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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1850-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL J. GOODWIN, a/k/a
MICHAEL WESTBROOKS,

Defendant-Appellant.

Argued March 29, 2023 – Decided April 27, 2023

Before Judges Accurso, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 18-01-0004.

Zachary G. Markarian, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Melanie K. Dellplain, Assistant Deputy Public Defender, of counsel and on the brief).

Ali Y. Ozbek, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Ali Y. Ozbek, of counsel and on the brief).

PER CURIAM

Following the denial of his motion to suppress physical evidence seized after law enforcement's warrantless entry into a home located at 56 Manchester Avenue in Paterson, defendant Michael J. Goodwin was found guilty of third-degree possession of a controlled dangerous substance (CDS) (heroin), N.J.S.A. 2C:35-10(a)(1); third-degree CDS possession with intent to distribute (heroin), N.J.S.A. 2C:35-5(a)(1); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1); second-degree possession of a weapon while committing a CDS offense, N.J.S.A. 2C:39-4.1(a); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2); and second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1).

After merger, the court sentenced defendant to an aggregate thirty-year custodial term with a fifteen-year period of parole ineligibility. Defendant challenges both his convictions and sentence and raises the following points for our consideration:

POINT I

THE MOTION COURT'S DENIAL OF DEFENDANT'S SUPPRESSION MOTION MUST BE REVERSED BECAUSE THE POLICE ENTERED 56 MANCHESTER AVENUE AND THE BACKYARD OF 58 MANCHESTER AVENUE WITHOUT A

WARRANT AND NO EXCEPTION TO THE
WARRANT REQUIREMENT APPLIED.

- a. The Police Conducted an Unlawful Search of
the Backyard of 58 Manchester Avenue.
 - i. Investigating Suspicious Behavior
Does Not Justify a Warrantless Search.
 - ii. The Police Did Not Have an
Objectively Reasonable Belief that 58
Manchester Avenue Was Abandoned.
- b. There was No Probable Cause or Exigency to
Justify the Search of 56 Manchester Avenue.

POINT II

THE STATE'S SUMMATION IMPROPERLY
REFERENCED FACTS NOT IN EVIDENCE,
THEREBY DEPRIVING DEFENDANT OF HIS
RIGHTS TO DUE PROCESS, CONFRONTATION,
AND A FAIR TRIAL.

POINT III

BECAUSE THE STATE'S EXPERT TESTIFIED ON
THE ULTIMATE ISSUE OF DEFENDANT'S STATE
OF MIND IN A DRUG-POSSESSION CASE AND
THE PROSECUTOR POSED A NUMBER OF
QUESTIONS DESIGNED TO ELICIT AN OPINION
THAT THE DEFENDANT POSSESSED DRUGS
WITH THE INTENT TO DISTRIBUTE, THE JURY'S
PROVINCE AS FACTFINDER WAS INVADED AND
THE STATE'S CASE WAS IMPROPERLY
BOLSTERED.

POINT IV

DEFENDANT'S SENTENCE IS ILLEGAL BECAUSE N.J.S.A. 2C:44-5(A)(2) PROHIBITS THE IMPOSITION OF MULTIPLE EXTENDED TERMS.

We agree with defendant's arguments in Point I. The police officers' warrantless entry into 56 Manchester Avenue was not supported by a well-grounded suspicion of criminal activity. We therefore reverse the denial of defendant's suppression motion, vacate his convictions and sentence, and remand for further proceedings consistent with this opinion. In light of our decision, we do not address defendant's remaining arguments related to alleged evidentiary errors committed by the court, improper comments made by the prosecutor, or challenges to his sentence.

I.

On October 17, 2017, at approximately 6:30 p.m. and while still daylight, detectives Jason English, Ryan Duffy, Gomez, and Sergeant Pacelli of the Paterson Police Department's Narcotics Division were patrolling Manchester Avenue when they observed a man they believed to be homeless, later identified as Alan Aiken, walking from the rear of 58 Manchester Avenue towards the street.

All four detectives exited their vehicle, at which point detectives Duffy and Pacelli stopped Aiken to conduct a field interview while detectives English and Gomez immediately walked to the backyard through the alleyway. Aiken first denied coming from the backyard, but then admitted to detectives Duffy and Pacelli he was behind 58 Manchester Avenue looking for his drug dealer, whom he claimed did not answer his phone. Detectives Duffy and Pacelli did not ask him the identity of the purported dealer, nor why he believed he would find him there.

While on the side of the house approaching the backyard, Detective English "heard a noise" and saw defendant come out of the rear of 56 Manchester Avenue. Detective English testified he was standing right next to the fence, which was approximately six feet tall, and "on [his] tippy toes [he] could see right through the hol[e]s on the top of the [fence] to look right through," and observed defendant standing on a porch six or seven feet beyond the fence and fifteen feet away from him. Detective English was wearing plain clothes, but with a vest and badge identifying him as a police officer.

According to Detective English, defendant "began looking over the fence in [his] direction . . . and then [he] noticed . . . a silver handgun in [defendant]'s right hand." After Detective English yelled, "Gun. There's a man with a gun,"

defendant "ran . . . back into the rear entrance of the household." Detective Gomez ran to the front of 58 Manchester Avenue to alert Detectives Duffy and Pacelli, and Detective English climbed over the shared fence between the two properties landing in 56 Manchester Avenue's backyard.

Detective English immediately "kicked [in] the back door" of 56 Manchester Avenue and entered the first-floor kitchen where he observed a .40 caliber Smith and Wesson handgun on the counter. He then witnessed defendant run through the living room, which was adjacent to the kitchen, and exit through a door on the left, which led to a common hallway. When he entered the common hallway, Detective English met Detectives Duffy and Gomez, who had "forced . . . in" the front door.

The detectives followed defendant up the shared staircase to the third floor where they witnessed defendant attempting to enter the third-floor apartment with a key. After defendant ignored commands to turn around and show his hands, Detective Duffy tackled defendant, causing the apartment door to open and the men to land in the apartment's entranceway.

While handcuffing defendant, Detective Duffy seized a silver Bryco .38 caliber handgun from defendant's waistband. Additionally, in the entranceway, Detective Gomez observed a bag of CDS, which contained fifteen bags of

marijuana, fourteen bricks of heroin, and three loose glassines. Defendant then signed a consent to search form for the third-floor apartment,¹ where the detectives seized the bag of CDS, packaging bags of various sizes, and a digital scale.

Detectives English and Pacelli returned to the first floor to secure the handgun. They observed the first floor "appeared abandoned [T]here was a couple milk crates and paint cans and stuff, but that was it." Next to the handgun, they discovered fourteen bricks of heroin sitting on top of a bag of rice.

A Passaic County grand jury charged defendant with two counts of second-degree CDS possession with intent to distribute (heroin, cocaine); two counts of second-degree unlawful possession of a weapon; two counts of second-degree possession of a weapon while committing certain CDS offenses; second-degree certain persons not to possess weapons; two counts of third-degree CDS possession (heroin, cocaine); three counts of third-degree CDS possession with intent to distribute within 1000 feet of school property (heroin,

¹ At the suppression hearing, the court concluded the detectives believed defendant lived in the residence. At trial, however, defendant introduced testimony from a third-party that defendant was merely a guest on the property. This discrepancy is inconsequential to our decision.

cocaine, marijuana), N.J.S.A. 2C:35-7; third-degree CDS possession with intent to distribute (marijuana), N.J.S.A. 2C:35-5(b)(11); fourth-degree CDS possession (marijuana), N.J.S.A. 2C:35-10(a)(3); and fourth-degree resisting arrest.

After a hearing in which Detectives English and Duffy testified, the court denied defendant's motion to suppress the physical evidence seized during their warrantless search of 56 Manchester Avenue. According to Detective English, the detectives stopped Aiken in front of 58 Manchester Avenue because in his experience it was common for homeless people to use and distribute drugs in abandoned homes. He believed Aiken was homeless because he "looked very dirty, like he [hadn't] changed his clothes in quite a bit, and you know, homeless."

Upon exiting the vehicle, Detective English recounted he "ran right to the back of the . . . house[.]" because he "assumed that maybe [Aiken] had just bought drugs" and wanted to "see if there [was] a dealer back there," as "[s]ometimes drugs dealers go behind th[o]se houses and . . . sell drugs." He claimed his assumption was based on his training and experience and noted he was familiar with the area through previous arrests.

Detective Duffy similarly testified they stopped Aiken for a field interview because they observed him walking alongside an abandoned house. Contrary to Detective English, however, Detective Duffy claimed the detectives stopped Aiken because "you see a lot of guys . . . steal stuff out of abandoned houses." When asked how the detectives knew the house was abandoned, Detective Duffy stated the house was "all boarded up."

The court found both detectives to be credible and credited both detectives' testimony they witnessed a man, who "appeared to be homeless," walking alongside an abandoned home. The court specifically found "Detectives English and Gomez . . . were in the rear yard of 58 Manchester Avenue, an abandoned home after seeing a party that Detective English described as a homeless man . . . walking in the rear, and returning a short time later."

The court relied on State v. Tucker, 136 N.J. 158, 167-68 (1994) for the proposition that "police may investigate suspicious behavior even if they do not possess probable cause to arrest that particular party," and concluded the detectives were therefore legally present in 58 Manchester Avenue's backyard. It recounted Detective English's testimony he witnessed defendant walk onto the rear porch of 56 Manchester Avenue "possessing a silver handgun in his right

hand," and determined, "at [that] point, the police had probable cause to believe . . . defendant . . . was committing a crime, very simply, that he had a gun in his hand."

Further, relying on the ten-factor test set forth in State v. Alvarez, 238 N.J. Super. 560, 568 (App. Div. 1990), the court concluded exigent circumstances justified a warrantless search of 56 Manchester Avenue when defendant ran back inside the residence. The court reasoned defendant's possession of a weapon and flight into 56 Manchester Avenue created a high degree of urgency and danger to the detectives. Specifically, the court stated defendant could "[v]ery easily . . . have hidden himself inside this home and shot at the officers from inside the home as they were waiting outside." It also found "[i]t was clear to . . . defendant that the police were on his trail," and the detectives did not create the exigent circumstances.

The court also determined the detectives were legally present in the residence, and accordingly found the CDS and handgun located in the first-floor apartment were properly seized under the plain view doctrine. The court then concluded the detectives seized items from the third-floor apartment pursuant to defendant's lawfully-obtained consent.

As noted, the jury convicted defendant of one count each of: third-degree CDS possession (heroin); third-degree CDS possession with intent to distribute (heroin); second-degree unlawful possession of a weapon; second-degree possession of a weapon while committing a CDS offense; fourth-degree resisting arrest; and certain persons not to have weapons. The jury acquitted defendant of all other charges. After merger, the court sentenced defendant to an aggregate thirty-year custodial term with a fifteen-year period of parole ineligibility, which included two consecutive extended terms. This appeal followed.

II.

In reviewing a motion to suppress, we defer to the factual and credibility findings of the trial court, "so long as those findings are supported by sufficient credible evidence in the record." State v. Coles, 218 N.J. 322, 342 (2014) (quoting State v. Hinton, 216 N.J. 211, 228 (2013)). Deference is afforded "because the 'findings of the trial [court] . . . are substantially influenced by [its] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Reece, 222 N.J. 154, 166 (2015) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). "A trial court's interpretation of the law, however, and the consequences that flow from

established facts are not entitled to special deference." State v. Hubbard, 222 N.J. 249, 263 (2015) (citing State v. Gandhi, 201 N.J. 161, 176 (2010)). We review a trial court's legal conclusions de novo. Ibid. (citing Gandhi, 201 N.J. at 176).

III.

In Point I, defendant contends the court erred in denying his suppression motion, as the State failed to establish any exception to the warrant requirement supported the warrantless searches of 56 and 58 Manchester Avenue. With respect to 58 Manchester Avenue, he argues Tucker does not authorize warrantless searches of homes, and the State failed to establish the detectives reasonably believed 58 Manchester Avenue was abandoned under State v. Brown, 216 N.J. 508, 527 (2014). Relying on Wong Sun v. United States, 371 U.S. 471, 486 (1963), he maintains any evidence flowing from Detective English's unlawful entry must therefore be suppressed as fruit of the poisonous tree. Further, according to defendant, even if Detective English lawfully entered the backyard of 58 Manchester Avenue, his observations of defendant holding a handgun "did not establish probable cause or exigent circumstances to justify the officers' warrantless entry into 56 Manchester Avenue."

The State, also relying on Brown, contends "a defendant has no standing to challenge the warrantless search of abandoned property." It maintains the detectives reasonably believed 58 Manchester Avenue was abandoned and their warrantless search of the backyard was therefore a valid exercise of their investigatory authority under Tucker.

Further, according to the State, "Aiken's behavior coupled with the appearance of 58 Manchester Avenue created a reasonable belief that a drug transaction was taking place. Thus, when Detective English entered the backyard and observed defendant with [a] handgun, it was not just defendant standing with a handgun that created probable cause." The State argues "the probable cause determination is undoubtedly impacted by the fact that defendant was holding a handgun and ran from the police."

We have considered the parties' arguments in light of the applicable law and agree with defendant the State failed to present evidence to the motion court sufficient to justify the detectives' warrantless entries into either property. We initially observe, although the property subject to defendant's suppression motion was seized from 56 Manchester Avenue, the parties extensively briefed the detectives' entry into 58 Manchester Avenue's backyard. Accordingly, we begin our discussion by addressing the applicable burden of proof and the

parties' arguments with respect to abandonment and the scope of the detectives' investigatory authority under Tucker.

"Because warrantless stops and searches are presumptively invalid, the State bears the burden of establishing that any such stop or search is justified by one of the 'well-delineated exceptions' to the warrant requirement." State v. Shaw, 213 N.J. 398, 409 (2012) (quoting State v. Frankel, 179 N.J. 586, 598 (2004)). "Indeed, the State must prove 'by a preponderance of the evidence the validity of a warrantless search.'" Ibid. (quoting State v. Edmonds, 211 N.J. 117, 128 (2012)).

Where property has been abandoned "a defendant will not have standing to object to the search or seizure" of that property. State v. Johnson, 193 N.J. 528, 548-49 (2008). Stated differently, "the abandonment of property strips a person of standing to challenge a search." Id. at 547. "To that extent, abandoned property falls within an exception to the warrant requirement," and "the State bears the burden of proving by a preponderance of the evidence" that the property is abandoned. Brown, 216 N.J. at 528-29.

As a threshold matter, we reject any contention defendant lacked standing to challenge the detectives' searches of 56 and 58 Manchester Avenue. Defendant was charged with a possessory offense of seized evidence and

therefore had standing to challenge the detectives' actions under N.J. Const. art. I, ¶ 7. State v. Randolph, 228 N.J. 566, 581, 585 (2017); State v. Lamb, 218 N.J. 300, 313 (2014); State v. Alston, 88 N.J. 211, 228 (1981). Additionally, the State failed to establish the detectives had a reasonable objective belief 58 Manchester Avenue was abandoned under the factors set forth in Brown.

"[O]n appeal we may only consider whether the motion to suppress was properly decided based on the evidence presented at that time." State v. Robinson, 200 N.J. 1, 15 (2009). Here, the evidence of 58 Manchester Avenue's abandonment presented to the motion court consisted of Aiken's presence at the house and Detective Duffy's statement the house was "all boarded up."

The State failed to meet its burden under Brown to establish "clear, unequivocal and unmistakable evidence that the property ha[d] been abandoned." 216 N.J. at 530. Indeed, the State did not address the majority of the factors articulated in Brown, such as the detectives' access to property records, the house's condition, or their personal knowledge of that specific building. See id. at 532-35. Although Detective English claimed he was familiar with the area, he did not represent he possessed any prior knowledge of 58 Manchester Avenue specifically or how his familiarity with the area led him to believe the house was abandoned.

Additionally, to the extent Detective Duffy indicated the house was boarded up, that fact weighs against a finding of abandonment under Brown, as the Court noted such action evinces an intent by an owner to keep people off the property. Id. at 534. Finally, even if we accept Aiken was present at the house to purchase CDS, his presence was insufficient to prove the house was abandoned. Ibid.

Furthermore, Tucker, relied upon by the motion court and the State, does not support Detective English's warrantless entry into 58 Manchester Avenue's backyard, as the holding in that case is unrelated to the Fourth Amendment issues before us. In Tucker, the Court reaffirmed the principle that "a police officer on patrol . . . having an articulable suspicion that citizens are engaged in illegal activity, has the right to question the suspects." Id. at 167. As the Court explained, reason and common sense dictate that the police clearly "have the right to stop persons on the street for summary inquiry where . . . the circumstances are so highly suspicious as to call for such inquiry." Id. at 168 (quoting State v. Dilley, 49 N.J. 460, 464 (1967)).

Focusing on the aforementioned language in Tucker, the motion court held "police may investigate suspicious behavior even if they do not possess probable cause to arrest that particular party." Contrary to the court's decision, however,

absent a recognized exception to the warrant requirement police may not enter protected property such as a home or a backyard in order to investigate suspicious activity. See State v. O'Herron, 153 N.J. Super. 570, 581 (App. Div. 1977) (holding that backyards are constitutionally protected spaces).

Tucker did not address the warrantless intrusion into a backyard. Rather, the case addressed the permissible scope of an investigative Terry² stop and explained that an officer who has reasonable and articulable suspicion an individual is engaged in illegal activity has the right to stop and question the suspect without a warrant. 136 N.J. at 167-68. That stop, however, must be justified by an objective reasonable belief that the suspect was or is involved in criminal activity. State v. Thomas, 110 N.J. 673, 678 (1988). Upon such reasonable belief, the police are permitted to stop the defendant for questioning. State v. Jefferson, 413 N.J. Super. 344, 354-55 (App. Div. 2010). It does not grant them the right to enter private property without a warrant to investigate further. Ibid.

Furthermore, "[n]othing in Terry can be understood to allow . . . any search whatever for anything but weapons." Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). "The purpose of this limited search is not to discover evidence of

² Terry v. Ohio, 392 U.S. 1 (1968).

crime, but to allow the officer to pursue his investigation without fear of violence." Adams v. Williams, 407 U.S. 143, 146 (1972).

Here, it was undisputed Detective English entered the backyard of 58 Manchester Avenue immediately after exiting the vehicle, and before Detectives Pacelli and Duffy commenced the field inquiry of Aiken. In fact, Detective English never spoke with Aiken, and never possessed the information Aiken told Detective Duffy that Aiken came there to meet his drug dealer. The search of the backyard was therefore unrelated to any stop, investigative or otherwise, and beyond the detectives' permissible investigatory scope of a field inquiry of Aiken. See Jefferson, 413 N.J. Super. at 354-55. While an officer who possesses a reasonable and articulable suspicion of criminal activity may conduct a warrantless search incident to a legal stop to ensure his safety, either through a frisk of a suspect or a protective sweep, neither exception applied here. State v. Garland, 270 N.J. Super. 31, 41 (App. Div. 1994) (citing Terry, 392 U.S. at 27).

The State therefore failed to meet its burden to establish an exception to the warrant requirement to validate the detectives' warrantless entry into 58 Manchester Avenue. See Shaw, 213 N.J. at 409. As the State failed to establish the detectives were lawfully present in the backyard of 58 Manchester Avenue,

we agree with defendant the State cannot rely on observations the officer made there to provide the basis for probable cause to search 56 Manchester Avenue. See Wong Sun, 371 U.S. at 485.

Even were we to assume Detective English was lawfully in 58 Manchester Avenue's backyard when he observed defendant, we also part company with the motion court's conclusion the search of 56 Manchester Avenue and seizure of physical evidence satisfied the Fourth Amendment. The State failed to establish the detectives possessed probable cause and exigent circumstances to permit that warrantless entry. See Hubbard, 222 N.J. at 263 (We do not defer to "[a] trial court's interpretation of the law . . . and the consequences that flow from established facts."); see also State v. Gibson, 218 N.J. 277, 294 (2014) (We are not "obliged to defer to the ultimate finding of probable cause when the facts and inferences do not support that conclusion.").

"In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." State v. Penalber, 386 N.J. Super. 1, 11 (App. Div. 2006) (quoting Payton v. New York, 445 U.S. 573 ,590 (1980)). To invoke the exigent circumstances exception, "the State must show that the officers had

probable cause and faced an objective exigency" that did not permit time to secure a warrant. In the Interest of J.A., 233 N.J. 432, 448 (2018) (citations omitted).

Probable cause is a "a well-grounded suspicion that a crime has been or is being committed." State v. Pineiro, 181 N.J. 13, 21 (2004) (internal citations omitted). "It requires nothing more than 'a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability'" that a crime has been committed. State v. Dangerfield, 171 N.J. 446, 456 (2002) (internal citations omitted).

A totality of the circumstances standard applies to probable cause determinations because probable 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." Schneider v. Simonini, 163 N.J. 336, 361 (2000) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)). The reasonableness of the arresting officers' actions must be considered from "the specific reasonable inferences which [they are] entitled to draw from the facts in light of [their] experience." Dangerfield, 171 N.J. at 456 (quoting Terry, 392 U.S. at 27). Probable cause, however "cannot be based upon a mere hunch." State v. Sansotta, 338 N.J. Super. 486, 491 (App. Div. 2001).

As noted, the detectives justified their search of 56 Manchester Avenue based on Detective English's observation of defendant holding a handgun on the porch and retreating into the house when he heard Detective English call out about a man with a gun. Those two facts, individually or in combination, failed to establish probable cause.

First, the mere possession of a weapon on the porch of a home, without more, does not support the trial court's finding that defendant was engaged in illegal activity. The only activity Detective English observed was not per se illegal, and thus could not establish probable cause. As our Supreme Court explained in State v. Petties, 139 N.J. 310, 315-16 (1995), "[p]ossession of a gun is not always and everywhere criminal. One may possess an unlicensed handgun at home. One may not, however, carry a handgun without a permit. Although we may legally possess a handgun at home, we may not possess it for an unlawful purpose." Further, a "homeowner who possesses a gun in his home (presumably as a precaution against crime) does not violate N.J.S.A. 2C:39-5 because under N.J.S.A. 2C:39-6(e), he is not carrying it."³ State v. Harmon, 104 N.J. 189, 198-99 (1986).

³ N.J.S.A. 2C:39-6(e) provides:

We similarly disagree with the undue significance the court gave to defendant retreating into his home once he assumedly saw Detective English and purportedly heard him say "[t]here's a man with gun." As the Tucker court noted when it concluded flight from police did not alone support a Terry stop, certain individuals "may not feel entirely comfortable in the presence of some, if not all, police is regrettable, but true." 136 N.J. at 169. The Court also explained a suspect's departure takes on the legal significance of flight only when "circumstances [are] present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt." Ibid. (quoting State v. Sullivan, 43 N.J. 209, 238-39 (1964)). "[F]light alone does not create reasonable suspicion for a stop, let alone probable cause." Dangerfield, 171 N.J. at 457.

Nothing in subsections b., c. and d. of N.J.S.[A.] 2C:39-5 shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm, or from carrying the same, in the manner specified in subsection g. of this section.

[N.J.S.A. 2C:39-6(e) (emphasis added); cf. N.J.S.A. 2C:39-7 (making it per se illegal for certain persons to purchase, own, possess, or control a firearm).]

We find the Tucker Court's observations particularly appropriate here, as based on Detective English's testimony from the suppression hearing, he did not direct defendant to stop, nor give him any instruction whatsoever. And nothing in the record supports an assertion that defendant took any action to place Detective English or the officers in danger, threatened to use the handgun in any way, or attempted to discard it. Prior to their warrantless entry, see Brown, 216 N.J. at 536 ("[t]he legitimacy of a search will not depend on what was learned by the police after entry into the home"), the detective, at most, saw defendant presumptively lawfully possessing a handgun on private property return inside a residence on hearing Detective English yell that an unidentified individual had a gun. Those circumstances do not "reasonably justify an inference" defendant's return to 56 Manchester Avenue "was done with a consciousness of guilt," Tucker, 136 N.J. at 169, nor do they support "a well-grounded suspicion that a crime [had] been or [was] being committed," Pineiro, 181 N.J. at 21.

We also reject the State's contention that defendant was observed with a handgun in an area the detectives reasonably believed drug transactions were taking place. The detectives' vague and conclusory testimony that Aiken was homeless and 58 Manchester Avenue was abandoned did not support an inference defendant was involved in a drug transaction on a neighboring

property. Additionally, the two properties were separated by a six-foot tall fence and the detectives did not present testimony with respect to their discussion with Aiken that would tie defendant to any drug transaction.

Finally, we also disagree with the motion court that the State met its burden to establish exigent circumstances justified the police forcing in the rear and front doors of 56 Manchester Avenue without a warrant. See Shaw, 213 N.J. at 409 (The State bears the burden to establish a warrantless search was justified by an exception to the warrant requirement.). Again, we owe no deference to the motion court's legal conclusions in this regard. See Hubbard, 222 N.J. at 263.

Whether exigent circumstances are present is a fact-sensitive inquiry and we have previously enumerated the following relevant factors to be considered when addressing whether such circumstances exist:

(1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; (5) the ready destructibility of the contraband . . .; (6) the gravity of the offense involved; (7) the possibility that the suspect

is armed; (8) the strength or weakness of the facts establishing probable cause[;] and (9) the time of the entry.

[Alvarez, 238 N.J. Super. at 568.]

In weighing such considerations, we are aware "[p]olice safety and the preservation of evidence remain the preeminent determinants of exigency." State v. Dunlap, 185 N.J. 543, 551 (2006); see also State v. Wilson, 362 N.J. Super. 319, 333 (App. Div. 2003) ("A deadly weapon poses a special threat to both the public and police, and its presence is a significant factor in evaluating whether there are exigent circumstances which justify a warrantless search."). Nonetheless, our courts "have never held that a generalized concern about public or police safety or the preservation of evidence would justify a warrantless search or seizure. Certainly, permitting warrantless searches and seizures in the absence of an objectively reasonable necessity would severely undermine the warrant requirement." State v. Manning, 240 N.J. 308, 335 (2020).

On balance, we are satisfied the circumstances presented to the detectives, as described at the suppression hearing, were insufficient to necessitate the detectives' decision to forego the warrant requirement. Significantly, contrary to the motion court, we find "the gravity of the offense involved" (factor six) and the "weakness of the facts establishing probable cause" (factor eight)

necessarily weigh against a finding of exigent circumstances because under the circumstances here, as noted, mere possession of a handgun on private property does not support a well-grounded suspicion of criminal activity. The evidence presented to the motion court was simply insufficient to support a finding defendant possessed the handgun for an unlawful purpose. See *infra* at pp. 21-24.

Similarly, again as possession of a handgun is not *per se* illegal, no evidence was presented to the motion court that defendant was observed with any illegal contraband. Therefore, the detectives did not have a "reasonable belief . . . contraband [was] about to be removed" (factor two) or destroyed (factor five).

We acknowledge certain of the Alvarez factors weigh in favor of finding exigent circumstances, as defendant was armed (factor seven) and seemingly aware the police were following him (factor four), although it is unclear from the record whether the detectives had reason to believe defendant knew they were chasing him into 56 Manchester Avenue. We are also mindful of the danger posed to police officers when confronting suspects armed with a handgun. See Wilson, 362 N.J. at 333. We do not find these factors tip the balance in favor of finding exigent circumstances, however, as there was no

evidence to suggest defendant took any action that would suggest he intended to use the handgun prior to retreating back into the house.

Additionally, the motion court found the detectives were faced with a high degree of urgency. The source of that urgency, however, is unclear from the court's analysis. Notably, there is no evidence to suggest the detectives attempted, or even considered attempting, to secure the perimeter and obtain a warrant, telephonically or otherwise. Our Supreme Court has explained:

When the circumstances are sufficiently exigent that appearing before a judge to obtain a written warrant is either impossible or impracticable, but not so exigent that there is insufficient time to stabilize the situation and call for a warrant, police officers must obtain a telephonic warrant rather than conduct a warrantless search or seizure.

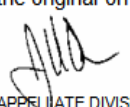
[Johnson, 193 N.J. at 556 (2008). See generally Brown v. State, 230 N.J. 84, 111-12 (2017).]

The detectives did not provide any testimony to suggest the four detectives on the scene would have been unable to secure the premises such that it was impossible or impracticable to make any efforts to obtain a search warrant. In sum, the State did not meet "its heavy burden of establishing that exigent circumstances existed," Alvarez, 238 N.J. Super. at 569, and, consequentially, failed to establish any exception to the warrant requirement justified the warrantless search of 56 Manchester Avenue, see Shaw, 213 N.J. at 409.

The CDS discovered on defendant's person, the first-floor kitchen, and the third-floor apartment, as well as the two handguns, were admitted as evidence, either physically, as exhibits, or by stipulation. Detectives English and Duffy also provided related testimony with respect to the events that unfolded after their warrantless entry into 56 Manchester Avenue. As that evidence was a material part of the State's case, we are satisfied its admission was "clearly capable of producing an unjust result." R. 2:10-2.

The court's order denying defendant's suppression motion is reversed, defendant's convictions and sentence are vacated, and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION