argument before the motion court shifted to whether defendant was present in the video when others were in possession of the guns and, if based on mere presence, there was probable cause defendant unlawfully possessed the Hi Point handgun.

The judge stated that McVicar testified defendant was present in the video while the others possessed the guns. The judge did not make notes or otherwise document McVicar's testimony. At the suppression hearing, defense counsel, who had apparently seen the video, did not dispute that defendant was present in the video when the Hi Point handgun is possessed by the other individuals.

The judge concluded McVicar's statement that defendant was seen in the video while others possessed the Hi Point handgun supported the probable cause determination. The judge found the

report showed defendant participated in "a video for the gang," her appearance in the video was not "inadvertent," and "[s]he agreed to be involved in a promotional video where guns were displayed." The court determined the report and McVicar's testimony established probable cause for the arrest warrant, and denied the suppression motion.

Defendant subsequently pleaded guilty to third-degree unlawful possession of a controlled dangerous substance. The court imposed a probationary sentence. This appeal followed.

Defendant presents the following argument:

POINT I

THE JUDGE ISSUING THE WARRANT TO ARREST [DEFENDANT] DID NOT HAVE SUFFICIENT INFORMATION THROUGH THE REPORT PRESENTED TO HIM TO CONCLUDE THAT THERE WAS PROBABLE CAUSE TO BELIEVE THAT [DEFENDANT] HAD COMMITTED A CRIME. ANY ADDITIONAL ORAL INFORMATION GIVEN BY THE OFFICER, WHICH THE COURT DID NOT CONTEMPORANEOUSLY RECORD, COULD NOT FORM THE BASIS FOR A PROBABLE CAUSE FINDING. CONSEQUENTLY, THE ORDER DENYING [DEFENDANT'S] MOTION TO SUPPRESS EVIDENCE AS THE FRUIT OF AN UNLAWFUL ARREST SHOULD BE REVERSED AND HER GUILTY PLEA VACATED. U.S. CONST. amend. IV, N.J. CONST. (1947), art. 1, ¶ 7.

II.

A warrant is presumed valid, and a defendant challenging its validity has the burden to prove there was no probable cause supporting the issuance of the warrant. State v. Jones, 179 N.J.

377, 388 (2004). We "accord substantial deference to the discretionary determination resulting in the issuance of [a] warrant." State v. Keyes, 184 N.J. 541, 554 (2005) (quoting Jones, 179 N.J. at 388).

Our deference to a judge's issuance of a warrant, however, is "not boundless." United States v. Leon, 468 U.S. 897, 914 (1984). A warrant cannot be based on an affidavit or testimony that does not "provide . . . a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S. 213, 239 (1983). Further, "probable cause is not established by a conclusory affidavit that does not provide a magistrate with sufficient facts to make an independent determination as to whether the warrant should issue." State v. Novembrino, 105 N.J. 95, 109 (1987).

"Probable cause to arrest . . . hinges on the distinct and discrete inquiry into whether the person to be arrested has committed or is committing a criminal offense." State v. Chippero, 201 N.J. 14, 29 (2009). For probable cause to arrest, there must be probable cause to believe that a crime has been committed and "that the person sought to be arrested committed the offense." Id. at 28 (quoting Schneider v. Simonini, 163 N.J. 336, 363 (2000)); see also State v. Brown, 205 N.J. 133, 144 (2010).

"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. Moore, 181 N.J. 40, 46 (2003) (alterations in original) (quoting Schneider, 163 N.J. at 361). "That showing calls for 'more than a mere suspicion of guilt,' but 'less evidence than is needed to convict at trial.'" State v. Ingram, 230 N.J. 190, 213 (2017) (internal citations omitted).

A court must "consider the totality of the circumstances when assessing the reasonable probabilities that flow from the evidence submitted in support of a warrant application." Chippero, 201 N.J. 14, 27 (2009). In making the probable cause determination, the judge may consider only information which is "contained within the four corners of the supporting affidavit" or sworn testimony provided by law enforcement personnel. Schneider, 163 N.J. at 363; accord State v. Evers, 175 N.J. 355, 380-81 (2001).

Here, the judge issued the arrest warrant on a charge of unlawful possession of the Hi Point handgun during defendant's appearance in the video. To obtain the arrest warrant, the State was required to establish there was probable cause defendant "knowingly ha[d] in [her] possession" the Hi Point handgun "without

first having obtained a permit to carry same." See N.J.S.A. 2C:39-5(b); Model Jury Charges (Criminal), "Unlawful Possession Of A Handgun (N.J.S.A. 2C:39-5(b))" (rev. Feb. 26, 2001).

Defendant argues the evidence presented in support of the warrant was insufficient to establish probable cause to arrest defendant for unlawful possession of the Hi Point handgun, and the court erred by relying on McVicar's testimony because the judge failed to make a contemporaneous record. The State contends McVicar's report and testimony established probable cause defendant had constructive and joint possession of the Hi Point handgun, and therefore the court correctly denied the suppression motion.

We reject defendant's contention that the judge's failure to document McVicar's testimony requires a reversal of the denial of the suppression motion. Although the judge should have documented McVicar's testimony because a review of a court's probable cause determination requires consideration of the affidavits submitted "as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously," State v. Marshall, 199 N.J. 602, 611 (2009) (quoting Schneider, 163 N.J. at 363), McVicar's testimony did not supply information that was not otherwise in his report. The judge stated only that McVicar testified defendant was present in the video when the guns were possessed by others,

but the report provides the identical information, expressly stating defendant and twelve other individuals are "present in the video." Thus, even ignoring McVicar's testimony, his report permitted the reasonable inference that defendant and the others listed in the report were present when the Hi Point gun was held, pointed and brandished by three of the individuals in the video.⁴

Defendant argues her mere presence in the video did not establish probable cause for unlawful possession of the Hi Point handgun. The State argues her presence was sufficient to establish unlawful constructive or joint possession of the handgun⁵ because the guns were displayed during a video that promoted the gang and threatened its opponents.

⁴ Defendant did not claim before the motion court and does not contend here that McVicar's report contains any falsehoods. See State v. Howery, 80 N.J. 563, 567 (1979) (quoting Franks v. Delaware, 438 U.S. 154, 170 (1978)) (finding defendant may challenge the veracity of an affidavit supporting a warrant in an evidentiary hearing upon a "'substantial preliminary showing' of falsity in the warrant").

⁵ The State argued before the motion court there was probable cause defendant unlawfully possessed the handgun based on accomplice and co-conspirator liability. The State does not make that argument here. An issue not briefed on appeal is deemed waived. Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008); Zavodnick v. Leven, 340 N.J. Super. 94, 103 (App. Div. 2001).

"[A] person has constructive possession of 'an object when, although [s]he lacks physical or manual control, the circumstances permit a reasonable inference that [s]he has knowledge of its presence, and intends and has the capacity to exercise physical control or dominion over it during a span of time.'" State v. Morrison, 188 N.J. 2, 14-15 (2006) (quoting State v. Spivey, 179 N.J. 229, 236 (2004)); see also Model Jury Charges (Criminal), "Possession (N.J.S.A. 2C:2-1)" (rev. June 20, 2014). "Two persons have joint possession of an object when they 'share actual or constructive knowing possession of' that object." Morrison, 188 N.J. at 14 (quoting Model Jury Charges (Criminal), "Possession" (rev. Apr. 18, 2005)).

Constructive possession arises out of an individual's conduct with regard to the subject item and is "a function of the relationship and conduct of the parties." State v. Schmidt, 110 N.J. 258, 268, 272 (1998). Immediate control and dominion over an object are not required; it must be shown a defendant had the capacity, by direct or indirect means, to gain almost immediate physical control, and the ability to affect the item during the time in question. Id. at 270-71; see also State v. Brown, 80 N.J. 587, 597 (1979) (finding constructive possession does not require "[p]hysical or manual control of the proscribed item . . . as long as there is an intention to exercise control over it manifested

in circumstances where it is reasonable to infer that the capacity to do so exists"). "[C]onstructive possession[, however,] cannot be based on mere presence at the place where contraband is located. There must be other circumstances or statements of defendant permitting the inference of defendant's control of the contraband." State v. Whyte, 265 N.J. Super. 518, 523 (App. Div. 1992), aff'd o.b., 133 N.J. 481 (1993).

"A determination of constructive possession is fact sensitive and requires careful scrutiny by a court" State v. Hurdle, 311 N.J. Super. 89, 96 (1998). A court must consider "the totality of the circumstances, including defendant's presence at the location of the" contraband "as well as other factors before . . . an inference of constructive possession [may] be drawn." Ibid.

Here, McVicar's report did not provide sufficient facts permitting the court to make the determination there was probable cause defendant constructively possessed the Hi Point handgun. Other than describing the six seconds during which three individuals possessed the Hi Point handgun, the report does not describe what occurs during the video, the actions of the thirteen people present, or statements, if any, made by anyone. The report does not detail defendant's actions while present in the video, explain if she had an opportunity to observe the others' possession

of the weapon, or provide any facts demonstrating an essential element to a finding she constructively possessed the weapon - that she had the capacity to gain almost immediate physical control of the Hi Point handgun or an ability to affect the handgun during the video. See Schmidt, 110 N.J. at 270. Of course, the video recording might have revealed circumstances supporting a probable cause determination, but the State failed to provide the recording to the judge and instead relied on McVicar's report.

The report states only that defendant was "present in the video." But since her mere presence alone could not establish she constructively possessed the handgun, Whyte, 265 N.J. Super. at 523, it could not provide probable cause she committed the crime of unlawful possession of a handgun.

In sustaining his probable cause determination at the suppression hearing, the judge relied on the portion of McVicar's report describing that members of the police department's major crimes and street crimes units reviewed the video and concluded its purpose was to promote defendant's gang. The judge reasoned that defendant knowingly appeared in the video and therefore constructively possessed the weapons used by her fellow gang members in support of the gang's promotional efforts.

The judge's reliance on McVicar's summary of the crime units' conclusions was misplaced. "[P]robable cause is not established

by a conclusory affidavit that does not provide . . . sufficient facts to make an independent determination as to whether the warrant should issue." Novembrino, 105 N.J. at 109. An affidavit supporting the issuance of a warrant "must allege specific facts and not conclusions," id. at 110, because the judge must determine "the persuasiveness of the facts relied on by a complaining officer to show probable cause" and "should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime," ibid. (quoting Giordenello v. United States, 357 U.S. 480, 486 (1958)).

McVicar's report states that the crime units' conclusion was based on their analysis of the video, but does not detail any facts upon which the conclusion was based. The State's failure to provide the video deprived the judge of the opportunity to determine whether the crime units' conclusion was supported by any facts. It was therefore error for the court to rely upon the crime units' wholly conclusory allegations in his determination of probable cause. Ibid.


We are mindful that affidavits and other sworn submissions supporting the issuance of arrest warrants are often "prepared in the midst and haste of criminal investigations, and by police officers and detectives who are laymen not possessed of the expertise in draftsmanship to be expected of a member of the bar

or bench." State v. Boyd, 44 N.J. 390, 392 (1965). Here, the State relied on an investigative report which provided scant details concerning what occurred in the video, and absolutely no details concerning defendant's actions other than she was present. In issuing a warrant, a court "cannot infer facts that are not supported by" the sworn submissions of law enforcement. State v. Boone, __ N.J. __, __ (2017) (slip op. at 14).

We have carefully considered the report and, for the reasons noted, are constrained to conclude it failed to provide sufficient facts supporting the court's determination there was probable cause that defendant had constructive possession of the Hi Point handgun. We therefore reverse the court's order denying defendant's motion to suppress the evidence seized incident to her arrest, vacate defendant's conviction and sentence, and remand for further proceedings.

Reversed 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