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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1027-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEITH SCOTT, a/k/a KASAAON
R. WILLIAMS,

Defendant-Appellant.

Submitted November 13, 2017 — Decided January 17, 2018

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
14-12-2033.

Law Office of Condon & Theurer, attorneys for
appellant (Kathleen M. Theurer, on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Roseanne Sessa,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Keith Scott appeals from an October 21, 2016
judgment of conviction after a jury trial. In particular,

defendant asserts error in the trial judge's denial of his request to adjourn the trial to seek new counsel and denial of his motion to suppress evidence. We affirm.

We discern the following facts from the record on appeal. On July 14, 2014, a Jersey City police officer received a phone call from a confidential informant (CI) regarding an individual in possession of a firearm in public. The CI reported that a black male, wearing a white t-shirt and blue jeans with a handgun in his waistband, was present in the area of an address on Ocean Avenue.

The CI had worked with the Jersey City Police Department in the past and had provided reliable information, leading to numerous arrests and many search warrants. The police broadcasted the information over the radio and an officer, who was only two or three blocks away, proceeded to the area in his marked vehicle. Deactivating his lights and sirens when approaching, the officer observed defendant – who matched the CI's description – walking towards him on Ocean Avenue and turning down a side street. The officer parked his vehicle to obscure the suspect's intended path, exited, drew his firearm, and instructed defendant to stop. Defendant complied and immediately raised his hands in the air. Another officer, who arrived to provide backup assistance, observed a bulge in defendant's waistband, patted him down, and removed a firearm.

Defendant was arrested within 100 to 125 feet from the location reported by the CI. Additionally, the lead officer testified he did not observe any other individuals wearing a white t-shirt and blue jeans in the area at that time.

On December 3, 2014, a Hudson County Grand Jury indicted defendant for second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b).

Defendant moved to suppress the firearm recovered from his person. After hearing testimony and oral argument, the trial judge denied defendant's motion. Defendant then moved for leave to file an interlocutory appeal and requested a stay of the trial proceedings. The judge denied the motion to stay the trial proceedings, and we denied the motion for leave to appeal.

On June 6, 2016, defendant appeared with counsel for a final pretrial conference. With trial scheduled the next day, defendant's counsel informed the judge that defendant wanted to obtain new counsel. The judge denied this request, because granting a continuance for counsel "would be a delay unnecessary in the eyes of the court."

Prior to trial, the State dismissed all counts, except second-degree certain persons not to have a weapon. After a short trial,

on June 9, 2016, the jury found defendant guilty. On September 30, 2016, after granting the State's motion to sentence defendant to an extended term as a persistent offender, N.J.S.A. 2C:44-3, the trial judge sentenced defendant to twelve years imprisonment with a five-year parole disqualifier. This appeal followed.

On appeal, defendant argues:

POINT I: DEFENDANT'S REQUEST FOR AN ADJOURNMENT OF THE INITIAL TRIAL DATE IN ORDER TO OBTAIN COUNSEL OF HIS CHOOSING WAS IMPROPERLY DENIED.

POINT II: THE COURT IMPROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

I.

Defendant argues the trial judge erroneously denied his request for an adjournment to obtain new counsel by failing to consider and analyze the factors listed in State v. Kates, 216 N.J. 393 (2014), and State v. Furquson, 198 N.J. Super. 395, 401 (App. Div. 1985).

The Constitutions of the United States and New Jersey both guarantee an accused the right to have the assistance of counsel. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. An essential element of this right is the right of a defendant to secure counsel of his own choice. Furquson, 198 N.J. Super. at 401 (citing Chandler v. Fretag, 348 U.S. 3 (1954)). "However, the right to retain counsel of one's own choice is not absolute[.]" Ibid.

(citation omitted). The trial court has "wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar." United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006).

To guide them exercising their discretion, we have instructed trial courts to consider the following factors:

the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case.

[Kates, 216 N.J. at 396 (citations omitted).]

"If a trial court conducts a reasoned, thoughtful analysis of the appropriate factors, it can exercise its authority to deny a request for an adjournment to obtain counsel of choice." Id. at 396-97. "Thus, we underscore that only if a trial court summarily denies an adjournment to retain private counsel without

considering the relevant factors, or abuses its discretion in its analysis of those factors, can a deprivation of the right to choice of counsel be found." Id. at 397. "Structural error is not triggered otherwise." Ibid.

Here, the record demonstrates the judge determined the State was prepared for trial and the witnesses and jurors were ready. He found defendant lacked a legitimate reason for the eleventh-hour request, noting defendant's counsel had adequately and professionally represented him since the suppression hearing and interlocutory appeal. The trial judge further found there was no change in the case warranting a continuance, explaining that, if anything, the case became simpler because the State just had removed two counts from the indictment. Lastly, acknowledging defendant did not produce new counsel and waited until the eve of trial to make the request, the judge concluded defendant's request was "nothing more than an attempt by [defendant] to delay these proceedings."

Accordingly, while the judge's impatience with defendant's request at the start of trial is evident from the record, he did not summarily deny the request. Instead, he adequately undertook the required analysis of the appropriate factors. We discern no abuse of the court's discretion in denying defendant's request for a continuance to seek new counsel on the eve of trial.

II.

Defendant also contends the trial court erroneously denied his motion to suppress evidence. In particular, defendant argues, among other things, there was a lack of articulable and reasonable suspicion necessary to conduct an investigatory stop, and accordingly, the firearm should be suppressed.

"Appellate courts reviewing a grant or denial of a motion to suppress 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. Hubbard, 222 N.J. 249, 262 (2015). We should be deferential to a trial judge's factual findings because these findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). However, the trial court's legal interpretations will be reviewed de novo. Hubbard, 222 N.J. at 263.

"Warrantless seizures and searches are presumptively invalid as contrary to the United States and the New Jersey Constitutions." State v. Pineiro, 181 N.J. 13, 19 (2004) (citation omitted). To overcome this presumption, the State must show by a preponderance of evidence that the search falls within one of the well-recognized exceptions to the warrant requirement. State v. Maryland, 167

N.J. 471, 482 (2001) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)). An investigatory stop, commonly referred to as a Terry¹ stop, is a valid exception "if it is based on specific and articulable facts which, taken together with the rational inferences from those facts, give rise to a reasonable suspicion of criminal activity[.]" State v. Williams, 192 N.J. 1, 9 (2007) (citing Pineiro, 181 N.J. at 20).

When an investigatory stop is based on a CI's tip, the State must establish the reliability of the tip under the totality of the circumstances. State v. Smith, 155 N.J. 83, 92-93 (1998) (citing Illinois v. Gates, 462 U.S. 213, 237 (1983)). The informant's veracity and basis of knowledge for the tip are two highly relevant factors. State v. Caldwell, 158 N.J. 452, 460 (1999) (citation omitted). Veracity may be established by the informant's past instances of reliability. State v. Keyes, 184 N.J. 541, 555 (2005). A sufficient basis of knowledge may be established "if the tip itself relates expressly or clearly how the informant knows of the criminal activity." Smith, 155 N.J. at 94. "Even in the absence of a disclosure that expressly indicates the source of the informant's knowledge, the nature and details revealed in the tip may imply that the informant's

¹ Terry v. Ohio, 392 U.S. 1 (1968).

knowledge of the alleged criminal activity is derived from a trustworthy source." Ibid. (citing State v. Novembrino, 105 N.J. 95, 115 (1987)).

Applying these principles, we discern no basis to disturb the judge's finding that the officers conducted a lawful investigatory stop. The trial judge reasonably determined the CI's tip provided the officers with articulable suspicion to stop defendant. As to the factor requiring veracity, the lead officer testified this CI had previously provided reliable information leading to numerous arrests and search warrants. Turning to the factor concerning the basis of knowledge, the CI provided multiple descriptive details about defendant further indicating the CI was a trustworthy source. The CI informed the officer that defendant was a black male, who was wearing a white t-shirt and blue jeans with a firearm in his waistband, in the area of the Ocean Avenue address. Arriving to this location within two or three minutes, the officer quickly corroborated this information and observed no other person in the vicinity matching the provided description.

The officers also properly frisked defendant. After stopping a suspect, a protective search, or frisk, is permissible when an officer reasonably believes the individual is armed and dangerous. Terry, 392 U.S. at 27. The "search is judged by whether a reasonably prudent person would be warranted in the belief that


his or her safety or that of others was in danger." State v. Lund, 119 N.J. 35, 45 (1990).

The CI's tip reasonably placed the officers on suspicion that defendant was armed. Furthermore, upon stopping defendant, the backup officer observed a bulge in defendant's waistband, which he reasonably believed to be the described firearm. Accordingly, the officers had a reasonable belief that defendant was armed and dangerous.

Therefore, the trial court did not err in denying defendant's motion to suppress the evidence.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION