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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2431-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RON D. SANDERS, a/k/a TRYSHAWN EACCO, DESMOND MADISON, DESMOND MASISON, DARELL NELSON, JASMIRE NELSON, ZYRON NELSON, DYRELL OVERTON, ROGEA OVERTON, DESMOND PARHAM, TARIQ PARHAM, RON SANDER, TRISHAWN SANDERS, and ZYRON SANDERS,

Defendant-Appellant.

Submitted March 6, 2018 – Decided March 16, 2018

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 13-12-1011.

Joseph E. Krakora, Public Defender, attorney for appellant (Joshua D. Sanders, Assistant Deputy Public Defender, of counsel and on the letter brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Adam D. Klein, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

In this appeal, we consider defendant's argument that the trial court erred in denying his motion to suppress evidence seized from a residence he shared with M.P., who consented to the search. The record is unclear about the consent given because of the lack of findings about the impact of the principles outlined in Georgia v. Randolph, 547 U.S. 103 (2006) and State v. Coles, 218 N.J. 322 (2014). Consequently, we remand for further findings without reaching defendant's argument that the sentence imposed was excessive.

The record reveals defendant was charged with a number of drug offenses and an eluding offense in one indictment, and other drug offenses in a second indictment. Defendant twice moved for the suppression of evidence regarding the first indictment; he succeeded in obtaining suppression of an out-of-court identification but failed to obtain a bar to the State's use of evidence seized from his residence. He also succeeded in defeating the State's motion to permit the admission of evidence under N.J.R.E. 404(b). With the disposition of these applications, defendant agreed to plead guilty to three counts of the first indictment and one count of the second, which we renumber for the reader's convenience:

> (1) third-degree possession of a controlled dangerous substance (CDS) with intent to distribute on or within 1000 feet of school property, N.J.S.A. 2C:35-7;
>
> (2) second-degree eluding, N.J.S.A. 2C:29-2(b);
>
> (3) third-degree CDS possession with the intent to distribute, N.J.S.A. 2C:35-5(b)(3); and
>
> (4) third-degree CDS possession with the intent to distribute, N.J.S.A. 2C:35-5(b)(3).

The judge sentenced defendant to: an eight-year prison term, subject to a forty-two-month period of parole ineligibility, on the renumbered first count; a seven-year term without a parole ineligibility period on the second; a five-year term with a thirty-month period of parole ineligibility on the third; and a five-year term with a thirty-month period of parole ineligibility on the fourth. All terms were ordered to run concurrently with each other and with other unrelated sentences, except the judge ordered that the five-year term on the third count run consecutively to the eight-year term on the first count. In sum, the judge imposed an aggregate prison term of thirteen years, subject to a six-year period of parole ineligibility.

Defendant appeals, arguing:

> I. THE WARRANTLESS ENTRY AND SEARCH WERE NOT JUSTIFIABLE UNDER A THEORY OF THIRD-PARTY CONSENT, THEREBY VIOLATING [DEFENDANT'S]

RIGHT UNDER U.S. CONST. AMENDS. IV, XIV; N.J. CONST. (1947) ART. I, PAR. 7.

II. [DEFENDANT'S] SENTENCE IS EXCESSIVE, UNDULY PUNITIVE, AND MUST BE REDUCED.

We do not reach the argument asserted in Point II because we find it necessary to remand for further proceedings regarding the arguments posed in Point I, to which we now turn.

After arresting defendant, police approached his residence. At a suppression hearing, testimony was offered that M.P., who lived there with defendant,[1] consented to the search. Armed only with this consent, police uncovered CDS in the residence. Defendant later moved to suppress that evidence because the State lacked a search warrant and because — defendant argues — consent was not freely or constitutionally given.

With regard to consent searches of the home, the Supreme Court recognized, in Randolph, 547 U.S. at 121, that when "a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search." In Coles, 218 N.J. at 338, our Supreme Court restated this constitutional principle in the following way: "when faced with the circumstances of a present and objecting co-

[1] Defendant and M.P. also have a child together.

occupant, it is objectively unreasonable for police to rely on the consenting occupant."

Both Courts recognized the potential for police interference with a defendant's ability to object. The Randolph Court held that "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," the search may be deemed objectively reasonable. Randolph, 547 U.S. at 121; see also Coles, 218 N.J. at 339. Later, the Supreme Court of the United States determined that when an occupant is absent due to a "lawful" detention or arrest, he stands in the same place as an occupant who is absent for any other reason. Fernandez v. California, 571 U.S. ___, 134 S. Ct. 1126, 1135 (2014). Our Supreme Court restated that principle as upholding another: "police responsibility for [an] unlawful detention or removal of a tenant who was prevented from being present at the scene to voice [an] objection to the search is not equivalent to other neutral circumstances causing the defendant's absence." Coles, 218 N.J. at 340.

Defendant was arrested and seated in a police car outside his apartment building. The record, however, does not reveal whether defendant was asked for consent or given an opportunity to object. Indeed, the record does not reveal whether defendant actually objected. To be sure, defendant did not make the argument as

clearly as he makes it now — at the trial level he mainly asserted that M.P. did not freely or voluntarily consent — but the principles set forth in Randolph and Coles were known at the time of this suppression hearing in September 2014.[2] Moreover, even if, as the State argues, the Randolph argument was not raised at all in the trial court, the consent issue that was asserted was so infused by those principles that simple fairness compels a remand for further development of the record, including consideration of whether consent was validly given when defendant, who had a greater interest in objecting, was present.

Consequently, we remand for further consideration of the validity of M.P.'s consent in light of the circumstances surrounding defendant's presence and his ability pursuant to Randolph and Coles to withhold consent. In short, the central issue that was clearly put before the motion judge was whether the officers' actions were objectively reasonable under all the circumstances, and defendant's presence was a circumstance that may have impacted M.P.'s ability to validly and unilaterally consent to the search. We remand for the judge's consideration of the concepts outlined in Randolph and Coles when applied to defendant's motion to suppress the evidence seized from his

[2] Randolph was decided in 2006, and Coles was decided four months before the suppression hearing.

residence. Whether further evidence should be elicited, or to what extent, is left to the motion judge's sound discretion.

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