

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2170-20

STATE OF NEW JERSEY IN THE
INTEREST OF S.H., a minor.

Submitted January 24, 2023 – Decided May 31, 2023

Before Judges Sumners and Fisher.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Atlantic County,
Docket Nos. FJ-01-0124-21 and FJ-01-0322-21.

Joseph E. Krakora, Public Defender, attorney for
appellant S.H. (Lauren S. Michaels, Assistant Deputy
Public Defender, of counsel and on the briefs).

William Reynolds, Atlantic County Prosecutor,
attorney for respondent State of New Jersey (Katrina
M. Koerner, Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

S.H. appeals the trial court's denial of his motion to suppress marijuana and a firearm recovered during a traffic stop. The stop was precipitated by the police officer's determination that the car in which S.H. was a passenger had

illegally tinted windows. S.H. contends the court erred in finding the stop valid because the State failed to prove the car windows were illegally tinted. S.H. also argues the State did not prove the police officers had probable cause to search the vehicle or reasonable articulable suspicion to prolong the stop for a dog sniff. Finally, S.H. asserts the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31 to -56, should retroactively apply to his case and remove any reasonable articulable suspicion the officers had that marijuana was in the vehicle. We are unpersuaded by these arguments and affirm.

I.

Shortly before midnight on September 2, 2020, Pleasantville Police Officer Michael Mabkhouti stopped a vehicle with "darkly-tinted front windows" for an illegal tinting infraction under N.J.S.A. 39:3-75.¹ As he was stopping the vehicle, Mabkhouti observed thorough the car's rear window that occupants were moving.

As Mabkhouti approached the car, he claimed he smelled the odor of raw marijuana. Mabkhouti asked the driver, Mohamed Toure, for his license,

¹ While Officer Mabkhouti's testimony indicates the stop occurred on August 2-3, the body camera footage and complaint both indicate it occurred on September 2 to 3.

registration, and insurance, however, Toure only provided a temporary registration and identifying information. Toure stated he was driving S.H., a back-seat passenger, to S.H.'s grandmother's house. There were also two other adults and two infants in the car. Meanwhile, Pleasantville Officer Robert D'Arcangelo arrived and Mabkhouti told him there was a high probability of contraband in the car, specifically, firearms. D'Arcangelo also testified he smelled raw marijuana in the car.

Mabkhouti asked to speak to S.H. about his friend's fatal shooting the prior night because information was received that there may be retaliatory shootings. When S.H. exited the car, Mabkhouti first asked how he was doing, then stated "[w]hat's up with all the weed you got on you? You got a ton of stuff in there?" S.H. denied the accusation. Mabkhouti and S.H. moved away from the car, and Mabkhouti frisked S.H.

After briefly questioning S.H., Mabkhouti asked Toure whether he could search the vehicle. Toure declined. Mabkhouti then frisked Toure, before requesting consent to search again and asking whether there were any drugs or firearms in the car. Toure denied both questions.

Mabkhouti went back to his car where he radioed for confirmation that Toure did not have a license and requested a K-9 unit. While waiting for the K-

9, Toure refused Mabkhouti's third request to search his car. Dispatch informed Mabkhouti that Toure did not have a license, nor any outstanding warrants.

The K-9 arrived almost twenty-one minutes after Toure's car was stopped. The dog "indicated positively on the vehicle." A search of the car found two small, tied-off bags of marijuana and a handgun in a duffle bag. S.H. took responsibility for the contraband and was arrested. Since the officers did not have a ticket book, Toure was told his ticket for his motor vehicle violation would be mailed to him, so he and the car's other occupants were allowed to leave. The entire stop took approximately one hour.

S.H. was charged with acts that, if committed by an adult, would constitute: second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b(1); second-degree possession of a firearm with an unlawful purpose, N.J.S.A. 2C:39-4a(1); fourth-degree possession of handgun ammunition without a license, N.J.S.A. 2C:58-3.3; and disorderly-persons possession of marijuana, N.J.S.A. 2C:35-10a(4).

S.H. unsuccessfully moved to suppress the gun and marijuana recovered during the traffic stop. S.H. thereafter pled guilty to second-degree unlawful possession of a handgun and violation of probation. He also pled guilty to first-degree maintaining/operating a controlled dangerous substance manufacturing

facility for another incident. S.H. was adjudicated delinquent and received an aggregate term of an additional nine months of probation covering all of his offenses.

II.

Our review of a decision on a motion to suppress is limited. State v. Ahmad, 246 N.J. 592, 609 (2021). "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)). The appellate court defers 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). However, legal conclusions to be drawn from those facts are reviewed de novo. State v. Radel, 249 N.J. 469, 493 (2022).

A. The Validity of the Traffic Stop

During the motion hearing, Mabkhouti and D'Arcangelo testified, and Mabkhouti's body camera footage was played. The trial court asked S.H.'s counsel, "[w]ell, let me ask you a question. You . . . concede it was an

appropriate or a valid motor vehicle stop because of the tinted windows." Counsel responded "yes." As a result, the court considered the stop lawful and valid.

Despite his concession at trial, S.H. argues on appeal the State did not present sufficient evidence to establish a reasonable articulable suspicion that Toure's car's window tinting violated either N.J.S.A. 39:3-74 or -75.² In support, S.H. notes Mabkhouti's testimony that: (1) the car "ha[d] darkly-tinted front windows, specifically the driver's side window"; and (2) he could see into the

² N.J.S.A. 39:3-74 states:

No person shall drive any motor vehicle with any sign, poster, sticker or other non-transparent material upon the front windshield, wings, deflectors, side shields, corner lights adjoining windshield or front side windows of such vehicle other than a certificate or other article required to be so displayed by statute or by regulations of the commissioner.

No person shall drive any vehicle so constructed, equipped or loaded as to unduly interfere with the driver's vision to the front and to the sides.

Whereas N.J.S.A. 39:3-75 states: "No person shall drive any motor vehicle equipped with safety glazing material which causes undue or unsafe distortion of visibility or equipped with unduly fractured, discolored or deteriorated safety glazing material, and the director may revoke the registration of any such vehicle."

car well enough, on a rainy night, to determine multiple people were moving inside. S.H. contends this testimony lacks detail and, in fact, Mabkhouti's ability to see into the car demonstrates the tinting was transparent and did not interfere with visibility.

The success of S.H.'s argument is based on whether we should retroactively apply our Supreme Court's ruling in State v. Smith—rendered after the stop here—that "reasonable suspicion of a tinted windows violation arises when a vehicle's front windshield or front side windows are so darkly tinted that police cannot clearly see peoples or articles within the car." 251 N.J. 244, 253 (2022). Prior to Smith, we would consider whether the stop was lawful under the more lenient "community caretaking function" as it was permissible to stop Toure's car "even if not violative of [a motor vehicle]" violation due to "a hazardous vehicular condition that deviates from the norm." State v. Cohen, 347 N.J. Super. 375, 381 (App. Div. 2002),

S.H.'s argument should not be considered because it was unambiguously conceded that the stop was valid. As a result, the trial court's finding cannot be disturbed. See State v. Witt, 223 N.J. 409, 418–19 (2015) ("[f]or sound jurisprudential reasons, with few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an

opportunity for such a presentation is available") (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 23 (1973)). Because of this concession, relevant testimony and legal argument concerning the tinted windows were not presented to the trial court.

B. The Validity of the Car Search and Dog Sniff

The trial court found Mabkhouti's testimony concerning the legality of their search based on marijuana odor was credible as "nothing . . . was indicated that would challenge [it] and the observations that the officers made." The court held the stop was not unreasonably prolonged considering: (1) it was a particularly busy night; (2) the K-9 had to come from Linwood; (3) the officers did not have a ticket book, so they waited for one to arrive; and (4) the search of the car following the dog sniff was extensive.

S.H. argues the officers' testimony indicating they smelled the odor of raw marijuana emanating from the car was "patently incredible," considering: (1) Mabkhouti's statement to D'Arcangelo that he believed it was possible there was a firearm in the car; (2) Mabkhouti's focus on S.H.; (3) Mabkhouti's lack of attention to Toure, the driver of the vehicle; (4) the officers' failure to mention any suspicion of drugs on the body camera footage or inform the car's occupants of their suspicion; and (5) the small amount of marijuana officers found in a

sealed bag would not produce an odor strong enough to be smelled from the open window. S.H. also argues the officers unlawfully prolonged the traffic stop for the dog sniff. Citing Rodriguez v. United States, 575 U.S. 348, 357 (2015), S.H. contends the officers' actions following the completion of their inquiry into Toure's license, about twelve minutes into the stop, unlawfully prolonged the stop by "add[ing] any time to the stop beyond what was reasonably necessary to address the traffic offense." If Mabkhouti had just mailed Toure his ticket and not questioned S.H., the stop would have been much shorter and not unlawfully prolonged.

"[A] police officer [is authorized] to conduct a warrantless search of a motor vehicle if it is 'readily mobile' and the officer has 'probable cause' to believe that the vehicle contains contraband or evidence of an offense." Witt, 223 N.J. at 422 (quoting Pennsylvania v. Labron, 518 U.S. 938, 940 (1996)). Prior to February 22, 2021,³ "the smell of marijuana itself constituted probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Mandel, 455 N.J. Super. 109, 114 (App.

³ On February 22, 2021, CREAMMA came into effect, stating, "the odor of cannabis or burnt cannabis" cannot "constitute reasonable articulable suspicion of a crime." N.J.S.A. 2C:35-10c(a). CREAMMA's applicability to this search is discussed below.

Div. 2018) (citing State v. Walker, 213 N.J. 281, 290 (2013)). "[I]f an officer has articulable reasonable suspicion independent from the reason for the traffic stop that a suspect possesses narcotics, the officer may continue a detention to administer a canine sniff." State v. Dunbar, 229 N.J. 521, 540 (2017) (citing Rodriguez, 575 U.S. at 357).

Because Mabkhouti's and D'Arcangelo's testimony were deemed credible by the trial court and that credibility determination is given deference, see State v. Gibson, 218 N.J. 277, 294 (2014), S.H.'s arguments fail, as they are predicated on the reasoning that the officers lied about smelling marijuana in the car. S.H.'s arguments make some sense, considering a small amount of marijuana in two sealed bags were found. In fact, Mabkhouti's statement to S.H., "[w]hat's up with all the weed you got on you? You got a ton of stuff in there?" is seemingly undermined by the fact that only two small, sealed bags of marijuana were found. Yet, no evidence was presented refuting the officer's testimony, in particular, the amount of marijuana necessary to produce a strong smell as they stated. Simply put, there is nothing in the record to suggest the officers' statements that they smelled the odor of raw marijuana were not believable. We thus find no basis to reject the trial court's credibility determination.

Given the concession that there was a valid traffic stop for a tinted windows violation, the smell of marijuana gave the officers the independent reasonable articulable suspicion necessary to request a dog sniff and lawfully prolong the stop beyond the time required to issue a motor vehicle violation. See Dunbar, 229 N.J. at 540; Mandel, 455 N.J. Super. at 114.

C. CREAMMA's Retroactivity

S.H. notes he was adjudicated delinquent three days after CREAMMA passed. He argues CREAMMA's legislative intent and ameliorative purpose indicate it should be given retroactive effect, removing the officers' reasonable suspicion to conduct a search based on the marijuana odor. See N.J.S.A. 2C:35-10c(a).

"When the Legislature does not clearly express its intent to give a statute prospective application, a court must determine whether to apply the statute retroactively." State v. J.V., 242 N.J. 432, 442 (2020) (quoting Twiss v. Dep't of Treasury, 124 N.J. 461, 467 (1991)). With respect to criminal laws, courts presume that the Legislature intended them to have prospective application only. Ibid.; accord State v. Parolin, 171 N.J. 223, 233 (2002) (affording prospective application only to an amendment to the No Early Release Act, which took effect immediately).

Our Supreme Court has recognized only three exceptions to the presumption of prospective application. J.V., 242 N.J. at 444. Those exceptions occur when:

(1) the Legislature provided for retroactivity expressly, either in the language of the statute itself or its legislative history, or implicitly, by requiring retroactive effect to "make the statute workable or to give it the most sensible interpretation"; (2) "the statute is ameliorative or curative"; or (3) the parties' expectations warrant retroactive application. Gibbons v. Gibbons, 86 N.J. [515] at 522-23 [(1981)].

[Ibid.]

An ameliorative statute "refers only to criminal laws that effect a reduction in a criminal penalty." Perry v. N.J. State Parole Bd., 459 N.J. Super. 186, 196 (App. Div. 2019) (quoting State in Interest of J.F., 446 N.J. Super. 39, 53-54 (App. Div. 2016)). To be afforded retroactive application, an ameliorative statute "must be aimed at mitigating a legislatively perceived undue severity in the existing criminal law." J.F., 446 N.J. Super. at 55 (quoting Kendall v. Snedeker, 219 N.J. Super. 283, 286 n.1 (App. Div. 1987)).

S.H.'s motion to suppress hearing occurred prior to CREAMMA's enactment, so its provisions are not applicable unless they are retroactive. This court has found CREAMMA to largely apply prospectively, except for specific opportunities for criminal justice relief. See State v. Gomes, 472 N.J. Super.

515, 535-36 (App. Div. 2022). This includes CREMMA's requirement that "the odor of cannabis or burnt cannabis" cannot "constitute reasonable articulable suspicion of a crime." N.J.S.A. 2C:35-10c(a). See State v. Cambrelen, 473 N.J. Super. 70, 76 n.6 (App. Div. 2022).

The language of N.J.S.A. 2C:35-10c(a) does not explicitly or implicitly indicate retroactive effect. The legislative history of CREMMA indicates its retrospective effect is limited to the "expeditious dismissal of pending charges, vacating of penal and remunerative consequences of such charges, and expungement." Gomes, 472 N.J. Super. at 535-36. N.J.S.A. 2C:35-10c(a) does not fall into one of these categories. The statute is also not ameliorative as it does not "effect a reduction in a criminal penalty." Perry, 459 N.J. Super. at 196 (App. Div. 2019) (quoting J.F., 446 N.J. Super. at 53-54). Therefore, N.J.S.A. 2C:35-10c(a) should only apply prospectively and, in turn, is not a basis to invalidate the car search here.

To the extent we have not addressed any arguments raised by S.H., they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



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