SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5247-16T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

BRIAN FARMER,

Defendant-Respondent.

Argued December 4, 2017 – Decided January 29, 2018

Before Judges Sabatino, Ostrer, and Whipple.

On appeal from an interlocutory order of Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 15-11-2054.

Monica do Outeiro, Assistant Prosecutor, argued the cause for appellant (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Monica do Outeiro, of counsel and on the brief).

Margaret McLane, Assistant Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Margaret McLane, of counsel and on the briefs).

Jane C. Schuster, Deputy Attorney General, argued the cause for amicus curiae Attorney

General of New Jersey (Christopher S. Porrino, Attorney General, attorney; Jane C. Schuster, of counsel and on the brief).

Tess Borden of the New York bar, admitted pro hac vice, argued the cause for amicus curiae American Civil Liberties Union of New Jersey Foundation (Tess Borden, Alexander R. Shalom, Edward L. Barocas and Jeanne M. LoCicero, on the brief).

PER CURIAM

On leave granted, the State appeals a June 21, 2017 interlocutory order of the trial court suppressing evidence recovered from defendant Brian Farmer's cell phone that implicated him in two homicide investigations. We affirm.

I.

On August 1, 2014, family members found sixty-one-year-old J.C.[1] and her ten-year-old foster daughter, V.R., dead in their apartment. Both were strangled.

From the outset, defendant, J.C.'s immediate relative, was a suspect. On August 8, 2014, after Detective Richard Chapman and Detective Ross Zotti interviewed defendant's daughter, defendant called and requested to speak with them. The detectives met defendant at a community resource center, and he agreed to accompany them to the Monmouth County Prosecutor's office to be interviewed.

[1] We use initials to protect the identities of the victims.

The detectives brought defendant to an interview room equipped with video and audio recording devices. Early in the interview, Detective Chapman asked defendant some background questions, including disclosure of his cell phone numbers. Defendant had two cell phones, which he described as an LG phone and a Virgin Mobile phone. Defendant was able to provide a cell phone number for one of his phones but not the other. Defendant and the officers discussed ways they could retrieve the missing cell phone number. Defendant said he "would get it for them." Detective Chapman advised defendant of his Miranda[2] rights, which defendant then waived. While defendant was signing the Miranda forms, Detective Chapman asked defendant if he was still trying to find the number and suggested defendant go to his contacts or settings on the cell phone to find the number. Defendant was apparently unsuccessful.

After discussing various other topics, Detective Chapman said, "[l]et me see if I can get somebody to work on that phone." Later, the following exchange took place:

> Detective Chapman: There's two things. We have someone that can get your number but we also want to get a consent from you for cell phone records. Okay. That's something that we want to do while we're here. That's a part of something that we would like to do. But also you're here to clear your name. That's

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

> something that we want to do to clear your name.
>
> Defendant: All right.
>
> Detective Chapman: Okay. We have to be thorough. Okay. We have to be thorough. We have to go over, you know, every bit and piece. You watch TV and that's always something that's one of the first things they have to do. Okay.
>
> Defendant: All right.

The officers presented defendant with a "Monmouth County Consent To Search Electronic Evidence" form for him to execute. Detective Chapman asked defendant about his employment status. He then suddenly turned the conversation back to defendant's consent, explaining the search, and reading from the consent form:

> Detective Chapman: Again this is for the phone. . . . We just want to get your phone and also going to do our thing as far as looking through any records, because this is going to show where we need to be. I, Brian Farmer, hereby authorize the [police] . . . to take the phone and conduct a complete search of the following devices and any and all internal and/or attached storage. Anything that we need, we're just focusing on this. Anything else, we could care about. We're worried about in the death of [J.C.] and [V.R.].
>
> Defendant: Uh-huh.
>
> Detective Chapman: Okay? So it's regarding our investigation into this incident. Anything else, I'm not concerned with that. Okay?

After discussing the types of phones and defendant's eyeglasses, the following exchange transpired.

> Detective Chapman: Now we're gonna do both of the phones. Is that okay with you?
>
> Defendant: What?
>
> Detective Chapman: This phone and that phone.
>
> Defendant: Oh, what you mean like, um - -
>
> Detective Chapman: We're gonna check the records.
>
> Defendant: I don't care.
>
> Detective Chapman: Oh, okay. All right.
>
> Defendant: I have no problem with that.

Detective Chapman then read defendant the consent form. Pertinent to this appeal, the consent form stated:

> I understand that the search will encompass all data and/or information stored in this specific electronic devices, including deleted items that may be recovered during the examination process, invisible files, password-protected files and encrypted files.

While signing the consent form, defendant asked, "but I thought you just wanted the phone records?" Detective Chapman replied, "Yeah, that's . . . what's in the phone . . . But in order to get to those records, these are the things that we're going to be looking at. These are part of the file." He further explained, "You're saying you're agreeing to this and are allowing us to do

the search of your phone records.[3] Okay." There was no discussion of photographs, deleted, encrypted or otherwise, contained in the phone and no mention of photographs in the consent form. Defendant signed the consent form and handed over his phones.

The phones were given to an officer in the computer crimes unit, who conducted a thorough search and found deleted photographs of V.R. In some of these photographs, V.R. was naked or partially naked, and posing in a sexually explicit manner.

Detective Chapman was informed of the photographs, returned to the interview room, and confronted defendant with printed copies. Defendant then invoked his right to counsel, and the interrogation immediately halted.

Soon thereafter, other officers arrived to transport defendant to the Long Branch Police Department. While en route, defendant asked to speak with the detectives again. The officers transported defendant to the Monmouth County Prosecutor's satellite office in Asbury Park.

Defendant explained his version of the events leading up to the deaths of J.C. and V.R. According to defendant, J.C. caught V.R. posing in a sexually explicit manner for him. Defendant then

[3] After reviewing the record, the trial court determined that it is unclear whether Detective Chapman said "phone and records" or "phone records."

ran out of the apartment, heard J.C. and V.R. fighting inside, and returned in order to beg J.C. to not report him to the police. Upon re-entering the apartment, he observed V.R. on the floor "gurgling." Defendant "snapped," struck J.C. with an object, choked her, and covered her lifeless body with a blanket.

Following an indictment on numerous charges, including two counts of first-degree murder, N.J.S.A. 2C:11-3(a), defendant moved to suppress: (1) certain oral statements made under Miranda; and (2) evidence obtained during the warrantless search of his cell phones.

After hearing testimony and oral argument, and watching video recordings of the interrogations, on June 12, 2017, the Honorable David F. Bauman, J.S.C., denied defendant's Miranda motion but granted his motion to suppress evidence from the warrantless search of the cell phones.

In a well-founded supplemental written opinion, Judge Bauman found defendant voluntarily consented to the search of his cell phones, however, "although defendant knew he could refuse consent, defendant was not reasonably apprised of the geographic scope of the search. Therefore, any consent given was not knowing." The judge further found "the failure of detectives to clarify the meaning of the term phone records and the overbroad search

conducted under the auspices of that ambiguous term contributed to an unknowing consent to the scope of the search."

The judge noted on three occasions Detective Chapman expressly stated the search was limited to defendant's "phone records," and defendant, on at least two occasions, attempted to clarify the meaning of "phone records." He found when defendant attempted to clarify the meaning of "phone records," Detective Chapman's reply was "disingenuous." The judge considered the definition of "phone records" to comprise "meta data" or call logs, and even if "phone records" is an ambiguous term, the "detective's failure to clarify the meaning of phone records limits the scope of the search to the colloquial definition of phone records." Judge Bauman concluded the information was obtained illegally and suppressed the photographs and the derivative confession.

The State moved for leave to appeal the suppression order, which we granted on August 7, 2017. On appeal, the State argues the trial court erred in suppressing the cell phone search and all evidence obtained derivatively. We invited the Attorney General of New Jersey and the American Civil Liberties Union of New Jersey to appear as amicus curiae and both submitted briefs and participated in oral argument.

II.

"Appellate courts reviewing a grant or denial of a motion to suppress must defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015). "The traditional deference given to factual findings of the trial court has deep roots in our jurisprudence." S.S. v. State, 229 N.J. 360, 374 (2017). Our Supreme Court has "cautioned that a trial court's factual findings should not be overturned merely because an appellate court disagrees with the inferences drawn and the evidence accepted by the trial court or because it would have reached a different conclusion." Ibid. (citing State v. Elders, 192 N.J. 224, 244 (2007)). A trial court's factual findings should only be disturbed if they are "so clearly mistaken that the interests of justice demand intervention and correction." State v. Gamble, 218 N.J. 412, 425 (2014) (quoting Elders, 192 N.J. at 244).

The United States and New Jersey Constitutions protect individuals against unreasonable searches and seizures. U.S. Const., amend IV; N.J. Const., art. I, ¶ 7. "Warrantless seizures and searches are presumptively invalid as contrary to the United States and the New Jersey Constitutions." State v. Pineiro, 181 N.J. 13, 19 (2004) (citation omitted). To overcome this

presumption, the State must show the search falls within one of the well-recognized exceptions to the warrant requirement. State v. Maryland, 167 N.J. 471, 482 (2001) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)). Consent is one such exception. State v. Hampton, 333 N.J. Super. 19, 27 (App. Div. 2000); see also Bustamonte, 412 U.S. at 219.

"Under our State Constitution, we have heightened requirements to ensure that the waiver of the right to refuse a consent search is voluntarily and knowingly exercised." State v. Domicz, 188 N.J. 285, 307 (2006); see State v. Carty, 170 N.J. 632, 639 (2002) ("[A]ny consent given by an individual to a police officer to conduct a warrantless search must be given knowingly and voluntarily.").

The trial court found defendant voluntarily consented to a search but not to the full extent of the search that was subsequently conducted. The judge determined defendant only had consented to a search of his "phone records" — not the entire contents of the phones. The State argues defendant knew he had the right to refuse to give consent, and thus the consent was voluntary and knowing. Further, the State argues defendant's lack of knowledge about what the officers were actually seeking does not undercut the voluntary consent given when defendant signed the form.

We agree the generic consent form signed by defendant is so broadly phrased that, if the surrounding circumstances were ignored, it would have literally permitted the extensive search of the phone undertaken. However, the court determined Detective Chapman's oral comments gave defendant reason to believe the search was limited to less than what was outlined in the unwritten consent form.[4]

"There is no question that the scope of a consent search is limited by the terms of its authorization." State v. Santana, 215 N.J. Super. 63, 72 (App. Div. 1987) (citing Walter v. United States, 447 U.S. 649, 656-57 (1980)). The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness: "What would the typical reasonable person have understood by the exchange and the person granting the consent?" Florida v. Jimeno, 500 U.S. 248, 251 (1991).

Here, Judge Bauman engaged in the requisite fact-sensitive inquiry of whether it was reasonable for Detective Chapman to believe the scope of defendant's consent included searching all

[4] We note, the consent form makes no reference to photographs. Perhaps if it did, utilizing a standard of objective reasonableness, defendant's argument might be less compelling. See Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization.").

photographs stored on the phones. He soundly determined that the circumstances of the request implicitly limited the scope of the consent. At the outset, the detectives stated the purpose of the search only was to ascertain defendant's phone number. Defendant was repeatedly told the search would be restricted to "phone records." The judge found that when defendant tried to clarify his understanding of the scope, the detective's explanations were disingenuous and misleading. That conclusion has ample support in the record, and we do not second-guess it.

Accordingly, because there is credible evidence in the record to support the trial court's determination that defendant did not authorize the all-encompassing search of his cell phones, we affirm the trial court's order suppressing the search and all evidence derivatively obtained. Our ruling, based on the discrete circumstances presented here makes it unnecessary for us reach broader constitutional questions that may arise in other settings involving cell phone searches.

Affirmed.