SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2092-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID A. EDMOND, a/k/a CHRIS STEWART, DAVE, DAVID ALEXANDER EDMOND, DAVID D. EDMOND, DAVID EDMOND, and POLO D,

Defendant-Appellant.

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Argued March 8, 2023 – Decided May 25, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 17-08-0589.

Cody T. Mason, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Cody T. Mason, of counsel and on the briefs).

Meredith L. Balo, Assistant Prosecutor, argued the cause for respondent (James O. Tansey, First Assistant

Prosecutor, Designated Union County Prosecutor for purpose of this appeal, attorney; Meredith L. Balo, of counsel and on the brief).

PER CURIAM

Following the denial of his motions to suppress out-of-court identifications and physical evidence seized after law enforcement's warrantless entry into the backyard of his mother Marlene Edmond's home in Plainfield, defendant David A. Edmond pled guilty to first-degree robbery, N.J.S.A. 2C:15-1(a)(3). The court sentenced defendant to an eight-year custodial term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, to run concurrently with his sentences in two other cases. Defendant challenges his conviction and jail credits awarded and raises the following points for our consideration:

POINT I

SUPPRESSION IS REQUIRED BECAUSE THE STATE FAILED TO JUSTIFY THE OFFICERS' WARRANTLESS SEARCHES OF THE BACKYARD AND SHOEBOX.[1]

A. The State Failed To Show That Exigent Circumstances Justified The Searches Of The Backyard And Shoebox.

B. The State Did Not Clearly And Convincingly Show That The Evidence Would Have Inevitably

[1] In this opinion, we refer to the "shoebox" as a "sneaker box."

Been Discovered If Not For The Initial Unlawful Searches.

1. The inevitable-discovery doctrine is a narrow exception that imposes a high burden of proof on the State, particularly in this case.

2. The State did not show that the officers would have inevitably applied for a warrant, searched the yard, and found the sneakers.

3. The State did not show that the officers would have recovered the evidence if not for the unlawful consent search of defendant's room.

4. The State did not show that the officers had probable cause to procure a search warrant absent the initial unlawful searches.

POINT II

THE MATTER MUST BE REMANDED TO DETERMINE WHETHER DEFENDANT IS ENTITLED TO ADDITIONAL JAIL CREDIT.

We agree with defendant's arguments in Point I. The police officers' warrantless entry into his mother's backyard and home was not supported by a well-grounded suspicion of criminal activity. We therefore reverse the denial of defendant's motion to suppress physical evidence and remand for further

proceedings consistent with this opinion. However, we disagree with defendant's arguments in Point II and affirm the jail credit awarded.

I.

We derive the following facts from the suppression hearing. On June 2, 2017, Alexander Brady arranged to sell three pairs of sneakers for $1,150 to an individual by the name of "Chris Stewart" on the LetGo app. Brady and his friend, Raymond Aguero, arranged to meet with the buyer at a location in Plainfield between 10:00 p.m. and 11:00 p.m. While waiting for the buyer to arrive, Brady noticed an Infiniti, with damage to the front bumper and headlight, circle the block twice, which made him feel anxious.

Defendant and another man approached the passenger side of Brady's car. Brady was the driver. Defendant asked Brady to see the sneakers. Aguero had two boxes of sneakers on his lap and passed one to defendant, who looked them over. Defendant asked Brady if he could try a pair of the sneakers on, but he responded, "No, because if you do, it cuts the value in half." The second man pulled out a gun and pointed it at Aguero's head. Just as the men ordered "give me all your sh . . .," Brady, who had the car in drive, hit the gas, leaving the box of sneakers with defendant, who ran away. Later, Brady described the sneakers were Jordan 5 Take Flight.

As he drove away, Brady called 9-1-1 and met with police at a gas station. Brady described one individual, later identified as defendant, as a black male wearing a white Versace sweatshirt, between nineteen and twenty-three years old, and also gave a physical description. According to Brady, the second perpetrator wore a "hoodie very tight over their head."

A few hours later on June 3, 2017, at approximately 12:30 a.m., the police received a report of an armed robbery that occurred on the east end of town in the Reeve Terrace area. The victims identified the suspects as two black males, one wearing a white hoodie shirt with a Versace logo, and the other wearing dark clothing and possessing a silver handgun. The victims of the second reported robbery, as well as Brady, informed the officers that the suspects were driving a black Infiniti with black rims and a headlight out.

Detective Pierre McCall and his partner, Sergeant Thomas Carvalho, canvassed the Reeve Terrace area. The officers noticed a black Infiniti matching the description given by the victim and Brady on the 200 block of Sumner Avenue, a couple of blocks away from where the robbery in the Reeve Terrace area took place. The Infiniti was parked in a driveway, and a Honda was parked across the sidewalk behind it. Three black males stood between the two vehicles, one wearing a white hoodie shirt with a Versace logo.

The officers exited their vehicles and approached the house. As Detective McCall walked toward the house, he observed black rims on the Infiniti and a damaged headlight, which matched the description of the car involved in the reported robberies. Based on their observations, the officers patted down and handcuffed the three men who were standing outside the vehicles and ordered the fourth man inside the Honda to keep his hands on the wheel. The three men were later identified as defendant, co-defendant Gary I. Manley, and defendant's brother Matthew Edmond. The fourth man inside the Honda was identified as "a Hispanic male," possibly named Jose. Detective McCall stayed with the four men and checked for outstanding warrants.

Back up units, including Sergeant Thomas Collina, Detective Michael Bowe, and Detective Michael Metz responded. Sergeant Collina, a patrol supervisor, was concerned about the officers' safety because the house only had a light on in front and there was a "vast, dark backyard," which was "not very well-lit," and "deep." The backyard was partially blocked off by bushes and trees and was not visible from the street. Sergeant Collina started to "look around" to secure the area for the officers' safety because the reported crime involved a firearm, and he was unaware if another suspect was involved.

Sergeant Collina testified he decided to enter the backyard, which contained large piles of construction material and debris, siding, wood, and "a ladder going to the roof," to look for the firearm. Sergeant Collina explained he entered the backyard "just to make sure no one was back there or hiding behind these big mounds of trash." The house was being renovated. Sergeant Collina testified there were "no fences" from the front of the house to the backyard, and he was able to walk around the house to the backyard. Officers Charles Martina and Johnson[2] also went into the backyard.

Meanwhile, Sergeant Collina and Officers Martina and Johnson looked behind the piles of debris and shone their flashlights towards the roof but did not find any individuals or weapons. However, they noticed a box of Jordan sneakers underneath a stairway situated diagonally across the house. The sneaker box was "sitting next to the back door on top of boxes" and was "not covered." Sergeant Collina opened the box and confirmed it contained a pair of sneakers. He thought this was relevant to the reported robbery, which involved a pair of Jordan sneakers. Sergeant Collina also testified the officers found a sweatshirt and masks near the sneaker box. Detective Bowe searched the backyard and did not find anything.

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[2] Officer Johnson's first name is not contained in the record.

Sergeant Collina and Officers Martina and Johnson were all wearing body cameras during the search, but Collina's camera was not activated. Sergeant Collina testified that as the "road supervisor" taking other calls, it was unnecessary to activate his body camera. Although Officers Martina and Johnson's body cameras were activated, according to Sergeant Collina, the State did not present any footage from their body cameras at the suppression hearing.

Detective Bowe then went to the front of the house and knocked on the door. A woman identified as Marlene[3] answered and let Bowe and Metz in. She inquired if her sons were in trouble. In response, the officers "downplayed" the situation and simply stated they were "conducting an investigation" and were "not sure" what the situation was. The officers did not advise Marlene they were looking for a weapon or that defendant and Matthew had already been arrested in connection with a robbery.

Detective Bowe then asked Marlene where defendant slept, and she responded his room was located in the basement. When asked about her "involvement" with defendant's room, Marlene answered, "I only clean, I do laundry." Detective Metz asked Marlene for permission to search defendant's

[3] We refer to certain individuals by their first name because they share a common surname. By doing so, we intend no disrespect.

room and presented her with a "Permission to Search" form. Marlene read and signed the form after she orally consented to a search of defendant's room. According to defendant, the detectives did not inform Marlene about her right to refuse to give consent.

As Marlene escorted the officers down to the basement, which included a "common area" and "at least two doors to other rooms," Detective Bowe observed a pair of blue and orange sneakers that he believed were connected to another robbery in North Plainfield that occurred on May 27, 2017. The door to defendant's room had no handle or lock and was "slightly open." After searching defendant's room, Detective Bowe found an airsoft gun under the bed.[4]

Detective Bowe exited the house and asked defendant for consent to search his room, but he refused. Detective Bowe testified his purpose in doing so was to show the officers were "legally in the room." By the time Sergeant Collina and the other officers returned to the front of the house, Detective McCall learned that defendant and Matthew had outstanding warrants. Officer Martina walked Matthew to his patrol car to transport him to police

[4] An airsoft gun shoots nonlethal plastic bullets and often resembles a traditional firearm.

headquarters. A pat down search by Officer Martina revealed Matthew had a gun in his pants pocket.

Detective Bowe then met with Lieutenant Fusco[5] and the on-call assistant prosecutor at the Plainfield police department to apply for a search warrant. The three of them drove to the on-call judge's residence to obtain a search warrant. Detective Bowe explained it was necessary to find potential evidence from three other robberies he thought defendant was involved in as well as the robbery at issue. In his search warrant application, Detective Bowe stated that defendant could have been involved in the Reeve Terrace area robbery based on the sneakers found in Marlene's basement and the masks found in the backyard. At 5:52 a.m., the judge granted the search warrant for the Infiniti and Marlene's home. Following their search of the Infiniti and home, the officers did not find any evidence related to the Reeve Terrace robbery, and defendant was not charged in connection with any other robberies.

A Union County grand jury charged defendant and co-defendant with first-degree robbery, N.J.S.A. 2C:15-1(a)(3) (count one); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1) (count two); and

[5] Lieutenant Fusco's first name is not contained in the record.

second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39:4(a)(1) (count three).

Defendant filed a motion to suppress physical evidence.[6] After a multi-day hearing at which Detectives McCall, Bowe, and Sergeant Collina testified, the court denied defendant's motion to suppress the physical evidence seized during their warrantless search of Marlene's home where defendant resided.

Detective McCall recounted he patrolled an area where robberies were occurring and responded to information that an armed robbery took place in the area of Reeve Terrace. He and Sergeant Carvalho canvassed the area looking for the black Infiniti with black rims and a "headlamp out," which they located on Sumner Avenue. Detective McCall described three black males, one wearing a "white shirt with Versace logos" and two cars—the Infiniti and the Honda.

The three black males were standing outside the vehicles and were "detained." A fourth male, sitting in the Honda, was also "detained." Detective McCall testified he placed them "in handcuffs" and "patted down" two of the suspects for weapons. He called for backup units and after checking for arrest

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[6] Defendant also filed a motion to suppress two out-of-court witness identifications under U.S. v. Wade, 388 U.S. 218 (1987). The trial court conducted a Wade hearing and denied defendant's motion. That ruling is not challenged on appeal.

warrants, learned defendant and Matthew both had outstanding warrants for their arrest. Neither Detective McCall nor Sergeant Carvalho recovered any proceeds from the robberies.

According to Sergeant Collina, he looked in the backyard because "there was an armed robbery with a gun" and "to make sure no one was back there or hiding behind these big mounds of trash." Sergeant Collina explained the officers in front of the house may not have "the suspects," and he wanted to walk in the backyard "basically for safety" reasons to protect the officers at the scene. Sergeant Collina conceded that no one asked him to enter the backyard, which was "pitch black," and no one gestured toward the backyard. Detective Bowe testified he believed the airsoft gun might have been used in other robberies but did not include that information in his search warrant application. Detective Bowe also admitted that no masks were used in the Reeve Terrace robbery.

The court found the officers to be credible and that they had "the legal right" to search the backyard due to the "degree of urgency" to find the gun and "the amount of time that would have been necessary to obtain a warrant." The court stated the officers were at defendant's house "about [forty], [forty-five] minutes after the alleged offense, [and] the weapon had not yet been recovered." The court also considered "[t]he ready destructibility of the contraband or

evidence" and the risk of harm to the officers and others. Specifically, the court determined "exigent circumstances existed authorizing the police to take the action they did walking to the rear of the home, and they were lawfully in a . . . spot where . . . they found the sneaker box near the rear wall area of the home." The court noted the seriousness of the offenses.

In addition, the court determined valid "consent" was obtained from defendant's mother Marlene to search his room because "defendant was living there," giving the officers "authority" to enter defendant's room. After observing what the officers believed was a "machine gun" under defendant's bed, they applied for a search warrant.

The court did not address the State's alternative argument that the items would have been inevitably discovered other than to summarily conclude that Marlene "granted a valid permission to search [defendant's] room" and the consent search led to the officers seeking a search warrant. The court also did not rule on defendant's argument challenging whether the officers had a legal basis to open the sneaker box found in the backyard without a warrant.

Following denial of his motions, defendant entered into a plea agreement with the State. He pled guilty to count one of the indictment in exchange for the State's agreement to dismiss the other counts. As stated, defendant was

sentenced to an eight-year custodial term subject to NERA, to run concurrently with his sentences in his other cases involving burglary and drug court probation violations.[7] In his plea agreement, defendant preserved the right to challenge the denial of his motion to suppress evidence. R. 3:5-7(d).[8] The court awarded defendant 1,088 days of jail credit. This appeal followed.

II.

The scope of review of a decision on a motion to suppress is limited. State v. Ahmad, 246 N.J. 592, 609 (2021); State v. Nelson, 237 N.J. 540, 551 (2019); State v. Boone, 232 N.J. 417, 425 (2017); State v. Robinson, 200 N.J. 1, 15 (2009). "Generally, on appellate review, a trial court's factual findings in support of granting or denying a motion to suppress must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)).

[7] The record shows defendant was charged with third-degree burglary, N.J.S.A. 2C:18-2(a)(1) - (3), under Indictment No. 18-05-0281; and drug court (now known as recovery court) probation violations, N.J.S.A. 2C:35-14, under Indictment Nos. 16-10-0772, 16-10-0774, 16-10-0775, and 16-10-0776.

[8] Rule 3:5-7(d) provides: "Appellate Review. Denial of a motion made pursuant to this [R]ule may be reviewed on appeal from a judgment of conviction notwithstanding that such judgment is entered following a plea of guilty."

We give deference to those factual 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." State v. Elders, 192 N.J. 224, 243 (2007). The reviewing court "ordinarily will not disturb the trial court's factual findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Goldsmith, 251 N.J. 384, 298 (2022) (quoting State v. Gamble, 218 N.J. 412, 425 (2014)). However, legal conclusions to be drawn from those facts are reviewed de novo. State v. Radel, 249 N.J. 469, 493 (2022); State v. Hubbard, 222 N.J. 249, 263 (2015).

III.

In Point I, defendant contends the court erred in denying his suppression motion because the State failed to establish any exception to the warrant requirement supported the warrantless searches of the backyard and sneaker box. Defendant argues a protective sweep was unnecessary. Further, defendant maintains the State failed to show exigent circumstances justified the officers' search because defendants had been handcuffed, patted down, were "under control," and the Honda and its driver had been detained. Defendant also asserts the State failed to clearly and convincingly show the evidence would have inevitably been discovered if not for the initial unlawful searches.

A. Protective Sweep

According to defendant, the backyard was protected curtilage entitled to enhanced Fourth Amendment protection. In addition, defendant contends the court did not find the officers had probable cause to search the backyard. Relying on State v. Nishina, defendant maintains any evidence flowing from the officers' unlawful entry into the backyard must be suppressed, because there was no "well-grounded suspicion that the weapon or a dangerous suspect was hiding there." 175 N.J. 502, 515 (2003). Defendant argues there was no information about "activity" in the backyard, no one was observed in the backyard, and the officers had detained "more men" than were reported to have been involved in the Reeve Terrace robbery.

Further, defendant asserts neither weapons nor sneakers are easily destroyed, unlike drugs, which may readily be "consumed, hidden, or sold," citing State v. Guerrero, 232 N.J. Super. 507, 512 (App. Div. 1989). Defendant contends there was nothing "to support a reasonable belief that evidence was about to be lost or destroyed" or used against the officers. State v. Cassidy, 179 N.J. 150, 162 (2004). Hence, defendant avers no exigent circumstances existed to conduct an immediate search of the backyard because the scene was under control.

For the first time on appeal, the State contends the police officers conducted a proper protective sweep in the face of exigent circumstances, thereby justifying the officers' search of the backyard for "other possible actors," the unrecovered firearm, proceeds of the robbery, and to secure the premises. According to the State, the officers had to act quickly to search for additional actors and the weapon. The State also asserts that the seizure of the sneaker box found in the backyard was valid, because it was apparent evidence of the Reeve Terrace robbery that occurred earlier in the evening. In addition, the State argues the contents of the sneaker box would have been inevitably discovered through a subsequent warrant search.

The Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protects against unreasonable searches and seizures. State v. Privott, 203 N.J. 16, 24 (2010). As part of that protection, a search or seizure "conducted without a warrant issued upon probable cause is 'per se unreasonable' and invalid 'subject only to a few specifically established and well-delineated exceptions.'" Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). The State bears the burden of proving that a warrant exception

applies by a preponderance of the evidence. State v. Wilson, 178 N.J. 7, 12-13 (2003) (citations omitted).

Probable cause is "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 v. Ohio, 392 U.S. 1, 27 (1968)). Probable cause, however "cannot be based upon a mere hunch." State v. Sansotta, 338 N.J. Super. 486, 491 (App. Div. 2001).

"Historically, federal and state courts have 'applied a more stringent standard of the Fourth Amendment to searches of a residential dwelling.'" State

v. Edmonds, 211 N.J. 117, 129 (2012) (quoting State v. Bruzzese, 94 N.J 210, 217 (1983)). "That is so because '[t]he sanctity of one's home is among our most cherished rights." Ibid. Such enhanced protection also applies to the curtilage of a home. State v. Domicz, 188 N.J. 285, 302 (2006) (citation omitted). "Curtilage is land adjacent to a home[,]" such as yards, walkways, driveways, and porches. Ibid.

When an arrest occurs outside a home, the police may not enter the dwelling or conduct a protective sweep in the absence of a reasonable and articulable suspicion that a person or persons are present inside and pose an imminent threat to the officers' safety. See, e.g., United States v. Lawlor, 406 F.3d 37, 41 (1st Cir. 2005); United States v. Colbert, 76 F.3d 773, 776-77 (6th Cir. 1996). Entering a home to conduct a protective sweep when an arrest is made outside a dwelling should be the rare circumstance, considering the special constitutional protections afforded the home. Radel, 249 N.J. at 477-78.

When objective facts give the police a reasonable and articulable suspicion that their lives may be placed in imminent danger by someone inside the home, justification exists for officers to enter and carry out a protective sweep to safeguard their lives. Ibid. This sensible balancing of the fundamental right to privacy in one's home and the compelling interest in officer safety will

depend on an objective assessment of the particular circumstances. Id. at 478. A self-created exigency by the police cannot justify entry into the home or a protective sweep. See State v. Davila, 203 N.J. 97, 103 (2010).

Existing New Jersey precedent is to be interpreted under the framework established by the United States Supreme Court. See State v. Adkins, 221 N.J. 300, 313 (2015) (concluding that New Jersey courts are bound to follow United States Supreme Court decisions establishing constitutional protections afforded under the Fourth Amendment); see also State v. Ingram, 474 N.J. Super. 522, 528 (App. Div. 2023) (reversing the trial court's denial of defendant's motion to suppress physical evidence because the officer took five steps onto the driveway, which constitutes curtilage of the home). Whether curtilage receives the same privacy protection as a home depends on "various factors, including 'whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.'" Domicz, 188 N.J. at 302.

"Ultimately, whether a 'reasonably prudent officer,' who has arrested a suspect outside a home had sufficient 'articulable facts' to form an objectively reasonable belief 'the area to be swept harbors an individual posing a danger to those on the arrest scene' depends on the totality of the evidence." Radel, 249

N.J. at 500 (quoting Maryland v. Buie, 494 U.S. 325, 334 (2022)). The Court articulated several factors courts should consider in determining whether a protective sweep is justified when an arrest is made outside the home. These factors include:

> (1) whether the police have information that others are in the home with access to weapons and a potential reason to use them or otherwise pose a dangerous threat; (2) the imminence of any potential threat; (3) the proximity of the arrest to the home; (4) whether the suspect was secured or resisted arrest and prolonged the police presence at the scene; and (5) any other relevant circumstances.
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> [Davila, 203 N.J. at 103.]

In Radel, which the Court consolidated with the Terres appeal, it determined whether the police had a right to conduct a protective sweep of a home following an arrest made outside the home, and if so, the requisite justification for a warrantless entry and protective sweep. 249 N.J. at 493. In the case of Radel, the Court held that the possibility of an unknown person inside the home launching a surprise attack constituted no more than an inchoate and unparticularized hunch, unlike the specific and articulable facts required by Buie. Ibid.

The Court found no danger arose that mandated an entry of [Radel's] home without a search warrant, "because the officers had no specific information that

another person was in the house, nor was there information from which they could reasonably infer someone inside posed an imminent danger." Id. at 506. Moreover, the arrest occurred " a distance from the home's entrance"—in Radel's driveway—"with watchful eyes on the front and rear doors of the house." Ibid.

On the other hand, in the case of Terres, the Court held that officers had a reasonable and articulable suspicion to believe a person capable of launching an attack maybe inside of a trailer home, and the imminence of the potential threat did not allow for calm reflection but required prompt action to safeguard their lives. Id. at 505. The Court reasoned that the chaotic circumstances justified the protective sweep because the officers had been warned of potential dangers inside the trailer, officers observed loose bullets and shell casings, and people were attempting to flee the scene as arrests were taking place. Ibid. The officers in Terres faced unexpected and fast evolving circumstances. Id. at 506.

Here, similar to Radel, the police executed a controlled arrest in the driveway with no specific information that another person was inside the home or any information from which the officers could reasonably infer that someone inside posed an imminent danger. Although the officers were investigating an armed robbery, arrests were made of defendant, his brother, and all of the other suspects fairly quickly in the driveway. Based upon our careful review of the

record, we conclude the officers did not face a discernable threat from the backyard of the home, and a protective sweep was not justified.

The backyard was not visible from the street and was partially blocked off by bushes and trees as stated. We observe from the record the backyard was a separate space protected as curtilage, having the same privacy protections of a home. See Domicz, 188 N.J. at 302 (finding curtilage is protected depending on factors including the enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by). Here, we conclude the backyard is a space separate from the front of the house based upon the testimony elicited at the suppression hearing, and therefore, constitutes curtilage.

The totality of the circumstances here does not support a finding the officers had "a reasonable and articulable suspicion of a safety threat necessitating a protective sweep." Radel, 249 N.J. at 498. The officers secured the perimeter of defendant's home, and they executed a controlled arrest in the driveway with no specific information that another suspect was in the backyard or inside the home. We note it is undisputed that defendant and the other suspects were already detained in the driveway located towards the front of the house similar to Terres. Moreover, there was no information from which the

officers could reasonably infer that someone inside the home posed an imminent danger. Therefore, the officers did not face a discernable threat from the backyard of the home, and they were not vulnerable to an unexpected attack. Id. at 495.

Moreover, no consent was obtained from Marlene or defendant to search the backyard, and the State has not shown any independent basis for the officers to enter the backyard. And, the officers did not provide a reasonable basis to justify bypassing the warrant requirement once defendant was under arrest. Further, as the State did not prove a protective sweep of the backyard was warranted, the plain view exception to the warrant requirement cannot serve to authorize seizure of the sneakers. In order to demonstrate the officers were permitted to recover contraband in plain view, the State was required to prove the officers were "lawfully in the viewing area," discovered the evidence inadvertently, and the criminality of the items must have been "immediately apparent" to the officers. State v. Earls, 214 N.J. 564, 592 (2013) (citing State v. Mann, 203 N.J. 328, 341 (2010)). Because the officers did not have a valid reason to enter the backyard, the sneaker box was not inadvertently found, and there was a lack of probable cause, the plain view doctrine does not apply. As

noted, the police were not "lawfully" in the home's rear curtilage. Therefore, we reverse the denial of defendant's motion to suppress physical evidence.

B. Exigent Circumstances

When the State invokes the exigent circumstances exception to justify a warrantless search, it must prove two factors by a preponderance of the evidence. State v. Manning, 240 N.J. 308, 333 (2020). First, it must show that "the search was premised on probable cause." Ibid. The State must show that there was "a well-grounded suspicion that a crime ha[d] been or [was] being committed[,]" Nishina, 175 N.J. at 515 (quoting State v. Sullivan, 169 N.J. 204, 211 (2001)), and that there was "a fair probability that contraband or evidence of [that] crime w[ould] be found in [the] particular place" to be searched. Ibid. (quoting State v. Johnson, 171 N.J. 192, 214 (2002)).

The State must also show "law enforcement acted in an objectively reasonable manner to meet an exigency that did not permit time to secure a warrant." Manning, 240 N.J. at 333. An exigency exists when the need to act without delay is imperative, an unusual situation that the State faces a "heavy burden" to establish. State v. Alvarez, 238 N.J. Super. 560, 569 (App. Div. 1990). Further, the State must show that the exigency was so pressing that it was impossible to even "stabilize the situation" for enough time to secure a

telephonic warrant. State v. Johnson, 193 N.J. 528, 556 (2008) (finding that when the circumstances are sufficiently exigent to obtain a written warrant, 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). Whether exigent circumstances are present is a fact-sensitive inquiry.

Our Supreme Court has enumerated the following relevant factors to be considered when addressing whether such circumstances exist:

> (1) the seriousness of the crime under investigation, (2) the urgency of the situation faced by the officers, (3) the time it would have taken to secure a warrant, (4) the threat that evidence would be destroyed or lost or people would be endangered unless immediate action was taken, (5) information that the suspect was armed and posed an imminent danger, and (6) the strength or weakness of the probable cause relating to the item to be searched or seized.
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> [Manning, 240 N.J. at 333-34 (citations omitted).]

"[I]naction due to the time needed to obtain a warrant will create a substantial likelihood that the police or members of the public will be exposed to physical danger or that evidence will be destroyed or removed from the scene." Johnson, 193 N.J. at 553.

We acknowledge one of the Manning factors weighs in favor of finding exigent circumstances, as the crime under investigation was serious (factor one). We are also mindful of the danger posed to police officers when confronting suspects armed with a handgun. See 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 pubic or police safety or the preservation of evidence would justify a warrantless search or seizure." Manning, 240 N.J. at 335.

However, contrary to the motion court, we conclude "the intent that evidence would be destroyed or lost, or people would be endangered unless immediate action was taken (factor four under Manning), and "the weakness of the probable cause relating to the item to be searched or seized (factor six under Manning), necessarily weighed against a finding of exigent circumstances. On balance, we are satisfied the circumstances presented to the officers, as described at the suppression hearing, were insufficient to forego the warrant requirement.

Defendant maintains the officers did not have probable cause to believe the backyard had a weapon or a "dangerous suspect" and did not face an emergency that made it "impossible or impracticable" to apply for a written or a telephonic warrant. In defendant's view, no on-going emergency existed that required an immediate search of the backyard. In addition, the sneaker box uncovered in the backyard with "shark's teeth" on it, which was opened to "confirm" that it contained sneakers, was an illegal search that cannot be justified under the exigent-circumstances exception. We agree with defendant on this point.

Recently, our Supreme Court decided State v. Miranda, ___ N.J. ___, ___ (2023). In Miranda, defendant's girlfriend N.D. reported that he threatened and assaulted her. N.D. told the investigating officers that Miranda stored weapons in a black bag inside the closet of the trailer where they lived. The Court noted there were two warrantless searches involved—the search of the trailer, and the search of the black bag. While the Court found the search of the trailer was lawful because N.D. had apparent authority to authorize the search, as she and her daughter kept items in the trailer, the Court held N.D. did not have apparent authority to consent to the search of the black bag. Because there were no exigent circumstances to justify the search of the black bag—which belonged to

Miranda—even though only one officer was on the scene and believed there was a weapon inside the bag, the situation was under control and Miranda was in custody. Id. at 27. The Court suppressed the evidence and reversed Miranda's conviction.

Here, we disagree with the undue significance the motion court gave to Sergeant Collina's "hunch" that the backyard was "dangerous" because it was after midnight, dark, and vast. We are also persuaded by the fact the record is devoid of any reason explaining why the officers could not have sought a telephonic search warrant. To summarize, we are persuaded the State failed to establish the officers had probable cause to search the backyard or that there was an objectively reasonable basis to believe exigent circumstances existed, which precluded law enforcement from securing a search warrant at the time of the incident. In light of our decision, we need not address the State's argument that the sneakers would have been inevitably discovered.

IV.

Lastly, in Point II, defendant contends a remand is warranted to determine whether he is entitled to an additional six days of jail credit. The State maintains defendant was awarded the correct amount of jail credit. Jail credits are "day-for-day credits," and they apply to the "front end" of a defendant's sentence,

meaning that a defendant is entitled to credit against the sentence for every day defendant was held in custody for that offense prior to sentencing. State v. Hernandez, 208 N.J. 24, 37 (2011) (quoting Buncie v. Dep't of Corr., 382 N.J. Super. 214, 217 (App. Div. 2005)). Rule 3:21-8 requires that a "defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence."

Here, defendant was awarded 1,088 days of jail credit for his time spent in custody from June 3, 2017, to June 13, 2017; September 8, 2017, to October 11, 2017; January 30, 2018, to February 5, 2018; and February 8, 2018, to December 9, 2020. The court based the number of days of jail credit on the calculation made by the probation department in the presentence report. Defendant claims his case should be remanded to determine whether he is entitled to an additional six days of jail credit based on a statement made by the prosecutor during the sentencing hearing. We disagree.

The prosecutor stated that defendant was arrested on January 24, 2018, in connection with the burglary case. But the record shows the prosecutor misspoke. The complaint date for the burglary case was January 24, 2018, however, defendant was not arrested until January 30, 2018, six days later. Thus, we are satisfied defendant was awarded the correct number of days of jail

credit based on the time he was actually in custody between the date of his arrest and sentencing. Although the prosecutor misstated the date of defendant's arrest, the court clarified in its sentencing decision that the correct date of arrest was January 30, 2018.

In sum, the court's order denying defendant's motion to suppress physical evidence is reversed, his conviction and sentence are vacated, and the matter is remanded for further proceedings consistent with this opinion. The amount of jail credit awarded is affirmed. We do not retain jurisdiction.