SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0723-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DANIEL BANNISTER, JR.,
and CATHERINE BANNISTER,

Defendants-Respondents.

———————————————————

Argued March 22, 2022 – Decided May 2, 2022

Before Judges Currier and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 19-10-0567.

Michael Grillo, Assistant Prosecutor, argued the cause for appellant (Angelo J. Onofri, Mercer County Prosecutor, attorney; Laura Sunyak, Assistant Prosecutor, of counsel and on the brief).

Jeffrey G. Garrigan argued the cause for respondent Daniel Bannister, Jr. (Cammarata, Nulty, & Garrigan, LLC, attorneys; Jeffrey G. Garrigan, on the brief).

Edward J. Hesketh, attorney for respondent Catherine Bannister, joins in the brief of respondent Daniel Bannister, Jr.

PER CURIAM

On leave granted, the State appeals from the trial court's September 30, 2021 order granting defendants' motion to suppress evidence retrieved from defendants' cell phones. The trial court found law enforcement did not have probable cause to seize the phones without a warrant because the detective did not testify during the suppression hearing that he believed he would find evidence of a crime on the phones.

The detective presented a number of facts to support a "well-grounded suspicion" that a crime had been committed. State v. Johnson, 171 N.J. 192, 214 (2002) (quoting State v. Sullivan, 169 N.J. 204, 211 (2001)). A review of his testimony regarding the information known to him, in light of the totality of the circumstances, shows the detective had the requisite probable cause to seize the phones. Therefore, we reverse and remand to the trial court for a determination of whether the State demonstrated exigency to seize the phones prior to the issuance of a warrant.

I.

After the death of their infant daughter, Daniel[1] was charged in an indictment with first-degree murder, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:11-3(a)(2); Catherine was charged with second-degree reckless manslaughter, N.J.S.A. 2C:11-4(b)(1). Both defendants were charged with second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2). Defendants moved to suppress the evidence found following a search of their cell phones. We derive our facts from the testimony elicited during the suppression hearing.

On December 5, 2018, detectives from the Mercer County Prosecutor's Office began investigating the circumstances surrounding the hospitalization of defendants' three-month-old daughter, H.B. Earlier that day, H.B. was taken by ambulance to the hospital, and medical personnel contacted the prosecutor's office after finding the infant's injuries suspicious. Detective Roberto Reyes, assigned to the homicide task force, was the lead detective on the investigation. He was the State's sole witness during the two-day suppression hearing.

[1] Because defendants share a surname, we refer to them by their first names for the ease of the reader.

When Reyes arrived at the hospital, he spoke to Dr. Jennifer Owensby, who told him that H.B. had suffered several skull fractures. In addition, there was evidence of rib fractures, which were "in the stages of healing," meaning they were older injuries. Dr. Owensby indicated the injuries were consistent with child abuse and likely were sustained within the prior two weeks. Dr. Owensby further told Reyes that H.B.'s vomiting was likely a symptom from her injuries.

Reyes asked Dr. Owensby whether defendants had provided her with any information about their daughter's injuries. She stated that defendants told her their two-year-old son had hit H.B. in the head with his elbow two weeks earlier while the family was attempting to take a photo. The doctor told Reyes it was "impossible" for H.B. to have sustained her injuries from that incident.

Reyes also spoke with defendants separately in the hospital. Daniel said he was caring for H.B. on December 5 when he noticed she was breathing shallowly while in a swing. When Catherine walked into the room, Daniel told her about it and they called 9-1-1. Daniel also told Reyes that their son had elbowed H.B. two weeks earlier. In response to further questioning, Daniel gave Reyes the names of people who had cared for H.B. in the prior few weeks – Daniel's cousin A.S., Daniel's parents, and Catherine's mother. According to

Daniel, A.S. babysat H.B. in the days leading up to the hospitalization. Daniel further told Reyes that he called A.S. to ask if anything had happened to H.B. while in her care, and she responded no.

A.S. later told Reyes she babysat H.B. on November 27, 29, 30, and December 3 and 4. Daniel's parents and Catherine's mother had last cared for H.B. more than two weeks prior to December 5.

Reyes also asked about H.B.'s recent health prior to the hospitalization. Daniel said they had taken the baby to the doctor's office seven times within the last two weeks and to another hospital one time because H.B. was vomiting and could not keep milk down. Reyes found it noteworthy that Daniel asked Reyes whether this incident would affect his employment as a police officer. Reyes testified that he "didn't find [this] to be evidence of [Daniel's] guilt but it . . . definitely heightened [his] senses a little bit."

Reyes also spoke with Catherine that same evening in the hospital. She said she nursed H.B. before leaving for work around 7:00 a.m., stating that H.B. had "fed pretty well." Catherine said she woke Daniel up, telling him she was leaving for work. When Catherine came home at 11:00 a.m. to nurse H.B., she said, "Daniel immediately approached her and told her to contact 911 because [H.B.] was having trouble breathing."

Catherine's statements to Reyes regarding H.B.'s health issues were consistent with the information provided by Daniel. She had taken H.B. to the doctor numerous times and was concerned the baby had reflux.

During his testimony, Reyes stated that Catherine told him she had "warned Dan about being so rough with [H.B.]," because he was grabbing and holding the baby "tightly." Catherine also said Daniel was "having trouble bonding with [H.B.]."[2] Catherine reported Daniel did not have any similar issues with their son.

Reyes spoke with Dr. Owensby a second time that night. The doctor reported that another employee had overheard Catherine talking on the phone in H.B.'s hospital room. During the conversation Catherine said, "[T]hat's why I kicked him out." Reyes was unable to speak to the employee as she had already finished her shift and left the hospital.

The following day, Reyes again spoke to Dr. Owensby, who informed him that H.B.'s "condition had worsened and that she suffered a brain injury and she was in critical condition." The doctor explained that if H.B. survived, she would likely "be in a vegetative state."

---

[2] During cross-examination, Reyes could not recall if Catherine used the word "rough" in their conversation. He did remember Catherine stated she had asked Daniel to handle H.B. more gently.

Reyes also interviewed A.S., who babysat for H.B. in the days leading up to her hospitalization. A.S. described H.B. as "a little cranky" and "able to keep some food down," but otherwise she was fine. A.S. also explained that H.B.'s vomiting began before A.S. started caring for her. The detective described A.S. as "crying and upset" during the interview.

Reyes returned to the hospital on December 7, intending to take formal recorded statements from defendants. Reyes also spoke with a second doctor who diagnosed H.B. with retinal hemorrhaging and retinal detachment in addition to her brain injury. The doctor explained the condition was a "detachment of the eyeballs" and "it's only caused by an acceleration and a fast deceleration." The doctor further stated this type of injury "[u]sually" occurs during a car accident, or when a child goes from "something quick to stopping quickly." The doctor also said the baby was not going to live.[3] Reyes testified that this new information "indicated to [him] that . . . someone definitely did something to [H.B.]"

Defendants agreed to give recorded statements. Catherine was interviewed first and provided the same information she had given Reyes two

[3] H.B. died on December 11, 2018.

days earlier in the hospital. In addition, Catherine informed the detectives she and Daniel "did a lot of research" regarding concussion symptoms and H.B.'s medical issues. She also stated she was joining on-line support groups and searching reflux symptoms. Moreover, Catherine advised that when she was away from the baby, she would check in with Daniel to see how H.B. was and he would update her as well.

However, before the interview was concluded, Catherine's sister knocked at the door and notified detectives that Daniel had called, informing that he had hired an attorney for himself and Catherine and instructing Catherine to stop speaking with the police. Reyes called Daniel to confirm this information. Catherine then invoked her right to counsel.

At this point, the detectives consulted with an assistant prosecutor, and determined they had probable cause to confiscate defendants' cell phones. Reyes said they wanted to take the phones,

> [b]ecause cell phones obviously contain tons of information and . . . we believed that it would help us regarding this investigation and the fact that we couldn't speak to Dan and Catherine at this time. Again, it was determined that we believed that there could have been some information in the cell phone that would help us with this investigation.

He said there was no other source to find out what happened to the baby. Because H.B. could not speak for herself, there was no other source from which police could gather information regarding her injuries other than defendants. And they were no longer cooperating with police.

Reyes said they decided to seize defendants' phones before waiting for a warrant because there was "a possibility that information . . . contained in that phone could possibly be deleted." During cross-examination, Reyes explained his thinking again, stating: "We had probable cause to take her cell phone because we believed there could have been information in there regarding [H.B.'s] either health or any incidents that could have occurred, they could have been talking about . . . . [a]nything that could have occurred or they could look up, anything."

Defendants' phones were confiscated and secured on Friday, December 7. Law enforcement applied for a communications data warrant (CDW) on Monday. After the CDW was approved, the detectives performed a forensic examination on the phones.

II.

The trial court issued an oral decision on September 30, 2021. The judge found Reyes's testimony was consistent and credible, and she made the

following findings of fact: (1) the doctors told Reyes that H.B.'s injuries were the result of child abuse; (2) defendants were the primary, although not the sole caregivers; (3) Daniel had not bonded well with H.B. and Catherine had spoken to him about handling H.B. more gently; and (4) "hospital personnel overheard Catherine, while speaking to someone over the phone, say, 'That's why I kicked him out.'"

However, the judge found the State failed to establish a finding of probable cause to support the seizure of the cell phones. The court reached its conclusion because Reyes "never testified that he believed there was evidence of a crime [on defendants' phones]." The court stated, "Not once during two days of testimony did Detective Reyes say that he believed evidence of a crime would be found on the phones at the time that the phones were seized." As a result of its ruling, the court did not consider whether exigent circumstances permitted an exception to the warrant requirement for the phones' seizure.

III.

We granted the State's motion for leave to appeal. The State raises a single point for our consideration:

> THE TRIAL COURT'S ERRONEOUS SUPPRESSION OF EVIDENCE MISAPPLIED THE FOURTH AMENDMENT'S WELL-GROUNDED OBJECTIVE ANALYSIS AND BASED ITS FINDING ON AN

INACCURATE FACTUAL FINDING OF THE OFFICER'S SUBJECTIVE BELIEF

Our scope of review of a decision on a suppression motion is limited. State v. Robinson, 200 N.J. 1, 15 (2009). "[W]e generally defer to the factual findings of the motion court when they are supported by credible evidence in the record." State v. Sims, 466 N.J. Super. 346, 362 (App. Div. 2021), rev'd on other grounds, __ N.J. __ (2022). We will only disturb a trial court's findings "if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. Elders, 192 N.J. 224, 244 (2007)).

Deference is appropriate for a trial court's factual findings "because the trial court has the 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. S.S., 229 N.J. 360, 374 (2017) (quoting Elders, 192 N.J. at 244). However, legal conclusions to be drawn from those facts are reviewed de novo. State v. Smith, 212 N.J. 365, 387 (2012). See State v. Handy, 206 N.J. 39, 45 (2011) (noting that whether established facts warrant suppression is "purely a legal question" subject to plenary review).

The State contends the trial court erred in its analysis of probable cause and its requirement that Reyes articulate his subjective belief that he believed

evidence of a crime would be found on the phones. Instead, the State asserts a court should apply an objective analysis. We agree.

The Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protects citizens by requiring a showing of probable cause prior to a search or seizure. "The probable-cause requirement is the constitutionally-prescribed standard for distinguishing unreasonable searches from those that can be tolerated in a free society . . . ." State v. Novembrino, 105 N.J. 95, 106 (1987). Therefore, a "warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." State v. Gamble, 218 N.J. 412, 425 (2014) (quoting State v. Cooke, 163 N.J. 657, 664 (2000)).

Our Supreme Court has stated that the probable cause standard "is not susceptible" to a "precise definition." State v. Bivins, 435 N.J. Super. 519, 529 (App. Div. 2014) (quoting State v. Moore, 181 N.J. 40, 45 (2004)). Instead, it is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." State v. Basil, 202 N.J. 570, 585 (2010) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)). Although probable cause need not be more than that evidence required to convict a defendant, it requires more than a mere suspicion

of guilt. Ibid. Therefore, "a well-grounded suspicion that a crime has been or is being committed" is enough to find probable cause. Moore, 181 N.J. at 45 (quoting State v. Nishina, 175 N.J. 502, 515 (2003)).

Under the exigent-circumstances exception, law enforcement may act immediately without a warrant if doing so "is necessary to stop the flight of a suspect, to safeguard members of the public from a threat of harm, or to prevent the destruction of evidence." State v. Manning, 240 N.J. 308, 334-35 (2020) (citing State v. Vargas, 213 N.J. 301, 323 (2013)). The burden is on the State to prove by a preponderance of the evidence that "the search was premised on probable cause" and "law enforcement acted in an objectively reasonable manner to meet an exigency that did not permit time to secure a warrant." Id. at 333 (citing In re J.A., 233 N.J. 432, 448 (2018)).

It is well-established that courts use an objective analysis when reviewing whether law enforcement had probable cause to conduct a warrantless search. As the Supreme Court articulated in Terry v. Ohio, 392 U.S. 1, 21-22 (1968), "[i]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" This objective analysis has been reaffirmed by our Supreme

Court. See State v. Gonzales, 227 N.J. 77, 99-104 (2016). A court considers a finding of probable cause under the lens of the totality of the circumstances known at the time of the search. Gates, 462 U.S. at 238; State v. Gibson, 218 N.J. 277, 293 (2014).

In its decision, the trial court found numerous facts that supported a finding of probable cause. Two doctors told Reyes that H.B.'s injuries resulted from child abuse; Catherine asked Daniel to handle the baby more gently; hospital personnel overheard Catherine state on the phone, "That's why I kicked him out"; and defendants were H.B.'s primary caregivers. In addition, Catherine stated when Daniel was watching H.B., Catherine checked in with him regarding the baby and she had joined on-line support groups and researched H.B.'s symptoms and diagnoses. These are all tasks that can be done on a cell phone. Catherine would likely have used her phone while at work to call and text Daniel and to research their daughter's medical issues. The court found these facts were all known to Reyes at the time he seized defendants' cell phones.

Under the totality of the circumstances, an objective analysis of the facts as found by the court after a hearing would have led a reasonable person to conclude probable cause existed. Moreover, Reyes articulated several times that he believed he had probable cause to seize the phones.

We reverse the order that suppressed the evidence gathered from a forensic examination of defendants' cell phones. However, because the trial judge did not decide whether exigent circumstances existed to seize the phones prior to the issuance of a warrant, we remand to the court for that determination, which can be made on the existing record. See State v. Hutchins, 116 N.J. 457, 477 (1989).

Reversed and remanded for further proceedings consistent with this opinion.