SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1379-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLAYTON R. ALLWOOD, JR.,
a/k/a CLAYTON R. ALLWOOD,

Defendant-Appellant.

Submitted January 17, 2018 – Decided January 31, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment Nos. 13-06-1182 and 15-05-0868.

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

Gurbir S. Grewal, Attorney General, attorney for respondent (Sarah Lichter, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

The trial court denied defendant Clayton R. Allwood Jr.'s motion to suppress evidence seized as the result of a warrantless

search of the automobile he was driving. The motion judge found that defendant validly consented to the search. Defendant thereafter pled guilty to third-degree possession of methylone, N.J.S.A. 2C:35-10a(1). Pursuant to the negotiated plea agreement, the State agreed to dismiss the disorderly persons offenses of possession of less than fifty grams of marijuana, N.J.S.A. 2C:35-10a(4), and possession with intent to use drug paraphernalia, N.J.S.A. 2C:36-2, as well as traffic summonses related to this incident. Defendant was sentenced to a two-year term of probation and ordered to pay certain fines and assessments. Defendant appeals from the denial of his suppression motion, and the $250 fine imposed by the sentencing judge. For the reasons that follow, we affirm the denial of the suppression motion but remand for reconsideration of the fine.

I.

The only witness at the suppression hearing was Officer Bryan Belardo, a thirteen-year veteran of the Manalapan Township Police Department. Belardo testified he was on routine patrol at approximately 2:50 a.m. on April 29, 2014, when he observed a car that appeared not to stop for a stop sign. Belardo followed the car and noticed its "rear plate light was not functioning." As a result, Belardo activated the patrol car's emergency lights and pulled the vehicle over.

Belardo approached the car from the passenger side and asked the driver, subsequently identified as defendant, for his driver's license, registration, and insurance. A front-seat passenger, later identified as co-defendant Born Wright, was also asked to produce identification. Neither individual produced a valid driver's license, and Belardo's investigation revealed that Wright's license was suspended.

As Belardo checked the occupants' credentials, he noted a "very strong" odor of marijuana coming from the car. Wright told Belardo the car was registered to his grandmother, and that the smell may have come from his clothing because he had smoked marijuana earlier that day.

Both Wright and defendant consented to a search of the car. Belardo elaborated:

> I asked Mr. Wright if he would sign a consent to search form. He said he would. I then asked [defendant] if he would also sign a consent to search form. Mr. Wright at this point said [defendant] could sign for both of them. I . . . asked Mr. Wright if he would sign the consent to search form because it's his grandmother's vehicle. He said he doesn't drive the vehicle, [defendant] drives the vehicle. It's either [defendant] or his grandmother [who] drives the vehicle, so he could sign for both of them.

Belardo explained he sought both occupants' consent because "[n]either one was a registered owner of the vehicle, so I covered

my bases by asking them both if they would consent to the search." Belardo then presented defendant with a "consent to search form" and read it aloud to him. Defendant signed the form, indicating he "understood and consented to the search." Wright also verbally consented to the search, and "indicated that [defendant] could sign for both of them."

Sergeant Daniel Carey arrived at the scene and assisted in the search of the vehicle. Belardo testified the odor of marijuana grew stronger toward the rear of the car. Upon opening the gas tank door, the police discovered three Ziploc bags that contained marijuana, a cigar wrapper with burnt marijuana, and two capsules of metholyne. The drugs were confiscated, and defendant and Wright were placed under arrest.

Judge John R. Tassini denied the suppression motion in a November 18, 2015 oral opinion. The judge carefully reviewed the testimony of Officer Belardo, who he "found . . . to be a candid and credible witness." The judge concluded that the initial stop of the vehicle was lawful "based on the stop sign [violation] and certainly the light violation."

Judge Tassini next found the strong odor of marijuana and Wright's admission that he had smoked marijuana established the reasonable and articulable suspicion needed to support the request for consent to search the car. The judge rejected the defense

position that the consent to search was invalid because only defendant and not Wright signed the consent form. The judge determined that Wright consented to the search and authorized defendant to sign the consent form for him, even though there was "no competent evidence that [Wright] owns [the car] or controls it." The judge further found: "[Wright] also acknowledges that [defendant] drives the car, so [defendant] has authority. [Defendant's] got control of this vehicle. He's driving it around. He's one of the two people [that based on] Wright's statement . . . drives the vehicle."

Finally, Judge Tassini found Belardo testified credibly that he read defendant each of the rights contained on the consent to search form. Consequently, before signing the form, defendant was properly advised he had the right to: refuse consent; revoke consent; stop the search; and be present during the search.

On appeal, defendant presents the following arguments:

> POINT I
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> THE WARRANTLESS SEARCH OF AND SEIZURE FROM THE CAR WHICH WAS DRIVEN BUT NOT OWNED BY . . . DEFENDANT VIOLATED . . . DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL PROTECTIONS AGAINST UNLAWFUL SEARCH AND SEIZURE, NECESSITATING SUPPRESSION. U.S. CONST. . . . AMENDS. IV, XIV; N.J. CONST. (1947) . . . ART. 1, PAR[A]. 7.

POINT II

THE TRIAL COURT IMPOSED A FINE THAT WAS NOT PART OF THE PLEA AGREEMENT AND WITHOUT CONSIDERING THE CIRCUMSTANCES OF THE OFF[E]NSE OR THE DEFENDANT'S ABILITY TO PAY, NECESSITATING VACATION. (Not Raised Below).

II.

We first address the suppression issue. The Supreme Court has explained the standard of review applicable to our consideration of a trial judge's fact-finding 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.'" State v. Elders, 192 N.J. 224, 243-44 (2007) (quoting State v. Elders, 386 N.J. Super. 208, 228 (App. Div. 2006)). Deference to those findings is particularly appropriate when the trial court has the "opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy." Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Nevertheless, we are not required to accept findings that are "clearly mistaken" based on our independent review of the record. Ibid. Moreover, we need not defer "to a trial . . . court's interpretation of the law" because "[l]egal issues are reviewed de novo." State v. Vargas, 213 N.J. 301, 327 (2013).
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> [State v. Watts, 223 N.J. 503, 516 (2015).]

An appellate court remains mindful not to "disturb the trial court's findings merely because 'it might have reached a different

conclusion were it the trial tribunal' or because the 'trial court decided all evidence or inference conflicts in favor of one side' in a close case." Elders, 192 N.J. at 244 (quoting Johnson, 42 N.J. at 162). Rather, we reverse only when the court's findings "are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Ibid. (quoting Johnson, 42 N.J. at 162).

The stop of a motor vehicle is lawful if the authorities have a reasonable and articulable suspicion that violations of motor vehicle or other laws have been or are being committed. State v. Carty, 170 N.J. 632, 639-40, modified on other grounds, 174 N.J. 351 (2002). Here, the motion judge found there was reasonable and articulable suspicion that defendant committed one or more motor vehicle violations. This provided the necessary legal basis for the stop. Defendant does not challenge this conclusion.

"[W]hen the reasonable inquiries by the officer related to the circumstances that justified the stop 'give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those suspicions.'" State v. Baum, 199 N.J. 407, 424 (2009) (second alteration in original) (quoting State v. Dickey, 152 N.J. 468, 479-80 (1998)). In the present case, when Belardo approached the car, he smelled a strong odor of raw

marijuana. This observation led him to request consent to search the vehicle.

Under the Fourth Amendment of the United States Constitution and Article 1, Paragraph 7 of the New Jersey Constitution, a warrantless search is presumed invalid, and places the burden on the State to prove that the search "falls within one of the few well-delineated exceptions to the warrant requirement." State v. Pineiro, 181 N.J. 13, 19 (2004) (quoting State v. Maryland, 167 N.J. 471, 482 (2001)). Consent is a well-recognized exception to the Fourth Amendment's search warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 227-28 (1973). Furthermore, "consent searches are considered a 'legitimate aspect of effective police activity.'" State v. Domicz, 188 N.J. 285, 305 (2006) (quoting Schneckloth, 412 U.S. at 228).

"Consent may be obtained from the person whose property is to be searched, from a third party who possesses common authority over the property, or from a third party whom the police reasonably believe has authority to consent . . . ." State v. Maristany, 133 N.J. 299, 305 (1993) (citations omitted). To be valid, a consent to search must be voluntary and knowing in nature. Schneckloth, 412 U.S. at 222. In New Jersey, the person giving consent must first be advised of his or her right to refuse. State v. Johnson, 68 N.J. 349, 353-54 (1975).

Additionally, when police request consent to search during a motor vehicle stop, they must have a reasonable and articulable suspicion that the search will produce evidence of criminal wrongdoing. Carty, 170 N.J. at 635; State v. Thomas, 392 N.J. Super. 169, 188 (App. Div. 2007). That standard has been defined as "a particularized and objective basis for suspecting the person stopped of criminal activity[,]" and is a far lower standard than probable cause. State v. Stovall, 170 N.J. 346, 356-57 (2002) (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)). "[A] finding of reasonable and articulable suspicion of ongoing criminality" is determined by objective "cumulative factors in a totality of the circumstances analysis . . . ." Elders, 192 N.J. at 250.

In summary, the consent exception to the warrant requirement, as applied to the search of a motor vehicle, has three prongs. The State must prove: 1) the police had a reasonable and articulable suspicion of criminal activity; 2) the consent was voluntary; and 3) the person who granted consent had the authority to do so.

Here, the first and second prongs were clearly established. Regarding the first prong, Officer Belardo smelled the odor of raw marijuana emanating from the vehicle. "New Jersey courts have recognized that the smell of marijuana itself constitutes probable

cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Walker, 213 N.J. 281, 290 (2013) (alteration in original) (quoting State v. Nishina, 175 N.J. 502, 516-17 (2003)). Defendant argues that the fact that the amount of marijuana was small and it was found in plastic bags within the fuel tank door renders Belardo's testimony that he smelled a strong odor of marijuana incredible. In rejecting this argument, we defer to Judge Tassini's finding that "[t]he car had its window down and [Belardo] candidly and credibly testified that he smelled the odor of marijuana." Additionally, Wright's statement that he had smoked marijuana is unchallenged.

Regarding the second prong, after the car was stopped, Belardo asked the occupants for consent to search the vehicle and both agreed. Belardo then presented defendant with the consent to search form. This form clearly explained to defendant his rights, including his right to refuse to give his consent. The record thus shows that defendant's consent was knowing and voluntary.

Defendant's appeal thus focuses on the third prong. Specifically, he contends he lacked the authority to consent to the search of the car, and that valid consent was not given by Wright. We disagree.

Whether a third party possesses the authority over property to consent to its search depends on the "appearances of control"

at the time of the search. State v. Farmer, 366 N.J. Super. 307, 313-14 (App. Div. 2004) (holding it was reasonable for the officers to believe that the female that answered the door and advised the officers that her mother and children were present in the apartment was a resident with authority to consent to a search); see also State v. Miller, 159 N.J. Super. 552, 558-59 (App. Div. 1978) (third party consent was valid where the third party told the police she resided in the room in question and possessed keys to the room).

In assessing an officer's reliance on a third party's consent, courts look to whether the officer's belief that the third party had the authority to consent was "objectively reasonable" in view of the facts and circumstances known at the time of the search. State v. Suazo, 133 N.J. 315, 320 (1993). As recognized in Maristany, "[a]ppearances of control at the time of the search, not subsequent determinations of title or property rights, inform our assessment of the officer's conduct." Maristany, 133 N.J. at 305 (citing State v. Santana, 215 N.J. Super. 63, 71 (App. Div. 1987)); see also Farmer, 366 N.J. Super. at 313. The "validity of the search does not depend on whether the [officer] used the best procedure, but rather on whether the officer's conduct was objectively reasonable under the circumstances." Maristany, 133 N.J. at 308.

A mistake as to whether a third party actually had authority to grant consent will not automatically invalidate a search. "[I]f a law-enforcement officer at the time of the search erroneously, but reasonably, believed that a third party possessed common authority over the property to be searched, a warrantless search based on that third party's consent is permissible under the Fourth Amendment." Suazo, 133 N.J. at 320 (citing Illinois v. Rodriquez, 497 U.S. 177, 186 (1990)). A police officer need not be factually correct; the officer need only have a reasonable belief that the consenting party has sufficient control over the property. State v. Crumb, 307 N.J. Super. 204, 243 (App. Div. 1997).

As the motion judge noted, our holding in State v. Powell, 294 N.J. Super. 557, 563 (App. Div. 1996), is especially instructive here. In Powell, defendant was the passenger in a car stopped by the State Police just over the Delaware Memorial Bridge. Id. at 560. The car was owned by defendant's friend, who often stayed with him, or a relative of that friend. Id. at 560. After the driver could not produce the vehicle's registration, and he and defendant gave the police conflicting stories about their destination, the troopers requested permission to search the car. Id. at 560-61. The driver gave permission by signing a consent form, and the police discovered cocaine concealed in a bag in a side panel of the driver's door. Ibid.

Defendant challenged the consent search, arguing, among other things, "that the investigating officers had a duty to determine which of the defendants had the superior right to the car, and to obtain consent from that defendant. Defendant asserts that he had such superior right." Id. at 562. In rejecting this argument, we held:

> Defendant's claim of a superior right to the car because his friend entrusted the car to him is . . . unavailing. As we noted in [Santana, 215 N.J. Super. at 71], we do not impose on investigating officers any duty to determine the actual property rights of those in apparent possession of the property or area to be searched. Rather, "[s]ince the reasonableness of the police action at the time is the question to be determined, the case must turn upon the appearances of control at the time. . . ." [Id. at 71]. Because the driver is in apparent control of the vehicle, it is objectively reasonable for the police to accept the driver's permission to search when the passenger does not demonstrate ownership or other superior right to possession of the vehicle. State in the Interest of C.S., 245 N.J. Super. 46, 50-51 (App. Div. 1990); State v. Binns, 222 N.J. Super. 583, 590-91 (App. Div. 1988).
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> [Powell, 294 N.J. Super. at 563.]

Here, it is undisputed that neither defendant nor Wright owned the vehicle that the police sought consent to search. Wright told Belardo his grandmother owned the car, and that she and defendant were its authorized users. Moreover, defendant had a valid driver's license, while Wright did not. The record thus

fails to demonstrate that Wright either had ownership or a superior right to possession of the car. Defendant was driving the car, which gave him "the appearance of control." As such, the search was valid as the police "reasonably believed" defendant had authority to grant consent to the search.

III.

In his second point, defendant argues that the $250 fine imposed by the sentencing judge should be vacated because: (1) it was not part of the plea agreement; (2) the judge failed to state a reason for imposing it, and (3) the judge failed to consider defendant's ability to pay the fine. We find insufficient merit in the first and third contentions to warrant discussion in a written opinion. R. 2:11-3(e)(2). However, we agree with defendant that the sentencing judge was required to explain his reasons for imposing a fine, State v. Ferguson, 273 N.J. Super. 486, 499 (App. Div. 1994), and that he failed to do so here. Accordingly, we remand for the court to consider the criteria governing the imposition of fines as established in N.J.S.A. 2C:44-2(a), and to state its reasons when determining the amount and method of payment should it again choose to impose a fine. See N.J.S.A. 2C:44-2(c)(1).

Affirmed in part and remanded in part. We do not retain jurisdiction.