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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1402-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID COMPANIONI,

Defendant-Appellant.

Submitted December 20, 2017 – Decided February 7, 2018

Before Judges Fuentes and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
13-06-0114.

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

Christopher S. Porrino, Attorney General,
attorney for respondent (Arielle E. Katz,
Deputy Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant David Companioni appeals from his conviction of
second-degree possession with intent to distribute marijuana in

violation of N.J.S.A. 2C:35-5, and first-degree maintaining or operating a controlled dangerous substance production facility in violation of N.J.S.A. 2C:35-4. Specifically, defendant challenges the trial court's denial of his motion to suppress evidence seized following the issuance of a Communications Data Warrant (CDW) as the affidavit requesting the warrant failed to establish probable cause. We disagree and affirm.

We discern the following facts from the affidavit of Detective Vito Flora of the New Jersey State Police (NJSP), Drug Trafficking North Unit (DTNU). Flora submitted the affidavit in support of his application for a CDW authorizing the installation and use of a Global Positioning System (GPS) tracking device on a vehicle registered to Aday Fernandez.¹

The NJSP received a tip from the Drug Enforcement Administration (DEA) that Fernandez and a group of Hispanic men were possibly involved in the cultivation of high-grade marijuana. The men were seen at a Pennsylvania establishment purchasing items known by law enforcement to be used in the cultivation of marijuana.

The DTNU later located a red vehicle in North Bergen, New Jersey and surveilled its movements with defendant as the operator.

¹ Fernandez is not a party to this appeal.

Defendant later exited the vehicle to meet Fernandez and three other men. All five men then entered a green vehicle operated by Fernandez. That vehicle departed and travelled to a Home Depot Store. The DTNU observed the men purchasing similar items to those purchased in Pennsylvania at the Home Depot and unloading them at a warehouse in Newark, New Jersey. DTNU officers installed surveillance equipment to monitor the warehouse.

Following a six-day investigation, the NJSP obtained a CDW authorizing the installation and use of a GPS tracking device on Fernandez's vehicle, and a warrant to search the warehouse as the suspected site of the marijuana grow operation. A search of the warehouse revealed a "fully operational indoor marijuana grow containing approximately 100 marijuana plants."

The NJSP then obtained a warrant to renew the CDW and to place a GPS tracking device on defendant's vehicle as well as a second warrant to search the warehouse without defendant or Fernandez's knowledge. The NJSP utilized the information obtained from the GPS to seek and obtain a warrant for the warehouse. The warehouse warrant was also premised on a utility check with PSE&G that revealed no power had been running to the warehouse, notwithstanding that an odor of marijuana was emanating from a fan affixed to the warehouse, indicating there was a power source.

Based on the physical surveillance and evidence gathered from these warrants, defendant was subsequently arrested.

Prior to trial, defendant and Fernandez filed a motion to suppress evidence gathered after the issuance of the initial CDW authorizing the placement of a GPS tracking device on Fernandez's vehicle. The trial court denied the motion, stating:

I do not find that the defense has established that the GPS tracking system was installed prior to the search warrant being signed by Judge Petrolle. Additionally, I do not find that the basis for which the search warrant was signed lacked probable cause. . . . I do find that the arguments advance[d] are [conclusory] in nature and no evidence has come forth to support these bare allegations. For these reasons, and the reasons expressed above, the [c]ourt denies the defendant's motion to suppress the evidence.

Defendant raises the following argument on appeal:

POINT I

THE TRIAL JUDGE ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED FOLLOWING THE INSTALLATION OF A GLOBAL POSITIONING SYSTEM DEVICE ON FERNANDEZ'S VEHICLE BECAUSE THE AFFIDAVIT REQUESTING THE WARRANT PERMITTING IT FAILED TO ESTABLISH PROBABLE CAUSE. U.S. CONST. [AMEND. IV]; N.J. CONST. ART. I, ¶ 7.

At the outset, we address the requirement for a warrant predicated upon the installation of a GPS device on a car. In United States v. Jones, 565 U.S. 400 (2012), the United States Supreme Court held that the installation of a GPS device on a car

amounted to a Fourth Amendment search and a warrant was required. See also State v. Lunsford, 226 N.J. 129 (2016). Here, the NJSP applied for and received a warrant to install a GPS device. On appeal, as before the Law Division, defendant challenges the sufficiency of the affidavit relative to its demonstration that probable cause existed to install the device.

"[A] search executed pursuant to a warrant is presumed to be valid and [] a defendant challenging its validity has the burden to prove 'that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable.'" State v. Jones, 179 N.J. 377, 388 (2004) (quoting State v. Valencia, 93 N.J. 126, 133 (1983)). "Accordingly, courts 'accord substantial deference to the discretionary determination resulting in the issuance of the [search] warrant.'" State v. Keyes, 184 N.J. 541, 554 (2005) (alteration in original) (quoting Jones, 179 N.J. at 388). When "reviewing a grant or denial of a motion to suppress [we] must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Gamble, 218 N.J. 412, 424 (2014) (citing State v. Elders, 192 N.J. 224, 243 (2007)). We "should reverse only when the trial court's determination is 'so clearly mistaken "that the interests of justice demand intervention and correction.'" Id. at 425 (quoting

Elders, 192 N.J. at 244). "A trial court's interpretation of the law, however, and the consequences that flow from established facts are not entitled to any special deference." Ibid. (citations omitted). Thus, "a trial court's legal conclusions are reviewed de novo." Ibid. (citing State v. Gandhi, 201 N.J. 161, 176 (2010)). Any "[d]oubt as to the validity of the warrant 'should ordinarily be resolved by sustaining the search.'" Keyes, 184 N.J. at 554 (quoting Jones, 179 N.J. at 389).

The New Jersey Constitution provides, "no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized." N.J. Const. art. I, ¶ 7. "When a court receives an application from the police for a search warrant, it should not issue that warrant 'unless [it] is satisfied that there is "probable cause to believe that . . . evidence of a crime is at the place sought to be searched."' " State v. Smith, 212 N.J. 365, 388 (2012) (quoting State v. Sullivan, 169 N.J. 204, 210 (2001)).

Probable cause requires "less than legal evidence necessary to convict though more than mere naked suspicion." Ibid. (quoting State v. Mark, 46 N.J. 262, 271 (1966)). It exists when a police officer possesses "a 'well grounded' suspicion that a crime has been or is being committed." Sullivan, 169 N.J. at 211. The

court must "make a practical, common sense determination whether, given all of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" State v. O'Neal, 190 N.J. 601, 612 (2007) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

Probable cause must be determined "based on the information contained within the four corners of the supporting affidavit, as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously." State v. Marshall, 199 N.J. 602, 611 (2009) (quoting Schneider v. Simonini, 163 N.J. 336, 363 (2000)). A common sense approach must be used in evaluating an affidavit, and if the facts within the affidavit "would provide reasonable support for the belief of a prudent [person] that the law is being violated at a place reasonably identified, they will be deemed sufficient." State v. Boyd, 44 N.J. 390, 392-93 (1965). However, "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).

"Information related by informants may constitute a basis for probable cause, provided that a substantial basis for crediting that information is presented." Jones, 179 N.J. at 389 (citing Sullivan, 169 N.J. at 212). The issuing court must consider the

totality of the circumstances in determining whether an informant's tip establishes probable cause, including the informant's "veracity and basis of knowledge." Ibid. (citing Novembrino, 105 N.J. at 123); see also Gates, 462 U.S. at 238-39. These are the most important factors, and a deficiency in one may be compensated "by a strong showing as to the other, or by some other indicia of reliability." State v. Zutic, 155 N.J. 103, 110-11 (1998).

Past instances of reliability are "probative of veracity, although [their] weight in the ultimate determination of probable cause may vary with the circumstances of each case." Smith, 155 N.J. at 94. The issuing court must consider whether the informant has provided reliable information to the police in past investigations. See Novembrino, 105 N.J. at 123. "However, under the totality of the circumstances, 'past instances of reliability do not conclusively establish an informant's reliability.'" Sullivan, 169 N.J. at 213 (quoting Smith, 155 N.J. at 94).

In determining the informant's basis of knowledge, the issuing court must consider whether the information was obtained in a reliable way. See Sullivan, 169 N.J. at 213. If the informant does not explicitly state how he obtained the information, "the nature and details revealed in the tip may imply that the informant's knowledge of the alleged criminal activity is derived

from a trustworthy source." Ibid. (quoting Smith, 155 N.J. at 94).

Independent police corroboration of the informant's tip "is an essential part of the determination of probable cause." Smith, 155 N.J. at 95. Such corroboration can "ratify the informant's veracity and validate the truthfulness of the tip." Jones, 179 N.J. at 390 (quoting Smith, 155 N.J. at 95). "However, if the informant's tip fails to demonstrate sufficient veracity or basis of knowledge, a search warrant issued on the basis of the tip may still pass muster if the other facts included in the supporting affidavit justify a finding of probable cause." Jones, 179 N.J. at 390 (citing Sullivan, 169 N.J. at 214; Novembrino, 105 N.J. at 121-22). Moreover,

the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' prong of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

[Jones, 179 N.J. at 390 (quoting Gates, 462 U.S. at 238).]

The factors that may be considered in determining probable cause based on an informant's tip will vary case by case. See Jones 179 N.J. at 390. An additional factor to consider is the

experience of the officer submitting the affidavit, specifically, experience in investigating and apprehending drug dealers. Ibid. (citing Novembrino, 105 N.J. at 126).

In light of the totality of circumstances, including the DEA tip and its corroboration through the NJSP's investigation, we hold there was sufficient probable cause for the trial court to issue the CDW authorizing the placement of a GPS tracking device on Fernandez's vehicle.

As to veracity, the DEA is considered a reliable source of information in a drug investigation. Although it is unclear which specific DEA agent provided the tip, and the extent of the DEA's preliminary investigation, "[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." United States v. Ventresca, 380 U.S. 102, 111 (1965). Here, the DTNU received a tip from a fellow law enforcement agency that alleged a specific individual, using a specific vehicle, was possibly involved in illegal drug related activities. Based on this information, the DTNU conducted an investigation.

As to the informant's basis of knowledge, the court looks to whether the information was obtained in a reliable way. Here, the description of the tip from the affidavit stated, "Fernandez and other yet unidentified Hispanic males had purchased a large

quantity of material known to law enforcement as being used to cultivate high grade marijuana from an establishment in Pennsylvania." Although not explicitly stated, we can infer that DEA members personally observed Fernandez and the other individuals purchase the materials, then relayed this information to the DTNU. They described the vehicle used by the individuals and stated that they purchased the materials from a Pennsylvania establishment. Therefore, the information provided in this tip revealed to the DTNU that the DEA, a fellow law enforcement agency and presumably a reliable source, believed that specific individuals were involved in illegal drug related activity.

Moreover, there is sufficient independent corroborating evidence documented in the affidavit to satisfy a finding of probable cause. The DTNU began their surveillance of defendant and Fernandez when they located Fernandez's vehicle described in the tip. The DTNU observed the men enter a Home Depot and purchase items "consistent with components used in the irrigation process while cultivating high grade marijuana." The DTNU subsequently discovered the warehouse, where they observed individuals unloading materials "commonly used in indoor marijuana grow operations" into the warehouse, and installed a surveillance camera to monitor the warehouse. The investigation also revealed no power was running to the warehouse. Thus, in addition to the

tip, the DTNU conducted independent surveillance for six days, and used the information obtained during that investigation in the application for the warrant.

Additionally, the trial court may consider the experience of the officer submitting the affidavit in investigating illegal drug activity. See Jones, 179 N.J. at 390 (citing Novembrino, 105 N.J. at 126). Here, in his affidavit, Flora documented his substantial experience in investigating drug trafficking operations, and his interpretation of defendant's and his codefendants' conduct. While following defendant, DTNU officers observed defendant drive onto a dead-end street, park the car facing traffic, talk on the phone for about forty minutes, then "intently scan the entire area" before entering and exiting the Home Depot. Further, while following Fernandez, Flora noted Fernandez drove at various speeds continuously checking his mirrors. According to Flora, these are "known counter-surveillance technique[s] used by drug traffickers to ensure that they are not being followed by law enforcement." Based on these counter-surveillance techniques employed by defendant and Fernandez, Flora requested the CDW as "a crucial aid to physical surveillance that will permit the investigation to remain covert." Moreover, Flora believed Fernandez's vehicle would "be used in the furtherance of the commission of the specified crimes on an unpredictable basis." As such, the trial


court did not err in relying on Flora's experience and opinions reaching its decision to grant the warrant application.

In sum, the information gleaned from the officers' surveillance sufficiently corroborated the DEA tip. The DTNU members witnessed the men purchase materials commonly used in the cultivation of marijuana, which was the same information received from the DEA tip. The DTNU also discovered the location of the suspected grow operation and observed individuals arriving and departing the warehouse for short intervals of time, unloading recently purchased items. In addition, according to Flora, an officer highly trained in narcotics investigations, defendant and other individuals engaged in multiple counter-surveillance techniques. This independent corroboration ratified the informant's veracity and the truthfulness of the tip, and the supporting facts gathered from the surveillance included in the affidavit justified a finding of probable cause. See Jones, 179 N.J. at 390. The trial court made a "practical, common-sense decision" in granting the warrant. Ibid. (quoting Gates, 462 U.S. at 238). Defendant has failed to satisfy his burden to show "that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable." Valencia, 93 N.J. at 133.

In reviewing the issuance of a search warrant, the appellate court accords "substantial deference to the discretionary determination resulting in the issuance of the search warrant." Jones, 179 N.J. at 388. Guided by this standard of review, there is no reason to believe the trial court erred in granting the warrant application. Since the warrant was issued on sufficient probable cause, the trial court did not err in denying the motion to suppress. The trial court heard arguments from counsel and concluded that defendant's arguments in favor of suppression were conclusory, and lacked evidentiary support. We agree.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION