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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2190-16T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JESUS M. MELENDEZ and FADI
HAMADE,

Defendants-Respondents.

Submitted September 13, 2017 – Decided February 14, 2018

Before Judges Fuentes, Manahan, and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No. 15-
12-0822.

Thomas K. Isenhour, Acting Prosecutor of Union
County, attorney for appellant (Meredith L.
Balo, Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

Weisman DiGioia, PA, attorneys for respondent
Jesus M. Melendez (Michael T. Simon, of
counsel and on the brief).

Joseph P. Depa, Jr., attorney for respondent
Fadi Hamade, join in the brief of respondent
Jesus M. Melendez.

PER CURIAM

Following leave granted, the State appeals from a November 18, 2016 order that suppressed evidence seized in a warrantless search of a jewelry store in Plainfield owned by defendant Fadi Hamade and managed by defendant Jesus Melendez. We affirm the suppression order.

Defendants were indicted on nine counts of an eleven-count indictment arising from the search of a jewelry store in Plainfield on August 8, 2015. Six of the counts related to the seizure of synthetic cannabinoid and were the subject of the suppression motion. These included: second-degree possession of synthetic cannabinoid with intent to distribute, N.J.S.A. 2C:35-5.3(b) (count one); third-degree possession of a controlled dangerous substance with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(13) (count two); third-degree possession of a controlled dangerous substance with intent to distribute on or within 1000 feet of school property, N.J.S.A. 2C:35-7 (count three); second-degree possession of a controlled dangerous substance with intent to distribute within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (count four); third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) (count

five); and fourth-degree possession of a synthetic cannabinoid, N.J.S.A. 2C:35-5.3(c) (count six).

The remaining counts alleged fourth-degree possession of drug paraphernalia with intent to distribute, N.J.S.A. 2C:36-3 (count nine); fourth-degree possession of a prohibited weapon, N.J.S.A. 2C:39-3(e) (count ten); and fourth-degree possession of a stun gun, N.J.S.A. 2C:39-3(h) (count eleven).¹ The November 18, 2016 order that granted defendants' suppression motion did not suppress evidence related to those charges. We gather the following facts from the record developed at the suppression motion.

I

Detective Michael Metz of the Plainfield Police Department testified that on August 8, 2015, he was assigned to the narcotics and vice section. As he and his partner were getting into their unmarked vehicle, he saw two women and a man walking northbound on Watchung Avenue in Plainfield. He recognized one of the women, S.L., from a previous investigation where she was found to be in possession of synthetic cannabinoid. He did not recognize the second woman, Mildred Moore, who at the next intersection, made a left turn while S.L. continued straight, crossed over and stood

¹ Co-defendant, Mildred Moore was charged along with defendants in count five of the indictment and charged solely in counts seven and eight. She is not a respondent here.

on the corner. Metz watched Moore go into the jewelry store. She was there less than a minute and came out carrying a black plastic bag. She proceeded on Watchung Avenue, now going southbound. Meanwhile, S.L. turned around and also was proceeding southbound on Watchung Avenue, but looking back as if she and Moore were going to "re-group."

Metz believed that Moore just had purchased synthetic cannabinoid. This was based on prior information he had from a confidential informant, who said it was being sold from the store, an inter-departmental memo that reported a juvenile said he purchased synthetic cannabinoid there, and similar information from his direct supervisor. Metz requested that nearby units stop Moore and investigate. She was found to be in possession of synthetic cannabinoid and was arrested. Moore admitted purchasing the drug from the jewelry store.

After speaking with his supervisor, Acting Lieutenant Christopher Sylvester, Metz "secure[d] the store to ensure no one went back," and to ensure that "no evidence could be destroyed or concealed." When he entered the store, Metz noticed a sweet smell, which he believed was synthetic cannabinoid based on his experience from past investigations. Defendants Hamade and Melendez were both standing behind a counter. Their niece, who was about fourteen or fifteen, was in the backroom. Another male was

cleaning the glass display cases. Some displays included jewelry, but others contained drug paraphernalia and weapons, including expandable batons, a stun gun and gravity knives.

Hamade told Metz that he was the owner of the store and that Melendez was the manager. Metz explained that he was conducting a narcotics investigation and advised them that no one could enter or leave the store. He asked Hamade for consent to search the store, explaining that if Hamade did not consent, the police would attempt to obtain a search warrant. Other police arrived, including Acting Lieutenant Sylvester. When Hamade did not consent to a search, Sylvester contacted an assistant prosecutor for approval to apply for a search warrant, and Metz left to prepare the search warrant paperwork.

Sylvester testified he did not threaten defendants, saying only that "with the search warrant anybody in the store may be arrested." He said Hamade became "cooperative" after realizing the officers "weren't bluffing" about obtaining a warrant and said either "fuck it" or "forget about it," "I'll sign the paper" and then signed the consent to search form.

Metz testified he was only gone a short time when Sylvester called to advise him that Hamade consented to a search of the premises. Metz returned to the store. Melendez handed synthetic cannabinoid to the officers from behind the counter; other

cannabinoid was found in the back of the store. Most of the cannabinoid was commercially packaged in foil under the brand name Scooby Snacks, like the package Moore had in her possession when she was arrested. The police seized a total of 5000 grams of synthetic cannabinoid.

Hamade testified that he knew he did not have to consent to the search. However, he said he was told several times that if he did not sign the consent form, the police were going to request a search warrant and, if obtained, then turn his niece over to juvenile authorities, call immigration on the fourth individual, and "take everything in the store." He sold toys, incense, body oils and hookahs. The store was his "life savings" and he "didn't want it to go."

The trial court granted defendants' motion to suppress the synthetic cannabinoid. Although the trial court believed that defendants had exaggerated their testimony, it found that "some version" of potential repercussions was told to Hamade by the officers. The court noted that the comments by the police about what would happen to the niece and to the fourth individual were "designed to bring pressure on Hamade to consent." The court assessed the factors set forth in State v. King, 44 N.J. 346 (1965), finding that Hamade's consent to the search was not voluntary. In addition, the court found there was "insufficient"

information to establish probable cause for a search warrant and that the police lacked a reasonable, articulable suspicion when they stopped Moore.

The State appeals the suppression order, claiming that Hamade gave knowing and voluntary consent to search. Even if the search were unlawful, the State contends the evidence should have been admissible under the inevitable discovery doctrine.

II

Our review of the denial of a suppression motion is limited. State v. Handy, 206 N.J. 39, 44 (2011). We review a motion judge's factual findings in a suppression hearing with great deference. State v. Gonzales, 227 N.J. 77, 101 (2016). 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). We defer "to those findings of the trial judge which are substantially influenced by [the] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

We owe no deference, however, to the trial court's legal conclusions or interpretation of the legal consequences that flow

from established facts. Our review in that regard is de novo. State v. Watts, 223 N.J. 503, 516 (2015).

Both the federal and State constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "[A] warrantless search is presumptively invalid," Brown v. State, 230 N.J. 84, 100 (2017) (citation omitted) (quoting Gonzales, 227 N.J. at 90), "unless [the search] falls within one of the few well-delineated exceptions to the warrant requirement." Ibid. (alteration in original) (citations omitted) (quoting State v. Maryland, 167 N.J. 471, 482 (2001)). "[T]he State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure 'falls within one of the few well-delineated exceptions to the warrant requirement.'" Elders, 192 N.J. at 246 (quoting State v. Pineiro, 181 N.J. 13, 19-20 (2004)).

The consent to search is a well-recognized exception. State v. Domicz, 188 N.J. 285, 305 (2006). Consent must be voluntarily given. However, it can "not be coerced, by explicit or implicit means, by implied threat or covert force." Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973). "[T]he proper analytical framework is whether a person has knowingly waived his right to refuse to consent to the search." Domicz, 188 N.J. at 308. The

burden is on the State to prove that consent was voluntary. State v. Johnson, 68 N.J. 349, 354 (1975).

To determine if consent was coerced, the court must examine the "surrounding circumstances." Schneckloth, 412 U.S. at 229. "Voluntariness is a question of fact to be determined from all the circumstances." Id. at 248-49. Under the State constitution, an essential element in determining whether consent is voluntary is proof that an individual was aware of the right to refuse. Johnson, 68 N.J. at 353-54.

In King, 44 N.J. at 352-53, the Court identified a non-exclusive list of factors to consider in evaluating if a defendant's consent was voluntary or coerced, cautioning, "the existence or absence of one or more of the . . . factors is not determinative of the issue." The factors that tend to show voluntariness of a consent include: "(1) that consent was given where the accused had reason to believe that the police would find no contraband; (2) that the defendant admitted his [or her] guilt before consent; [and] (3) that the defendant affirmatively assisted the police officers." Id. at 353 (citations omitted). The factors that tend to show that consent was coerced include:

(1) that consent was made by an individual already arrested; (2) that consent was obtained despite a denial of guilt; (3) that consent was obtained only after the accused had refused initial requests for consent to

search; (4) that consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered; [and] (5) that consent was given while the defendant was handcuffed.

[Id. at 352-53 (citations omitted).]

Here, "[t]he trial court had the 'feel of the case' [and] the opportunity to make observations of the witnesses." Domicz, 188 N.J. at 309 (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). The record supported the trial court's findings that the police discussed the repercussions of obtaining a search warrant with defendants. Sylvester said that everyone would be arrested and that none of the people there were free to leave the premises. Hamade refused consent for forty minutes, a period of time the trial court considered "substantial." Nonetheless, he consented even though, as the judge found, defendants "certainly" had to be aware of the drugs in light of the quantity that was seized. Hamade explained he was concerned for his niece, who might be taken into custody, for the fourth person who might have immigration issues, and for the disposition of all of his property in the store.

Predicated upon our decision that the trial court properly held that the State failed to sustain the validity of the search based upon consent, we do not need to address the determination

that there was insufficient probable cause to obtain a search warrant.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION