NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1363-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.B.,

Defendant-Appellant.

APPROVED FOR PUBLICATION
April 6, 2022
APPELLATE DIVISION

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Submitted March 2, 2022 – Decided April 6, 2022

Before Judges Hoffman, Whipple, and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 19-07-1182.

Joseph E. Krakora, Public Defender, attorney for appellant (Molly O'Donnell Meng, Assistant Deputy Public Defender, of counsel and on the briefs).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Dina R. Khajezadeh, Assistant Prosecutor, on the brief).

The opinion of the court was delivered by

WHIPPLE, J.A.D.

Defendant M.B. appeals from his conviction for fourth-degree certain persons not to possess a weapon, N.J.S.A. 2C:39-7(a). He argues the trial court erred when it denied his motion to suppress evidence seized as a result of a search warrant issued in connection with an ex parte domestic violence restraining order. We reverse and vacate defendant's conviction.

According to Officer Patrick Watkins, on March 8, 2018, shortly before 1:00 a.m., four Lacey Township police officers were called to defendant M.B.'s Forked River home. S.B.,[1] a nineteen-year-old daughter of defendant's former girlfriend who lived with defendant, told Officer Watkins that the two had been in an argument and that defendant kicked her in the throat. S.B. told police she had deflected the kick with her hand, and she had complained of pain and a cut on her hand. Police arrested defendant for simple assault and for providing alcohol to a minor, because S.B. appeared intoxicated. Police thereafter asked S.B. if she wanted to seek a temporary restraining order (TRO) against defendant. She said she did, and police took her to the police department to obtain information. S.B. alleged prior verbal abuse by defendant, but she did not report prior physical abuse. S.B. told police that

[1] We use initials to protect the identity of an alleged victim of domestic violence. R. 1:38-3(c)(12).

knives and a pistol were in the home, but she did not indicate how she knew about the weapons.

At about 3:00 a.m., Officer Watkins called the Municipal Court judge from police headquarters and gave him a brief synopsis of the incident. During the call with the judge, Officer Watkins was not under oath, nor did the judge take any notes. Officer Watkins gave the phone to S.B. and overheard part of her conversation with the judge. Because Officer Watkins heard S.B. state her name and say, "I do," he assumed the judge had placed S.B. under oath. The judge issued a TRO based on that call and authorized police to search defendant's home for weapons. Police searched defendant's home and recovered numerous knives, but no pistol.

According to Officer Watkins, the police department records all telephone systems. The department recorded this call between S.B. and the Municipal Court judge but subsequently destroyed the recording, pursuant to the Lacey Township Police Department's thirty-one-day record retention policy.

On July 31, 2019, an Ocean County grand jury returned Indictment 19-07-1182-I, charging defendant with one count of second-degree certain person not to possess a weapon (N.J.S.A. 2C:39-7(b)(1)) and fifteen counts of fourth-degree certain person not to possess a weapon (N.J.S.A. 2C:39-7(a)).

Indictment 19-07-1182-I superseded Indictment 18-05-0954-I, returned on May 29, 2018, which charged defendant with one count of second-degree certain person not to possess weapons (N.J.S.A. 2C:39-7(b)(1)) and two counts of fourth-degree certain person not to possess weapons (N.J.S.A. 2C:39-7(a)).

Defendant moved to suppress evidence seized as a result of the search warrant. Officer Watkins was the only witness who testified at the hearing. After hearing his testimony, the motion judge denied suppression.

On August 19, 2019, defendant pleaded guilty to one fourth-degree count of certain persons not to possess a weapon, N.J.S.A. 2C:39-7(a). On October 11, 2019, the same judge who denied defendant's suppression motion sentenced defendant to time served, which was 530 days in Ocean County Jail.

This appeal followed. Defendant raises the following issues on appeal:

> POINT I: THE WARRANT WAS INVALID BECAUSE A) IT DID NOT COMPLY WITH THE PROCEDURAL SAFEGUARDS OF RULE 5:7A AND B) WAS NOT SUPPORTED BY PROBABLE CAUSE. THEREFORE, THE EVIDENCE MUST BE SUPPRESSED AS THE RESULT OF A WARRANTLESS SEARCH.
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> The Warrant Was Invalid Because It Did Not Comply With The Procedural Safeguards of Rule 5:7A.
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> The Warrant Was Invalid Because It Was Issued Without Probable Cause.

"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) (citations omitted). We do not, however, defer to the trial court's legal conclusions, which we review de novo. Id. at 263 (citing State v. Gandhi, 201 N.J. 161, 176 (2010)).

When a search warrant is issued under N.J.S.A. 2C:25-28(j), the police are authorized to search for and seize weapons. In State v. Hemenway, our Supreme Court stated that:

> before issuing a warrant to search for weapons under the [Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35], a court must find that there is (1) probable cause to believe that an act of domestic violence has been committed by the defendant; (2) probable cause to believe that a search for and seizure of weapons is "necessary to protect the life, health or well-being of a victim on whose behalf the relief is sought[]"; and (3) probable cause to believe that the weapons are located in the place to be searched.
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> [239 N.J. 111, 117 (2019) (quoting N.J.S.A. 2C:25-28(f)).]

In State v. Cassidy, the Court determined that a warrant included in a TRO was invalid because the issuing judge who spoke to the domestic violence complainant by telephone did not swear her in, nor did he record his conversations with her or the officer who took the complaint. 179 N.J. 150,

155, 159 (2004), abrogated on other grounds by State v. Edmonds, 179 N.J. 117 (2012). The Court noted "the procedural requirements for a telephonic search warrant are fundamental to the substantive validity of the warrant," and a telephonic authorization will only be deemed the "functional equivalent of a written warrant" when "all of the procedural safeguards . . . to assure the underlying reliability of the judge's decision to authorize the search have been met." Id. at 158. Given the Court adheres to the principle that "searches and seizures inside a home without a warrant [are] presumptively unreasonable," it is imperative that "[t]he record of the ex parte proceeding . . . disclose a proper basis" for the TRO and accompanying warrant. Id. at 164 (citation omitted). Cognizant of the principles enunciated in Hemenway and Cassidy, we turn to the motion judge's analysis herein and find that the search warrant was invalid because the repeated procedural failures do not provide a reliable record to assure the Municipal Court judge properly authorized the warrant.

Here, the motion judge was concerned with the destruction of the recording in support of the search warrant but did not find the destruction was in bad faith. Generally, "[w]ithout bad faith on the part of the State, 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" George v. City of Newark, 384 N.J. Super. 232, 243 (App. Div. 2006) (quoting Arizona v. Youngblood, 488 U.S. 51, 57 (1988)); see also State

v. Marshall, 123 N.J. 1, 109-10 (1991) (applying Youngblood's bad faith standard); State v. Mustaro, 411 N.J. Super. 91, 103 (App. Div. 2009). However, the motion judge did not address the State's obligation to preserve evidence consistent with the strictures of the Fourth Amendment in cases it prosecutes criminally, nor did he consider the prejudice to defendant by the destruction of evidence. We address both.

When evidence has been destroyed, the court must focus on "(1) whether there was bad faith or connivance on the part of the government . . . , (2) whether the evidence . . . was sufficiently material to the defense . . . , [and] (3) whether [the] defendant was prejudiced by the loss or destruction of the evidence." State v. Hollander, 201 N.J. Super. 453, 479 (App. Div. 1985) (citations omitted). "In the absence of bad faith, relief should be granted to a defendant only where there is a 'showing of manifest prejudice or harm' arising from the failure to preserve evidence." State v Dreher, 302 N.J. Super. 408, 489 (App. Div. 1994) (quoting De Vitis v. N.J. Racing Comm'n, 202 N.J. Super. 484 (App. Div. 1985)), abrogated on other grounds by State v. Brown, 170 N.J. 138 (2001).

Although we decline to label a thirty-one-day retention policy as per se bad faith or to find bad faith equating to a per se denial of due process on this record, we have sufficient evidence to consider this policy and application as

less than a good faith effort by the State to maintain its constitutional obligations.

Twelve years ago and six years after Cassidy, the New Jersey Attorney General issued guidelines for retaining evidence in criminal cases that required each county prosecutor's office to develop and follow its own evidence destruction authorization policy and procedures, which include procedures regarding both evidence held by the county prosecutor's office as well as evidence held by local law enforcement agencies within its jurisdiction. N.J. ATT'Y GEN. DEP'T OF LAW & PUB. SAFETY & THE N.J. PROSECUTOR'S ASS'N, ATT'Y GEN. GUIDELINES FOR THE RETENTION OF EVIDENCE (Mar. 2010), https://www.nj.gov/oag/dcj/agguide/directives/2010-1evidence-retention.pdf. The record does not reflect whether Ocean County set forth any procedures and whether thirty-one days would follow such procedures, so we decline to say that thirty-one days to automatically destroy potential evidence is per se bad faith.

In considering bad faith applied to defendant's case, Lacey Township Police Department's retention policy provided no valid measure of the State's good faith obligation to preserve evidence it controlled in a criminal prosecution. While the matter began as a domestic violence case, the moment the State chose to bring criminal charges against defendant as a result of a

search warrant generated under the PDVA, its obligation to preserve evidence arose. The record does not reflect whether the State took any steps to even acknowledge this obligation. Rather than remand on that issue to affirmatively find bad faith, we vacate because, regardless of bad faith, the destruction of evidence manifestly prejudiced the defendant.

The manifest prejudice or harm from the destruction of evidence is clear—there was no record of the basis for a search warrant, which instructed police to seize weapons from defendant's home and prompted criminal charges. In New Jersey, an accused has a right to broad discovery after the return of an indictment in a criminal case. R. 3:13-3(b); State v. Scoles, 214 N.J. 236, 252 (2013); State v. Hernandez, 225 N.J. 451, 461-62 (2016). Defendant cannot be faulted for not requesting the recording before its destruction—he was not even charged with the weapons offenses until nearly five months after the warrant was issued and about four months after the record was destroyed. Without any record of the telephonic TRO application to review, we do not have a sufficient factual basis by which to determine whether the municipal court judge properly issued the search warrant. This increases the manifest prejudice by denying defendant a fair review of the proceedings. Without a sufficient basis, we conclude the warrant is invalid, as the motion judge should have found.

The manifest prejudice is especially harmful because of the failure to properly reconstruct the record. As such, we reject the State's suggestion that the record was adequately addressed through reconstruction during the suppression hearing. The absence of a verbatim record "raises a question concerning fairness that must be addressed." State v. Casimono, 298 N.J. Super. 22, 26 (App. Div. 1997) (quoting State v. Izaguirre, 272 N.J. Super. 51, 56 (App. Div. 1994)).

In State v. Harris, the trial court held an evidentiary hearing to reconstruct the record because a warrant and affidavit were improperly filed. 98 N.J. Super. 502, 503-04 (App. Div. 1968). We affirmed the denial of a motion to suppress because "[the] [d]efendant ha[d] sustained no prejudice by the failure to file the affidavit." Id. at 504. The defendant was charged in the municipal court with possession of a hypodermic needle and a narcotic drug. Id. at 503. Defendant moved to compel the production of the affidavits upon which the warrant had been issued. Ibid. The State was unable to produce a warrant or the affidavit because they had been lost while in police custody during transmittal between departments. Id. at 503-04.

At the motion hearing to suppress Harris's evidence, the trial judge heard the testimony of the magistrate who issued the warrant and that of the police officer who prepared and signed the affidavit in the presence of the magistrate

at the latter's home on the evening of the raid. Id. at 504. Testimony was also taken of another police officer who had been present at the magistrate's home when the warrant was issued. Ibid. The testimony of these witnesses established the fact that a warrant was issued and the contents of the warrant and the supporting affidavit. Ibid.

Defendant's case differs at the threshold level because the department's cavalier policy destroyed rather than lost the evidence. Moreover, defendant's case continues to differ because the motion judge did not reconstruct a reliable record, which clearly prejudiced defendant's ability to argue against the validity of the warrant. The motion judge did not instruct the Municipal Court judge to reconstruct the record. The motion judge adduced testimony from only Officer Watkins who was not put under oath when he relayed information to the Municipal Court judge. Officer Watkins only heard S.B.'s side of the conversation with the judge; the phone call was not on speaker, so Officer Watkins did not overhear the judge. The Municipal Court judge did not testify as to why he issued the warrant, nor did he explain why he found S.B. to be credible.

Further, under Rule 2:5-3(f), "[i]f a verbatim record made of the proceedings has been lost, destroyed or is otherwise unavailable, the court or agency from which the appeal was taken shall supervise the reconstruction of

the record." When such a record is lost, the trial judge, as a matter of due process, must reconstruct the record in a manner that "provides a reasonable assurance of accuracy and completeness." Casimono, 298 N.J. Super. at 26. Here, that means the Municipal Court judge, the judge who presided over the missing proceeding, was obligated to reconstruct the record via testimony at the suppression hearing. Thus, this reconstruction was inconsistent with Rule 2:5-3(f), further prejudiced defendant, and was insufficient to support a finding of a valid warrant.

To the extent we have not addressed defendant's remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Reversed and conviction vacated.