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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2594-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH CURTIS, III,
a/k/a JOSEPH CURTIS,

Defendant-Appellant.

Submitted December 6, 2022 – Decided December 15, 2022

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law
Division, Camden County, Indictment No. 17-02-0342.

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

Grace C. MacAulay, Camden County Prosecutor,
attorney for respondent (Rachel M. Lamb, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Joseph Curtis, III appeals from a Law Division order that denied his motion to suppress evidence seized during a warrantless search.

While on patrol on September 11, 2016, at approximately 2:15 a.m., Patrolman Jesus Soto observed two individuals running in a "crouched position" away from a Burger King located in Pennsauken on Route 130 near 48th Street. The individuals ran across the Burger King parking lot to the back of an adjacent dance studio, mounted two bicycles, and rode away together on 49th Street towards Westfield Avenue.

Soto testified that the Burger King usually closes at 2:00 a.m., so he approached the Burger King and knocked on the drive-through window. When no one came to the window, Soto went to the front door, which was locked. Soto then went to the side door and observed that the window had been shattered. Soto immediately notified dispatchers to send additional units.

Soto learned that the Burger King had been burglarized. Burger King employees gave a description of the robbers as "two black males, one taller, one shorter, wearing black with masks on." The employees also indicated the two robbers were thin, wearing gloves, had medium to dark skin, and one of the robbers was wearing short sleeves and was injured. The employees also reported

that one of the robbers had a "small handgun" that looked "like a two-barrel shotgun."

Soto notified the responding units "to start an immediate search" of the area. Soto testified that he broadcast "the description of the individuals" as told to him by the employees "and that an armed robbery had just occurred" over the radio. He also gave a description of the type of handgun used and advised the two suspects were on bicycles.

Soto testified that less than two minutes elapsed from the time he observed the two individuals running across the Burger King parking lot to the time that he broadcasted the suspects' description. He acknowledged that he could not describe the race, age, gender, or any other identifying characteristics of the individuals he saw running away from the Burger King but testified he believed they were involved in the armed robbery based on his observations and the short period that had transpired.

Patrolman Michael Pennington was also on patrol that night and heard Soto's broadcast over the radio. Pennington testified that Soto said there were "two males on bicycles traveling down 49th Street towards the area of Westfield Avenue." Pennington testified that the only description of the suspects provided

by Soto that he recalled "was just two males on bicycles down 49th Street towards Westfield Avenue."

Pennington drove down 49th Street and turned onto Westfield Avenue. He did not see anyone on Westfield Avenue, so he went one block up to High Street, and turned onto High Street continuing his search. As Pennington traveled down High Street, he observed two males on bicycles matching the description of the suspects in the area of 34th Street and High Street. He testified that 34th and High Street is approximately a mile-and-a-half from the Burger King and that he saw the bicyclists about five to ten minutes after the broadcast from Soto. Pennington did not observe anyone else on bicycles during his search.

Pennington radioed dispatch for backup because Soto indicated the suspects were armed. He followed the bicyclists for a few blocks with his headlights off, until they split up. Pennington maintained a visual on one of the suspects and attempted to stop that individual later identified as defendant.

Pennington pulled up in his vehicle, turned his headlights on, exited his car about ten feet away from defendant, announced himself as police, and ordered defendant to stop and get off the bicycle. Defendant looked back at

Pennington but continued pedaling away from him. Defendant was not wearing a mask at that time.

Pennington followed defendant but eventually lost sight of him. The police then established a perimeter around defendant. Pennington exited his vehicle and continued to search the area on foot and found defendant hiding in a bush with his bicycle protruding from the bush. Pennington then shined his flashlight on defendant and defendant took off running and hopped over a fence. Defendant ran right into the path of two other officers who apprehended and placed defendant under arrest.

Pennington testified that while defendant was in custody at the station, officers noticed he had a GPS monitoring bracelet on his ankle. The GPS monitor revealed defendant was in the vicinity of the Burger King at 2:15 a.m.

A Camden County grand jury returned an indictment charging defendant with first-degree armed robbery, N.J.S.A. 2C:15-1(a)(1) and (2); second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1) and 2C:15-1(a)(1) and (2); second degree burglary, N.J.S.A. 2C:18-2(a)(1); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1); third-degree criminal restraint, N.J.S.A. 2C:13-2(a); fourth-degree aggravated assault, N.J.S.A.

2C:12-1(b)(4); fourth-degree criminal mischief, N.J.S.A. 2C:17-3(a)(1); and second degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b).

Defendant moved to suppress the evidence that resulted from the warrantless arrest and warrantless search. The court conducted a testimonial hearing. Soto and Pennington were the only witnesses.

On May 14, 2018, the judge issued an order and twenty-page opinion denying the suppression motion. The judge found Soto and Pennington testified credibly, without hesitation, or evasion. The judge found the investigation, pursuit, and subsequent arrest were performed lawfully, the doctrine of fresh pursuit applied, and the police had probable cause to arrest defendant.

The judge noted Soto's training and experience as a police officer and that he "directly observed two individuals, who matched the description given by the Burger King employees almost immediately after the alleged robbery had taken place." The employees' description of the suspects was broadcast only two minutes after the suspects were observed leaving the parking lot. The judge then recounted Pennington's testimony, which she found credible.

The judge rejected defendant's argument that the description of the suspect was "unconstitutionally vague," finding that "based upon the totality of the facts and circumstances within Officer Pennington's knowledge, including the

reasonably trustworthy information he received by virtue of Ptlm. Soto's broadcasted description of the [d]efendant, . . . there was sufficient information to warrant a person of reasonable caution to believe that a robbery had occurred, and that the [d]efendant had committed the robbery." Therefore, defendant's arrest "was supported by probable cause."

Considerably later, defendant moved for reconsideration. Another judge heard oral argument and denied the motion, finding no basis to reconsider the court's findings. The court found there was sufficient evidence to find probable cause and declined to disturb the other judge's findings just because defendant "see[s] the facts differently." The judge found the findings were not palpably incorrect.

On October 10, 2019, defendant pled guilty to second-degree conspiracy to commit robbery, in exchange for a recommended nine-year prison term subject to the period of parole ineligibility and mandatory parole supervision imposed by the No Early Release Act, N.J.S.A. 2C:43-7.2, and the dismissal of the remaining counts. Defendant preserved his right to appeal the denial of his motion to suppress. Defendant was sentenced in accordance with the plea agreement and the remaining counts were dismissed. This appeal followed.

Defendant raises the following point for our consideration:

THE TRIAL COURT ERRED IN DENYING THE
MOTION TO SUPPRESS BECAUSE POLICE
LACKED PROBABLE CAUSE TO ARREST THE
DEFENDANT.

"Our standard of review on a motion to suppress is deferential -- we must 'uphold the factual findings underlying the trial court's decision' if they 'are supported by sufficient credible evidence in the record.'" State v. Nyema, 249 N.J. 509, 526 (2022) (quoting State v. Ahmad, 246 N.J. 592, 609 (2021)). Appellate courts "defer[] to those findings in recognition of the trial court's 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Ibid. (quoting State v. Elders, 192 N.J. 224, 244 (2007)). "A trial court's legal conclusions, however, and its view of 'the consequences that flow from established facts,' are reviewed de novo." Id. at 526-27 (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

Defendant contends the police lacked probable cause to arrest him. He argues the warrantless arrest was based solely on a description that a "male on a bicycle" had committed a robbery in a different city. Relying on the Supreme Court's opinion in State v. Nyema, 249 N.J. 509 (2022), he asserts that gender and riding a bicycle alone were insufficient facts to meet the standard of reasonable and articulable suspicion for an investigatory stop let alone

constituting probable cause to believe defendant was one of the individuals who committed the robbery.

An investigative stop is a procedure that "involves a relatively brief detention by police during which a person's movement is restricted." Nyema, 249 N.J. at 527. "An investigative stop or detention . . . does not offend the Federal or State Constitution, and no warrant is needed, 'if it is based on "specific and articulable facts which, taken together with rational inferences from those facts," give rise to a reasonable suspicion.'" Ibid. (quoting State v. Rodriguez, 172 N.J. 117, 126 (2002)).

"Although reasonable suspicion is a less demanding standard than probable cause, '[n]either "inarticulate hunches" nor an arresting officer's subjective good faith can justify infringement of a citizen's constitutionally guaranteed rights.'" Id. at 527-28 (alteration I original) (quoting State v. Stovall, 170 N.J. 346, 372 (2002) (Coleman, J., concurring in part and dissenting in part)).

"Determining 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.'" Id. at 528 (quoting State v. Privott, 203 N.J. 16, 25-26 (2010)).

In Nyema, our Supreme Court held that a police dispatch description of "two Black males, one [armed] with a gun, who fled the robbery on foot" combined with the fact that an officer observed three black males who did not react to the officer shining a spotlight into their vehicle as they were driving by was not sufficient to show a reasonable and articulable suspicion justifying the officer's stop of the vehicle. 249 N.J. at 514-516.

The Court noted that "[t]he only information the officer possessed at the time of the stop was the race and sex of the suspects, with no further descriptors." Id. at 516. The Court emphasized that "the initial description did not provide any additional physical descriptions such as the suspects' approximate heights, weights, ages, clothing worn, mode of transportation, or any other identifying feature that would differentiate the two Black male suspects from any other Black men in New Jersey. That vague description, quite frankly, was 'descriptive of nothing.'" Id. at 531 (quoting State v. Caldwell, 158 N.J. 452, 468 (1999) (Handler, J., concurring)). The Court stated that limited description "effectively placed every single Black male in the area under the veil

of suspicion, was insufficient to justify the stop of the vehicle and therefore does not withstand constitutional scrutiny." Id. at 516.

The facts in this case are easily distinguishable from those in Nyema. Here, the Burger king employees described the robbers as thin, had medium to dark skin, and were wearing black clothing. One was wearing short sleeves and was injured. One had a small handgun that looked like a double-barreled shotgun. At 2:15 a.m., both fled the scene on bicycles together. When Pennington approached defendant rode away. When located a few moments later, defendant was found hiding in a bush with his bicycle protruding from the bush. When Pennington shined his light on defendant, defendant took off running, hopped over a fence, and was apprehended. These undisputed facts provided reasonable and articulable suspicion for an investigatory stop.

We next consider whether there was probable cause for defendant's arrest. "The Fourth Amendment permits a police officer to make a warrantless arrest of a defendant in a public place provided the officer has probable cause to believe the defendant committed a crime." State v. Basil, 202 N.J. 570, 584 (2010) (citing Maryland v. Pringle, 540 U.S. 366, 370 (2003)). "In State v. Basil, our Supreme Court acknowledged that probable cause 'cannot be defined with scientific precision' because it is 'based on factual and practical considerations

of . . . reasonable [individuals], not legal technicians" State v. Diaz, 470 N.J. Super. 495, 528 (App. Div. 2022) (alterations in original) (quoting Basil, 202 N.J. at 585).

"[P]robable cause 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." Basil, 202 N.J. at 585 (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)). "Although probable cause is more than a mere suspicion of guilt, it is less than the evidence necessary to convict a defendant of a crime in a court of law." Ibid. (citing Brinegar v. United States, 338 U.S. 160, 175 (1949)). "[A] police officer has probable cause to arrest a suspect when the officer possesses 'a well[-]grounded suspicion that a crime has been or is being committed.'" Ibid. (quoting State v. Sullivan, 169 N.J. 204, 211 (2001)).

"In determining whether there was probable cause to make an arrest, a court must look to the totality of the circumstances" Ibid. (citing Gates, 462 U.S. at 238). Those circumstances are to be viewed "from the standpoint of an objectively reasonable police officer." Ibid. (quoting Pringle, 540 U.S. at 371). "Ultimately, '[p]robable cause exists where the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably

trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." Diaz, 470 N.J. Super. at 529 (alterations in original) (quoting State v. Moore, 181 N.J. 40, 46 (2004)).

We recognize that that flight from police standing alone cannot justify an investigatory stop or detention. State v. Tucker, 136 N.J. 158, 165, 173 (1994). However, "[o]nce a reasonable detention is established, 'reactions by individuals to a properly limited Terry encounter, . . . such as flight, may often provide the necessary information, in addition to that the officers already possess, to constitute probable cause.'" Ibid. at 168. (alteration in original) (quoting Kolender v. Lawson, 461 U.S. 352, 366 n. 4 (1983) (Brennan, J., concurring)); see also State v. Doss, 254 N.J. Super. 122, 130 (App. Div. 1992) ("When defendant continued his flight from the pursuing officers despite their shouted orders to halt, his refusal to obey their orders, together with all of the other circumstances of the case, gave the police reasonable cause to believe that he had committed or was then committing a criminal offense.").

Applying these principles, we note that unlike in Nyema, the mode of transportation was provided, and the general vicinity and direction of travel was provided. Soto broadcast that "two males on bicycles traveling down 49th Street

towards the area of Westfield Avenue" were suspected of committing an armed robbery. The color of their clothing, their skin color, and their build was reported. Moreover, this occurred at approximately 2:15 a.m. No other cyclists were observed. Defendant matched the description given.

When Pennington first spotted defendant, he was riding a bicycle with another male, also on a bicycle. When he approached, defendant took off on his bicycle. Shortly thereafter, he was found hiding in a bush with his bicycle protruding. Defendant then attempted to run away, hopping a fence until intercepted by other officers. A suspect's attempt to run away from police is a relevant factor when determining whether probable cause to arrest existed.

Considering the totality of the circumstances, we conclude there was probable cause to arrest defendant. Consequently, a search incident to arrest of defendant and the area within his immediate control was constitutionally permissible under both the United States Constitution, Chimel v. California, 395 U.S. 752, 763 (1969), and the New Jersey Constitution, State v. Rose, 357 N.J. Super. 100, 103-04 (App. Div. 2003), and any evidence gained seized during a search incident to arrest was admissible. Accordingly, the trial court correctly denied defendant's motions to suppress and for reconsideration.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION