SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5300-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MODESTO ALVAREZ,

Defendant-Appellant.

Submitted October 25, 2017 – Decided February 22, 2018

Before Judges Alvarez and Currier
(Judge Nugent concurring).

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-12-2869.

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

Robert D. Laurino, Acting Essex County Prosecutor, attorney for respondent (Tiffany M. Russo, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Modesto Alvarez appeals the denial of his motion to suppress evidence, after which he entered guilty pleas to controlled dangerous substance (CDS) offenses. He also appeals the sentence, which the State concedes included an illegal term of parole ineligibility on two counts of simple possession. We vacate the decision denying the motion, remand for a suppression hearing to be conducted, and vacate defendant's guilty plea.

The sequence of events that resulted in defendant's arrest are undisputed and described by the arresting officer in the police incident report. That report was the only proof presented to the Law Division judge, who decided the matter based solely on the police report and the parties' written briefs, because she concluded there were no material facts in dispute. See R. 3:5-7(c).

At approximately 3:30 in the afternoon on May 2, 2014, Newark police stopped a Honda Accord with heavily tinted windows for speeding. The report states that the officers were present in order to "address the increase in open air narcotics complaints, which have increased in recent days. The unit was further instructed to address all quality of life offenses." When asked

for his credentials, defendant, the driver, was unable to produce his driver's license.[1]

The report further states:

> DETECTIVES APPROACHED THIS VEHICLE FROM ALL SIDES WITH CAUTION DUE TO THE HEAVILY TINTED WINDOWS. ONCE AT THE DRIVER SIDE DOOR I MET WITH A VERY NERVOUS HISPANIC MALE. I NOW ASKED THE DRIVER LATER IDENTIFIED AS MODESTO ALVAREZ FOR HIS DRIVER CREDENTIALS, AFTER A FEW MINUTES NERVOUSLY LOOKING AROUND HE INFORMED ME THAT HE IS UNABLE TO FIND HIS DRIVER LICENSE. I NOW ASKED MR. MODESTO TO STEP OUT OF THE VEHICLE UNTIL HE WAS PROPERLY IDENTIFIED, AS HE STEPPED OUT OF THE VEHICLE I NOTICED HE HAD HIS LEFT HAND CLINCHED. AT THIS TIME FOR OFFICERS SAFETY I ASKED HIM TO OPEN HIS HAND AND HE COMPLIED, WHICH REVEALED A WHITE PLASTIC BAG WITH SEVERAL SMALL WHITE PILLS.

Defendant was charged with third-degree possession of a CDS, N.J.S.A. 2C:35-10(a), third-degree possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a)(1) and (b)(5), third-degree possession with intent to distribute a CDS on school property, N.J.S.A. 2C:35-7, and second-degree possession with intent to distribute a CDS on a public housing complex, N.J.S.A. 2C:35-7.1.

Rule 3:5-7(c) begins simply with the word "[h]earing," and says that "[i]f material facts are disputed, testimony thereon

[1] The report omits any mention of any request for either proof of insurance or a motor vehicle registration. We cannot discern if the omissions stem from the officer having failed to request them or the defendant's failure to produce them.

shall be taken in open court." In his trial brief, defendant's counsel requested "that a hearing be scheduled to resolve the Fourth Amendment issues flowing from the stop of the vehicle, the removal of the defendant from the vehicle and the warrantless search of the defendant."

We have been provided with only one motion transcript, dated September 21, 2015. It is titled "TRANSCRIPT OF MOTION DECISION." The proceedings begin with the judge stating:

> Thank you, okay. I have reviewed the submissions of counsel. In the present case it is the facts as I've determined them to be. The officers observed Mr. Alvarez speeding in his car. That car had heavily tinted windows. As such the officers had an articulable and reasonable suspicion that the driver was in violation of motor vehicle laws of the State. Once the stop occurred the officers noticed that Mr. Alvarez was acting nervously. And due to the heavily tinted windows they could not properly observe[] his movements. As a result he was asked to exit the vehicle. The defense does not -- in their offering of fact does not raise any material issues of fact, but puts forth particular fact -- put forth argument that ask for that inquiry as to more detail that is included in the police report.

The judge did not ask if counsel wished to comment on her decision to address the matter without a hearing. No objection was made by defense counsel. The judge did not refer to any off-the-record discussions that would have put counsel on notice that no testimony would be elicited from the officer, and that defendant

would not be afforded the opportunity to challenge the officer's version, through cross-examination, by his own testimony, or any other means. The judge did not mention any correspondence that would have alerted counsel to the fact the judge intended to decide the matter solely on the facts set forth in the police report, and the legal arguments found in the briefs. The judge summarily found that no material facts were in dispute, and she therefore proceeded without a hearing.

The judge, after canvassing the relevant caselaw, then says: "In the present matter the traffic stop was conducted in a high crime area and the officer could not adequately observe Mr. Alvarez in his car. There was a potential that criminal activity was afoot."

The judge added:

> In general there seems to be no dispute as to the facts in this case. A motion to suppress is not to be used as just another discovery device. State v. Hewins, 166 N.J. Super. 210 at 214 (Law Div. 1979) and the defense does not provide any counter facts.
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> However, the defense seeks answers to specific questions regarding the nervousness of Mr. Alvarez. Details of the conversation, which took place between the officers and the defendant and details regarding the clenched fist. All of these issues pertain to discovery. Based upon the lack of material, facts in dispute, and evidentiary hearing I do not find is warranted pursuant to Rule 3:5-7.

> It is only when a defendant's counterstatement places material facts in dispute than [sic] an evidentiary hearing is required. Here there are no facts of material dispute which warrant an evidentiary hearing. For the aforementioned reasons the evidentiary hearing is not going to be allowed in this case.

Next, the judge asked counsel if an order had been provided and about the status of the plea negotiations. Some days later, on October 19, 2015, the judge issued a written order denying the motion.

On April 22, 2016, defendant entered guilty pleas to two counts of third-degree possession of a CDS and one count of third-degree possession with intent to distribute a CDS in a school zone. The recommended sentence was an aggregate five years imprisonment subject to three years of parole ineligibility as required by the school zone statute. Through oversight, the same term of parole ineligibility was imposed on the two concurrent five-year terms for simple possession.

On appeal, defendant raises the following point for our consideration:[2]

> POINT I
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE. . . . IN THE

[2] The second point addresses the sentence, therefore we will not repeat it.

ALTERNATIVE, THE COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING ON THE MATTER.

Ordinarily we uphold a trial court's factual findings so long as they are supported by sufficient credible evidence. State v. Hinton, 216 N.J. 211, 228 (2013); see also State v. Elders, 192 N.J. 224, 243 (2007). "When . . . we consider a ruling that applies legal principles to the factual findings of the trial court, we defer to those findings but review de novo the application of those principles to the factual findings." Hinton, 216 N.J. at 228 (citing State v. Harris, 191 N.J. 391, 416 (2004).

It is well-established that a police stop of a moving vehicle constitutes a seizure of the occupant, and therefore falls within the purview of the Fourth Amendment and Article I, Paragraph 7, of the New Jersey Constitution. State v. Baum, 199 N.J. 407, 423 (2009). Directing a driver to step out of his or her vehicle constitutes a seizure within the meaning of the Fourth Amendment because the person's liberty has been restricted. See State v. Davis, 104 N.J. 490, 498 (1986).

New Jersey has adopted the per se rule announced in Pennsylvania v. Mimms, 434 U.S. 106 (1977), authorizing officers to order drivers out of a vehicle incident to a lawful stop for a traffic violation. See State v. Smith, 134 N.J. 599, 618 (1994).

Thus, the officer's order that defendant step out of his vehicle, in light of the unchallenged motor vehicle stop, is unobjectionable. No impropriety occurred in the initial stop of the speeding vehicle, or the request that defendant step out of the car since he was unable to produce his driver's license.

The order that defendant open his hand, however, is a separate event which must be subjected to Fourth Amendment scrutiny. Such scrutiny is not possible absent the officer's testimony regarding his observations of defendant's "nervousness."

The rationale behind our deferential review of a trial court's findings of fact as a result of a suppression hearing is that only the trial judge has the benefit of hearing and seeing the witnesses and to have a "feel" for the case. Elders, 223 N.J. at 516. That enhanced opportunity did not occur here. Not only was defendant denied the means by which to meaningfully challenge through cross-examination the officer's statement regarding defendant's nervousness, defendant was not afforded the opportunity to argue the legal points he raised in his brief.

The officer's characterization of defendant as nervous was the subjective underpinning for his decision to order defendant to open his hand, and for the judge's finding that he was justified in doing so. Nothing in the incident report states this was a high crime area. We do not know where the stop occurred in

relation to the area that engendered the "open air narcotics complaints."

Nothing in the report connects defendant's nervousness — which might have been the result of the obvious, his inability to produce a valid driver's license — to concerns about officer safety. A clenched hand is not the same, for example, as a bulge in the waistband or pocket that might indicate the presence of a firearm.

The State contends that the directive that defendant open his hand was permissible based on the "realities" faced by law enforcement officers on a daily basis. That generality is not a legally sufficient justification for the search.

We give "appropriate deference . . . to an officer's experience in evaluating suspicious conduct and circumstances." State v. Love, 338 N.J. Super. 504, 507 (App. Div. 2001) (citation omitted). That deference is not equivalent to untested acceptance of an officer's judgments.

In Love, for example, security officers observed defendant riding his bicycle, parking it outside a casino, and entering the building. Id. at 505. There had been a number of purse snatchings in that area of the boardwalk a few months earlier. Ibid. One of the officers thought the purse snatcher's description matched Love's appearance. Id. at 505-06. As a result, when he returned

to his bicycle, Love was surrounded by security officers. Id. at 506. Shortly thereafter, police moved in, intending to detain the defendant until he "answered questions as to what he was doing and where he lived," although nothing untoward happened while he was in the casino. Ibid. When an officer told Love that he fit the description of someone wanted for a series of purse snatchings, he began to look nervous. Ibid.

The officer directed Love to place his hands on top of his head so he could be frisked for weapons. Ibid. He started to comply, but kept bringing his hands down despite being told repeatedly to keep them on top of his head. Ibid. The officers patted a belly bag around Love's waist, and Love brought his hands down. Ibid. The officer grabbed the handle of a gun in the belly bag and announced that he had seized a weapon, and Love began to struggle. Ibid.

As we said in Love, "[w]hile citizens must be assured that their personal integrity will not be violated by overzealous or unreasoned police actions, law enforcement officers must not be held to inflexible, unrealistic standards which compromise their safety or the safety of the general citizenry." Id. at 507. But that Love appeared "nervous" was of little consequence, because he was suddenly and without warning surrounded by a number of officers. Id. at 508. Love's nervousness was simply not connected

to officer safety. Ibid. Officer safety was the only reason the State proffered to justify the frisk. Ibid. The concern did not justify the pat down search. Ibid.

The police report in this case does not connect defendant's nervousness to any threat, or criminal activity, or even describe it. Only an evidentiary hearing would have definitively answered the question of whether directing defendant to open his clenched fist was indeed justified for officer safety or for any other reason. Decisions regarding the lawfulness of unwarranted searches, which are presumptively unreasonable, require a fact-sensitive inquiry. See State v. Shaw, 213 N.J. 398, 409 (2012). Such an inquiry was necessary here.

Vacated and remanded for a hearing.

Nugent, J.A.D., concurring.

Indicted for various CDS offenses, defendant moved before the trial court to suppress CDS police seized from his person after stopping him for speeding in a car with tinted windows. The issue presented on the suppression motion was whether police violated defendant's right to be free from unlawful searches and seizures by ordering him to open his clenched fist when he exited the car after failing to produce credentials. The State took the position that it was unnecessary for the court to take testimony because the material facts in the police report were undisputed. The trial court agreed and, based on the facts in the police report, denied defendant's motion.

On appeal, defendant argues, among other things, he was entitled to a hearing on his suppression motion. I disagree with the majority that the trial court erred in determining a hearing was unnecessary. In my view, we should decide this case on its merits on the record before us. My disagreement notwithstanding, defendant has requested a remand as alternative relief, and there is some precedent that supports a remand in cases — and I do not suggest this is such a case — where the State has not fully developed proofs that establish an exception to the warrant requirement. For these reasons, I concur with the decision to remand this matter.

The procedural requirements concerning suppression motions are clear. If a defendant moves to suppress evidence seized without a warrant, "the State shall, within 15 days of the filing of the motion, file a brief, including a statement of the facts as it alleges them to be, and the movant shall file a brief and counter-statement of facts no later than three days before the hearing." R. 3:5-7(b). "If material facts are disputed, testimony thereon shall be taken in open court." R. 3:5-7(c); accord, State v. Kadonsky, 288 N.J. Super. 41, 45-46 (App. Div. 1996).

Thus, "[i]t is only when the defendant's counter-statement places material facts in dispute that an evidentiary hearing is required." State v. Green, 346 N.J. Super. 87, 90 (App. Div. 2001) (citing State v. Hewins, 166 N.J. Super. 210, 213-15 (Law Div. 1979), aff'd, 178 N.J. Super. 360 (App. Div. 1981)). "The mere allegation of a warrantless search, with the attendant burden of proof on the State to justify same, does not place material issues in dispute, nor does defendant's assertion that he denies the truth of the State's allegations." Id. at 91 (citing Hewins, 166 N.J. Super. at 214).

Here, in response to the State's brief, defendant asserted:

> The issues before this [c]ourt can be found within two paragraphs of the Incident Report:
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> > DETECTIVES APPROACHED THIS VEHICLE FROM ALL SIDES WITH CAUTION DUE TO

> THE HEAVILY TINTED WINDOWS. ONCE AT THE DRIVER SIDE DOOR I MET WITH A VERY NERVOUS HISPANIC MALE. I NOW ASKED THE DRIVER LATER IDENTIFIED AS MODESTO ALVAREZ FOR HIS DRIVER CREDENTIALS. AFTER A FEW MINUTES NERVOUSLY LOOKING AROUND HE INFORMED ME THAT HE IS UNABLE TO FIND HIS DRIVER LICENSE. I NOW ASKED MR. MODESTO TO STEP OUT OF THE VEHICLE UNTIL HE WAS PROPERLY IDENTIFIED. AS HE STEPPED OUT OF THE VEHICLE I NOTICED HE HAD HIS LEFT HAND CLINCHED. AT THIS TIME FOR OFFICERS SAFETY I ASKED HIM TO OPEN HIS HAND AND HE COMPLIED, WHICH REVEALED A WHITE PLASTIC BAG WITH SEVERAL SMALL WHITE PILLS.
>
> ACTOR MODESTO ALVAREZ IMMEDIATELY BLURTED "IT'S ONLY ROXIES" WHICH IS THE STREET TERM FOR OXYCODONE. HE WAS ASKED IF HAD A PRESCRIPTION FOR THESE PILLS HE STATED "NO", HE WAS IMMEDIATELY ADVISED OF HIS MIRANDA RIGHTS AND PLACED UNDER ARREST. DETECTIVE J. RUSA COMPLETED SECONDARY SEARCH OF THIS ACTOR FOR FURTHER POSSIBLE CONTRABAND, AND DISCOVERED MR. ALVAREZ HAD A LARGE ADDITIONAL AMOUNT OF PRESCRIPTION LEGEND PILLS THAT HE ATTEMPTED [TO] CONCEAL INSIDE OF A BLACK GLOVE WHICH WAS FOUND IN HIS REAR LEFT PANTS POCKET. MR. ALVAREZ WAS PLACED INTO REAR OF POLICE VEHICLE AND HIS VEHICLE WAS PARKED AT THIS LOCATION AT HIS REQUEST. MR. ALVAREZ WAS TRANSPORTED TO THE 2ND PRECINCT COMMAND WHERE HE WAS SLATED ACCORDINGLY.

In his trial brief, defendant asserted a hearing was necessary because the police report stated merely that defendant appeared

to be "very nervous." Defendant further asserted there was no indication of how the driver appeared nervous, or whether he was sweating profusely, twitching or shaking, pale or flush. Defendant asked rhetorically, "[d]id the defendant refuse to look the officer in the eyes." Defendant argued that without more detail as to what constituted nervousness, "the reliability and validity of the observation cannot be tested and is in question."

When defendant's motion came before the court for argument, the court noted it had received the parties' briefs and asked counsel, "Is there any additional information or arguments that you wish to put on the record pertaining to this matter?" Defense counsel replied that "anything . . . I would argue would . . . already be in the brief. So I will spare the [c]ourt . . . repeating what's already been set forth[.]"

The prosecutor stated he too would rely upon the State's moving papers. He then informed the court: "The only thing I would add was that there . . . is no - - there is no[] fact issue here, Your Honor." Defense counsel remained silent, not disputing the State's assertion. The court then decided the motion based upon the facts in the police report, and denied it.

On appeal, defendant asserts the State failed to sustain its burden of proving the constitutionality of the officer's order to defendant to open his hand. The majority declines to address this

issue. Alternatively, defendant argues that a hearing was necessary because his counter-statement of the case raised contested issues of fact, namely, "that 'a left hand clenched' resulted in the officer fearing for his safety." Contrary to defendant's assertion, this legal issue is not a disputed fact. Defendant does not dispute that he exited the car with his left hand clenched.

The majority states defendant was "denied the means by which to meaningfully challenge through cross-examination the officer's statement regarding defendant's nervousness," and was "not afforded the opportunity to argue the legal points he raised in his brief." I disagree that suppression motions exist to afford defendants the opportunity to challenge through cross-examination statements in a police report. That concept appears contrary to our holding in Green, namely, a "defendant's assertion that he denies the truth of the State's allegations" does not place material issues in dispute. 346 N.J. Super. at 91. Moreover, the record reveals the trial court afforded defendant the opportunity to argue the legal points he raised in his brief, but defendant declined to do so.

The majority emphasizes, "[t]he police report in this case does not connect defendant's nervousness to any threat, or criminal activity, or even describe it. Only an evidentiary hearing would

have definitively answered the question of whether directing defendant to open his clenched fist was indeed justified for officer's safety or for any other reason." Ante at 10-11. I fail to discern how the officer's testimony at an evidentiary hearing, either that he cannot recall the specifics of defendant's nervousness, or, for example, defendant was sweating profusely, would shed additional light on the issue of the officer's safety or somehow connect defendant's nervousness to a threat to the officer's safety. If, as the majority intimates, defendant's nervousness was not a pertinent factor in the analysis of the officer's safety, then this matter should be decided on the remaining totality of circumstances, including the car's tinted windows and defendant's inability to produce credentials; and whether given those circumstances, the officer's order was unreasonable.

The State was willing to rest its case on the police report. The majority concludes that only an evidentiary hearing would have definitively answered the question of whether directing defendant to open his clenched fist was indeed justified for officer's safety or for any other reason. The State's decision to rest its case on the police report and the majority's implicit determination the current record does not justify the "search" raise another, albeit subtler issue. Warrantless searches are presumed invalid. State

v. Gamble, 218 N.J. 412, 425 (2014). The presumption of invalidity of a warrantless search "is overcome only if the search falls within one of the specific exceptions created by the United States Supreme Court." State v. Patino, 83 N.J. 1, 7 (1980).

> These exceptions may be found in such Supreme Court decisions as New Jersey v. T.L.O., 469 U.S. 325 (1985) (the 'regulatory authority' exception); United States v. Jacobsen, 466 U.S. 109 (1984) (the 'third party intervention' exception); Thompson v. Louisiana, 469 U.S. 17 (1984) (the 'emergency' exception); Texas v. Brown, 460 U.S. 730 (1983) (the 'plain view' exception); South Dakota v. Opperman, 428 U.S. 364 (1976) (the 'inventory search' exception); United States v. Santana, 427 U.S. 38 (1976) (the 'hot pursuit' exception); Cady v. Dombrowski, 413 U.S. 433 (1973) (the 'community caretaking' exception); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (the 'consent search' exception); Chimel v. California, 395 U.S. 752 (1969) (the 'search incident to arrest' exception); Lewis v. United States, 385 U.S. 206 (1967) (the 'deceptive guest' exception); Carroll v. United States, 267 U.S. 132 (1925) (the 'automobile' exception).
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> [State v. Hill, 115 N.J. 169, 173-74 (1989).]

"The State bears the burden of proving that the warrantless search is justified by one of those exceptions." Gamble, 218 N.J. at 425 (citing State v. Bogan, 200 N.J. 61, 73 (2009)).

We presume that when reviewing police investigative material in preparation for presenting evidence at a suppression hearing, prosecutors will run through a mental checklist of the warrant

exceptions in order to make the best record possible for the trial court and appellate courts. But assuming for purposes of argument a prosecutor overlooks either pertinent evidence or a viable exception, and thus fails to sustain the burden of proving an exception to the warrant requirement, should the State be permitted to proceed at a second hearing and fill in the gaps? Stated differently, should the State have more than one opportunity to sustain its burden of establishing an exception to the warrant requirement? If, as the majority intimates, the current record is inadequate to establish the State has carried its burden of sustaining the warrantless search — a proposition with which I do not necessarily agree — then is it appropriate to provide the State with a second opportunity to do so?

There is some authority that suggests it is not inappropriate to remand under such circumstances. See State v. Robinson, 228 N.J. 529, 551-53 (2017) (determining that a police officer's seizure of a handgun from an automobile did not fall within the protective sweep or community-caretaking exceptions, but due to an inadequate suppression hearing record, remanding for the trial court to afford the State an opportunity to meet its burden to prove the weapon inevitably would have been discovered by lawful means). Although the Robinson Court did not discuss its decision to remand in the context of the State getting a second chance to

sustain its burden of proving an exception to the warrant requirement, the decision appears to provide support for a remand in such instances. For that reason, and because defendant has requested a remand as alternative relief — not for the reasons discussed by the majority — I concur with the decision to remand for the purpose of expanding and clarifying the motion record.