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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1869-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN COLES, a/k/a
JEFFREY THOMPSON,
JOHN TALIAFERRO,
JOHN H. COLES, EDWARD
GORDON, and JOHN TOWN,

Defendant-Appellant.

Submitted April 25, 2022 – Decided May 3, 2022

Before Judges Fasciale and Sumners.

On appeal from the Superior Court of New Jersey, Law
Division, Atlantic County, Indictment No. 17-10-2278.

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

Cary Shill, Acting Atlantic County Prosecutor, attorney
for respondent (Kristen Pulkstenis, Special Deputy

Attorney General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

After pleading guilty, defendant appeals from his conviction for second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1). Defendant was stopped by Atlantic City police during a controlled dangerous substances (CDS) investigation along with another individual. During the stop, the officers noticed an abnormal bulge on defendant's right side and conducted a weapons search, which uncovered defendant's possession of a handgun. Defendant focuses on the denial of his suppression motion of the handgun. After taking testimony from two officers, the judge denied defendant's motion and rendered a thorough written decision. We affirm.

We derive the facts from the motion to suppress hearing. The State produced testimony from two witnesses: Sergeant Richard Andrews and Detective Avette A. Harper. The judge accepted their testimony, finding them to be credible.

On the day of the incident, Andrews conducted surveillance in plain clothes and an unmarked vehicle. With binoculars, he noticed an individual (the individual) standing "for an extended period of time" in an area "known for drug sales, open[-]air drug sales . . . near a bus stop." For about twenty minutes,

Andrews observed people going to the individual "constantly," engaging in short conversations, and exchanging "objects." He saw a female (the female) ride up on a bicycle, converse with the individual, hand him paper currency, then ride away after inspecting an object from him. Andrews believed he witnessed a drug transaction. He followed the female and when he exited his vehicle with his badge displayed and stopped her, she "discarded a small white rocky[-]type substance," which turned out to be crack cocaine. Andrews arrested and charged the female with possession of drugs.

Andrews then radioed officers in the area and asked them to look for the individual who sold the drugs to the female. He described that individual as a "taller black male with a distinctive color like teal type, greenish teal shirt." Andrews went back to the area where the transaction occurred and waited for assistance.

Harper received Andrews's dispatch and spotted one male—the individual—matching the description. As he approached the individual, a second male who was wearing a similar top also approached the individual. The second male turned out to be defendant. Harper testified that at the time of the stop, he was unsure which male was the suspect as both matched the description. According to Harper, defendant continually adjusted his waistband near an

abnormal bulge in defendant's shorts, and defendant failed to immediately comply with Harper's orders. Harper, based on his experience as an officer, suspected defendant had a gun, and patted down defendant and found a gun in defendant's waistband.

Andrews heard transmissions that a male had been stopped and a weapon had been recovered while on his way to meet Harper. Andrews arrived and identified the individual as the suspect from the drug sale and not defendant. Andrews testified, looking at a photograph marked as S-2, that both the individual and defendant wore "teal[-]colored shirts." On cross-examination, Andrews indicated that defendant was wearing a teal hoodie. Andrews testified that "moments" after he radioed the description, Harper advised that he had stopped someone in the area fitting the description of the suspect.

Harper testified at the motion to suppress hearing that he was advised that a "tall black male wearing a turquoise blue shirt was the suspected seller" of the cocaine. Harper explained that, to him, blue, teal, and turquoise are a "light blue color" and are the same. Harper also explained that he knows the difference between a shirt and a hoodie but in his experience as an officer, whether an officer, witness, or victim describes a "shirt," it is "very frequently confused whether it's a hood[ie] or a shirt." The motion judge found the officers credible,

and that Harper had proper grounds to stop defendant because the individual and defendant "were both wearing the same colored shirt and were standing next to each other" when Harper stopped the individual.

After defendant's suppression motion was denied, defendant pled guilty to the weapons charge. On appeal, defendant argues:

POINT I

BOTH THE TERRY¹ STOP AND TERRY FRISK WERE UNCONSTITUTIONAL, REQUIRING SUPPRESSION OF THE EVIDENCE.

A. The Officer Lacked Reasonable Suspicion To Stop [Defendant] Based Exclusively On A Vague, Race-Based Description, Which [Defendant] Did Not Match.

B. The Officer Lacked Reasonable Suspicion To Believe That [Defendant] Was Armed And Dangerous. In Addition, The State Failed To Demonstrate That Detective Harper Did Not Squeeze Or Manipulate The Item Before Determining It Was Contraband.²

We have considered defendant's contentions, including those outlined in defense counsel's Rule 2:6-11(d) letter, and conclude that the descriptors were

¹ Terry v. Ohio, 392 U.S. 1, 20 (1968).

² We have altered the capitalization of defendant's Subpoints A and B to comport with our style conventions but have omitted those alterations for readability.

sufficiently specific to provide a reasonable suspicion to stop defendant, defendant's conduct at the stop supported the pat down, and Harper seized the gun under the plain feel doctrine.

Our review of a judge's order denying a motion to suppress evidence is limited. State v. Handy, 206 N.J. 39, 44 (2011). We defer to a motion judge's factual findings "so long as [they] are supported by sufficient evidence in the record." State v. Vincenty, 237 N.J. 122, 131-32 (2019) (quoting State v. Hubbard, 222 N.J. 249, 262 (2015)). We do so even if an opportunity for independent review could lead to a different conclusion. State v. Johnson, 42 N.J. 146, 162 (1964). Whether established facts warrant the grant or denial of a suppression motion is a legal question subject to de novo review, Handy, 206 N.J. at 45, and, "[w]hen a question of law is at stake," our review is plenary, State v. Mann, 203 N.J. 328, 337 (2010).

Both the federal and state constitutions protect citizens against unreasonable searches and seizures. See U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7; see also State v. Terry, 232 N.J. 218, 231 (2018). "The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts." Terry, 232 N.J. at 231 (quoting South Dakota v. Opperman, 428 U.S. 364, 373 (1976)).

An investigatory stop or detention, sometimes referred to as a Terry stop, involves a temporary seizure that restricts a person's movement. State v. Chisum, 236 N.J. 530, 545 (2019). A Terry stop implicates a constitutional requirement that there be "'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." State v. Elders, 192 N.J. 224, 247 (2007) (quoting State v. Rodriguez, 172 N.J. 117, 126 (2002)). Our Supreme Court recently reiterated that "[d]etermining whether reasonable and articulable suspicion exists for an investigatory stop is a highly fact-intensive inquiry that demands evaluation of 'the totality of circumstances surrounding the police-citizen encounter, balancing the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions.'" State v. Nyema, 249 N.J. 509, 528 (2022) (quoting State v. Privott, 203 N.J. 16, 25-26 (2010)).

In this case, whether reasonable suspicion exists begins with the description Harper received. See ibid. (stating "[i]n many cases, the reasonable suspicion inquiry begins with the description police obtained regarding a person involved in criminal activity and whether that information was sufficient to initiate an investigatory detention"). Defendant's reliance on Nyema is

misplaced. Unlike in Nyema, the description here is not solely limited to race and sex. Nyema involved a vague description of "two . . . Black males, one with a handgun." Id. at 531. The Court determined that such a description "was descriptive of nothing." Ibid. (internal quotation marks omitted) (quoting State v. Caldwell, 158 N.J. 452, 468 (1999) (Handler, J., concurring)). But the Court pointed out that an officer can consider "a person's race or ethnicity when race or ethnicity is used to describe physical characteristics that identify a particular individual." Id. at 530 (quoting Attorney General, Directive Establishing an Official Statewide Policy Defining and Prohibiting the Practice of "Racially-Influenced Policing" (June 28, 2005) (Directive 2005-1)).

Here, Andrews gave a description beyond race and sex. He described the suspect as a "taller black male with a distinctive color like teal type, greenish teal shirt." The Nyema Court explained that other discrete factors can include height and clothing. Id. at 531. Andrews specifically testified that, in addition to the height, he thought the description of the shirt was distinctive and would "stand out certainly." Harper testified that the color of the clothing is what "dominated [the] description." He knew that teal or turquoise is a "pretty specific color," different than royal, sky, or navy blue. He was not focused on

the distinctions between a "T-shirt, long sleeve shirt, hood[ie], [or] sweater"; it was a "teal top on a tall black male" that was the important descriptor.

A "frisk" is "a carefully limited search of the outer clothing of [a suspect] in an attempt to discover weapons which might be used to assault [an officer]." Privott, 203 N.J. at 26 (quoting Terry, 392 U.S. at 30). An officer may lawfully frisk a suspect when he or she has "a 'specific and particularized basis for an objectively reasonable suspicion that [the suspect is] armed and dangerous.'" State v. Roach, 172 N.J. 19, 27 (2002) (quoting State v. Thomas, 110 N.J. 673, 683 (1988)); see also State v. Matthews, 398 N.J. Super. 551, 557 (App. Div. 2008). Conversely, an officer's frisk for weapons is unlawful if he or she lacks an objectively reasonable and articulable suspicion to believe a suspect is armed and dangerous. Thomas, 110 N.J. at 679.

Harper had the requisite basis to pat down defendant. Harper gave commands to the individual and defendant simultaneously. The individual complied; defendant did not. Despite Harper's orders, defendant did not immediately sit down or place his hands above his head. Instead, defendant grabbed his shorts to pull them up. At that point, Harper noticed the "abnormal bulge" on defendant's right side. Defendant eventually sat down but again attempted to place his hand inside the pocket of his shorts while sitting. The

bulge remained visible. Harper limited the pat down to defendant's right side and felt the hard object, which was a Rohm Model 66-22 caliber revolver with several rounds in the chamber. Factors supporting an articulable and reasonable suspicion include a suspect's movements towards a waistband, pocket, or other area of the body where the suspect is likely to conceal a weapon. See Privott, 203 N.J. at 29-30.

Finally, Harper legally recovered the firearm based on the plain feel doctrine. See State v. Evans, 235 N.J. 125, 138 (2018) (holding "[c]ontraband found during the course of a lawful pat down may be seized without a warrant if the officer 'feels an object whose contour or mass makes its identity immediately apparent'" (quoting Minnesota v. Dickerson, 508 U.S. 366, 375 (1993))); see also State v. Toth, 321 N.J. Super. 609, 616-17 (App. Div. 1999) (holding that a pat down in which an officer immediately identifies an object as contraband without "in any way, manipul[at]ing] or explor[at]ing]" it "with his fingers" was a valid Terry frisk under the plain feel doctrine). Harper felt a hard metal object and distinctive U-shaped handle. The incriminating character of the object was immediately apparent to Harper, without first manipulating it, based on his training and experience arresting suspects with guns, and because he himself carried a gun every day.

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

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION