SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1866-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICKY RICHARDSON, a/k/a
MARK RICHARDSON,

Defendant-Appellant.

Argued January 23, 2018 – Decided March 22, 2018

Before Judges Fisher and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 15-08-0899.

Peter T. Blum, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Peter T. Blum, of counsel and on the brief).

Lila B. Leonard, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Lila B. Leonard, of counsel and on the brief).

PER CURIAM

Defendant Ricky Richardson appeals from the denial of his motion to suppress controlled dangerous substances that Detective Keith Walcott of the New Brunswick Police Department found inside an opaque plastic bag defendant allegedly tossed out a window just after police entered the house, in which he was located, to execute an arrest warrant for unrelated individuals. He argues:

> POINT I
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> THE CONTENTS OF RICHARDSON'S BAG SHOULD BE SUPPRESSED BECAUSE THE OFFICER SEARCHED IT WITHOUT A WARRANT, AND THE STATE FAILED TO PROVE THAT AN EXCEPTION WAS APPLICABLE. U.S. CONST. AMENDS. IV, XIV; N.J. CONST. ART. I, [¶] 7.
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> > A. THE PLAIN VIEW EXCEPTION DID NOT PERMIT THE DETECTIVE TO OPEN THE BAG BECAUSE THE STATE FAILED TO PROVE THAT THE BAG'S EXTERIOR APPEARANCE INDICATED THAT CONTRABAND WAS INSIDE.
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> > B. THE ABANDONMENT EXCEPTION WAS INAPPLICABLE BECAUSE THE OFFICER SAW RICHARDSON DROP THE BAG, YET DID NOT QUESTION RICHARDSON TO DETERMINE IF HE RELINQUISHED IT.

We agree the bag was impermissibly searched without a warrant, but remand the case for consideration of the abandonment issue.

The motion judge ruled the search and seizure was justified under the plain view doctrine. Our "review of a motion judge's factual findings in a suppression hearing is highly deferential." State v. Gonzales, 227 N.J. 77, 101 (2016) (citing State v.

Hubbard, 222 N.J. 249, 262 (2015)). We are obliged to uphold a motion judge's factual findings so long as there is sufficient credible evidence in the record to support the judge's findings. State v. Elders, 192 N.J. 224, 243 (2007). We will reverse only when the trial court's findings "are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). A court's conclusions of law, however, are reviewed de novo. State v. Gamble, 218 N.J. 412, 425 (2014).

The plain view doctrine permits law enforcement to seize contraband without a warrant under the following conditions:

> First, the police officer must be lawfully in the viewing area.
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> Second, the officer has to discover the evidence "inadvertently," meaning that he did not know in advance where evidence was located nor intend beforehand to seize it.
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> Third, it has to be "immediately apparent" to the police that the items in plain view were evidence of a crime, contraband, or otherwise subject to seizure.
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> [State v. Bruzesse, 94 N.J. 210, 236 (1983) (citation omitted) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 470, 466 (1971)).[1]]

[1] In Gonzales, 227 N.J. at 82, our Supreme Court held prospectively "that an inadvertent discovery of contraband or evidence of a crime is no longer a predicate for a plain view seizure." This

Defendant does not challenge the propriety of the bag's seizure, conceding "[p]robable cause might have permitted" the detective to seize Richardson's bag. As the motion judge found,[2] the detective was lawfully in the viewing area; he "was standing beneath the elevated porch [of the home occupied by defendant] in order to secure the back entrance . . . while multiple arrest warrants were being effectuated inside." The judge also credited the detective's testimony that while he was monitoring the back windows and doors of the home, "he heard the window directly above him open. Immediately after hearing that noise, a bag dropped from the window [and landed] two to three feet from" the detective. The judge thus found the seizure of the bag was inadvertent. The record amply supports the judge's findings.

The third factor deserves close attention. "[T]he 'immediate[ly] apparent' prong requires the [c]ourt to determine whether probable cause existed to associate the . . . object that was in plain view with criminal activity," depending on "what the police officer reasonably knew at the time of the seizure." State v. Johnson, 171 N.J. 192, 213 (2002) (quoting Bruzzese, 94 N.J. at 237). The judge considered the detective's knowledge, training

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suppression motion pre-dated Gonzales; the officer's discovery therefore had to have been inadvertent.

[2] The judge found the detective "was a credible witness."

and experience in the identification, packaging and concealment of controlled dangerous substances, and the circumstances known to him at the time of his discovery: he saw defendant "in the window of his bedroom engaging in what [the detective] concluded was drug-dealing"; the bag was thrown from defendant's window close in time to the police entry to the house; he saw defendant in the window immediately after the bag was dropped, a location from which he could see where the bag landed. We agree with the judge's conclusion that this information, factoring the timing of the drop and the time of day as established at the motion hearing — four o'clock in the morning — made it "immediately apparent" that the bag was "evidence of a crime, contraband, or otherwise subject to seizure."

Although we find just cause for the seizure of the bag, we part company with the motion judge and conclude the search of the bag was not justified. Indeed, the Court in Johnson — the case chiefly relied on by the motion judge — held only that "the conduct of the police in seizing" a bag found to contain CDS "was reasonable under the plain view doctrine," id. at 220; the Court did not address the propriety of searching the bag.

Our Supreme Court has determined, "[t]he requisite cause for the search of effects can differ from the cause needed to seize them," and that separate consideration of each is required. State

v. Hempele, 120 N.J. 182, 216 (1990); see also Texas v. Brown, 460 U.S. 730, 749 (1983) (Stevens, J., concurring) (recognizing "the constitutionality of a container search is not automatically determined by the constitutionality of the prior seizure"). Apropos of this case is our Supreme Court's observation that

> although the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protect against both unreasonable searches and seizures, there are important differences between the interests of citizens protected from unlawful searches and those protected from unlawful seizures that are relevant to the plain view doctrine. A search threatens a citizen's personal privacy interest while a seizure threatens a citizen's interest in retaining possession of his or her property. Segura v. United States, 468 U.S. 796, 810 (1984). Frequently, a seizure is preceded by a search. But when containers are involved, the converse is often the case. An object is considered to be in plain view if it can be seized without compromising any interest in personal privacy. Because seizure of an object in plain view threatens the possessory interest, surrounding circumstances, such as when a suspect abandons property, may make it unnecessary to obtain a warrant to justify a seizure.
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> [Johnson, 171 N.J. at 206.]

The object's seizure, as the Court noted, is only half of the equation and an analysis of only the seizure is, as Justice Stevens

opined in Brown,[3] "incomplete" because "[i]t gives inadequate consideration to . . . cases holding that a closed container may not be opened without a warrant, even when the container is in plain view and the officer has probable cause to believe contraband is concealed within." 460 U.S. at 747 (Stevens, J., concurring) (citing United States v. Chadwick, 433 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Ross, 456 U.S. 798, 811-812 (1982)).

We conclude, although the detective properly seized the bag, the search was impermissible without a warrant. In the context of determining if a warrant was required to search opaque garbage bags placed on the curb, the Hempele Court held:

> Once the protections of article I, paragraph 7 apply, a lower expectation of privacy is not a sufficient basis on which to carve out an exception to the warrant and probable-cause requirement. We can dispense with that requirement "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." . . .
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> Thus, even if garbage searches are only "minimally intrusive" of a person's privacy, the warrant and probable-cause requirement for garbage searches can be scrapped only if a special government interest significantly

[3] The Supreme Court in Brown issued four separate opinions; none garnered a majority of the Court but all agreed in the judgment. Justice Stevens's concurrence was joined by Justices Brennan and Marshall.

> outweighs those privacy interests. The State does not identify any such government interest.
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> [Hempele, 120 N.J. at 218-19 (first quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring), and then quoting United States v. Place, 462 U.S. 696, 703 (1983)).]

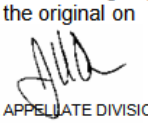
The State in this case doesn't identify any such interest. The bag could have been easily secured while police applied for a search warrant. See Hempele, 120 N.J. at 219 ("If the police fear that the bag will disappear before they are able to secure a search warrant, they can seize it for the interim."). The plain view doctrine did not justify the warrantless search of the bag.

The motion judge, after finding the plain view exception justified the seizure and search, said she would "not address the additional arguments raised by counsel in support of this motion," including the State's contention that the search and seizure was proper because defendant abandoned the bag. We remand the case for the judge's consideration of that theory.[4]

[4] For the first time on appeal the State contends the search was justified under the exigent circumstances exception. "Generally, issues not raised below, even constitutional issues, will not ordinarily be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest." State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006). The State's exigency argument is neither jurisdictional in nature nor does it implicate the public interest; the State does not argue either ground. We will not consider the issue.

Reversed and remanded. 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