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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2177-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHON GIBBS, a/k/a
RASHON N. GIBBS,

Defendant-Appellant.

Argued January 18, 2023 – Decided March 31, 2023

Before Judges Susswein and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 19-05-0308.

Sarah Hardtke, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Alison Perrone, Deputy Public Defender, of counsel; Sarah Hardtke, Andrew I. Lief and Jane Metcalf, Designated Counsel, admitted pursuant to Rule 1:21-3, on the briefs).

Debra G. Simms, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney

General, attorney; Debra G. Simms, of counsel and on the brief).

PER CURIAM

This case arises from a shooting incident involving rival gangs. After pleading guilty to eluding police and aggravated assault, defendant Rashon Gibbs appeals the denial of his motion to suppress incriminating evidence extracted from his cell phone pursuant to a communications data warrant (CDW). Defendant contends the affidavit in support of the CDW failed to establish probable cause to believe his phone stored communications data relevant to the shooting. We conclude it was reasonable for the judge who issued the CDW to infer from the facts set forth in the application that defendant, an admitted gang member, would use his phone to communicate with fellow gang members about his exchange of gunfire with members of a rival gang. We therefore affirm the denial of the motion to suppress.

I.

Around 5:30 p.m. on February 19, 2019, Plainfield Police Department officers responded to a report of gunshots. Witnesses told police that a man—later identified as defendant—exited a white, two-door Mercedes before firing at two other men. At least one of the two targets shot back at defendant as they were running away. Defendant got back in the Mercedes and fled. Police found

bullet casings of two different calibers, corroborating the eyewitness reports of an exchange of gunfire.

Three days after the shooting, an officer spotted the Mercedes and attempted to stop it. The vehicle sped off. Police tracked it to an apartment complex where defendant—the driver and sole occupant—exited the vehicle. Defendant was arrested. Police seized his cell phone in a search incident to the arrest.

The police investigation revealed the pedestrian targets were suspected members of the Crips gang. Defendant acknowledged to police he is a member of a sect of the Bloods gang, a rival of the Crips.

The detective who investigated the shooting and conducted the stationhouse interrogation applied for a CDW to search the stored contents of the seized cell phone. After detailing the information learned during the shooting investigation, the detective concluded:

Based on my training, education, and experience, as well as the facts set forth in this Affidavit, I have probable cause to believe and do believe that being able to open, power on and conduct a forensic examination on the recovered white Apple iPhone . . . will further this investigation. I believe that a forensic examination will confirm that the recovered phone belongs to and is commonly used by [defendant]. This will in turn reveal who [defendant] was in communication with before and after the shooting incident in the 400 block of East

Sixth Street on February 19, 2019. Therefore, I am requesting an Order authorizing a forensic examination of the white iPhone . . . including but not limited to powering on the cellular phone, downloading stored content, including contact lists, ingoing and outgoing calls, in/out text messages, in/out data transactions, photographs, "my phone" information, and retrieving any deleted data, and any other application which can be used for communication.

Judge Lisa Miralles Walsh issued the CDW,¹ authorizing a forensic examination of the stored content of the phone, including "contact lists, incoming and outgoing calls, in/out text messages and in/out data transactions, photographs, 'my phone' information, deleted data, and . . . any other application which can be used for communication." The ensuing examination of the phone's content revealed a text message defendant sent about an hour after the shooting stating he "just got into a shootout."

In May 2019, defendant was charged by indictment with (1) second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1); (2) second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); (3) first-degree attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3(a)(1); and (4) first-degree unlawful possession of a firearm by a

¹ Only specially trained Superior Court judges designated by the Chief Justice are authorized to issue CDWs. N.J.S.A. 2A:156A-2(i).

convicted felon, N.J.S.A. 2C:39-5(j). In June 2019, a second indictment charged defendant with second-degree eluding police, N.J.S.A. 2C:29-2(b).

In September 2020, defendant moved to suppress evidence obtained from his cell phone.² Judge Regina Caulfield conducted hearings on the suppression motion over the course of three days in October 2020. On October 29, 2020, she rendered an oral decision denying defendant's motion.

On the same day, defendant pled guilty to second-degree aggravated assault pursuant to a plea agreement. Judge Caulfield imposed a nine-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, to be served concurrently with the sentence previously imposed on the eluding conviction.

Defendant raises the following contentions for our consideration:

POINT I

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT DID NOT ESTABLISH PROBABLE CAUSE THAT EVIDENCE OF THE SHOOTING WOULD BE FOUND ON THE IPHONE.

A. THERE IS NO EVIDENCE
CONNECTING THE IPHONE TO THE
SHOOTING

² While that motion was pending, defendant pled guilty to the eluding charge pursuant to a plea agreement and was sentenced to a seven-year prison term with no period of parole eligibility.

B. AN OFFICER'S AFFIRMATIONS OF
EXTENSIVE EXPERIENCE IN LAW
ENFORCEMENT CANNOT STAND IN FOR
FACTS CONNECTING THE IPHONE TO THE
SHOOTING

C. PROBABLE CAUSE TO ARREST AN
INDIVIDUAL DOES NOT AUTOMATICALLY
YIELD PROBABLE CAUSE TO SEARCH THE
INDIVIDUAL'S PHONE

II.

The scope of our review of a search warrant is limited. State v. Chippero, 201 N.J. 14, 32 (2009). "[R]eviewing courts 'should pay substantial deference' to judicial findings of probable cause in search warrant applications." State v. Andrews, 243 N.J. 447, 464 (2020) (quoting State v. Kasabucki, 52 N.J. 110, 117 (1968)); see also State v. Marshall, 123 N.J. 1, 72 (1991). "[W]hen the adequacy of the facts offered to show probable cause is challenged . . . and their adequacy appears to be marginal, the doubt should ordinarily be resolved by sustaining the search." State v. Jones, 179 N.J. 377, 388–89 (2004) (quoting Kasabucki, 52 N.J. at 116).

Both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution "protect individuals' rights 'to be secure in their persons, houses, papers, and effects' by requiring that search

warrants be 'supported by oath or affirmation' and describe with particularity the places subject to search." Andrews, 243 N.J. at 464. "[N]o warrant shall issue except upon probable cause." N.J. Const. art. I, ¶ 7. "Searches executed pursuant to warrants compliant with those requirements are presumptively valid." Andrews, 243 N.J. at 464 (citing Jones, 179 N.J. at 388).

A defendant challenging a search warrant must demonstrate a lack of probable cause. State v. Boone, 232 N.J. 417, 427 (2017) (citing State v. Watts, 223 N.J. 503, 513–14 (2015)). 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." Chippero, 201 N.J. at 27 (quoting United States v. Jones, 994 F.2d 1051, 1056 (3d Cir. 1993)). Our jurisprudence "require[s] issuing courts to consider the totality of the circumstances when assessing the reasonable probabilities that flow from the evidence submitted in support of a warrant application." Ibid. Probable cause for a search warrant requires "a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 28 (citing Jones, 994 F.2d at 1056).

Importantly for purposes of this appeal, "the probable cause determination must be made based on the information contained within the four corners of the

supporting affidavit, as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously." State v. Marshall, 199 N.J. 602, 611 (2009) (quoting Schneider v. Simonini, 163 N.J. 336, 363 (2000)). The purpose of the "four corners" limitation is to "assure[] that the magistrate was in a position to adequately perform the constitutional function of providing independent judicial review prior to executive intrusions on individual privacy." Ibid. (quoting Kevin G. Byrnes, New Jersey Arrest, Search, & Seizure § 5:2-5 at 78 (2008–09)).

The four corners limitation does not, however, preclude judges from drawing reasonable inferences from the facts set forth in the warrant application. It has long been held that some level of inference by the issuing judge is permissible. As Justice Robert H. Jackson explained, "[t]he point of the Fourth Amendment . . . is not that it denies law enforcement officers the support of the usual inferences which reasonable men [and women] draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate." Johnson v. United States, 333 U.S. 10, 13–14 (1948).

More recently, our Supreme Court explained "fair and logical inference[s]" that lead to a "simple and sensible conclusion" can give rise to probable cause. State v. Evers, 175 N.J. 355, 383 (2003). Additionally, "the

proofs in support of a search warrant . . . [are] examined in a common-sense and not a hypertechnical manner." Id. at 385. In Evers, for example, an inference that the billing address connected to an online account was where the account user's computer would be found was held to be sufficient for probable cause to search that address. Id. at 383.

We agree with defendant that probable cause to arrest does not automatically constitute probable cause to search a cell phone found on a defendant's person. Rather, a CDW affidavit must establish a link between the phone and the criminal activity. That link was established in this case. Judge Caulfield found it "jump[s] out from the affidavit that this is a gang related shooting." She also acknowledged cases that recognize the pervasive use of modern cell phones. See Riley v. California, 573 U.S. 373, 393 (2014); State v. Manning, 240 N.J. 308, 316–17 (2020); State v. Earls, 214 N.J. 564, 586–87 (2013).

Piecing these circumstances together, we conclude a fair and logical—if not inescapable—inference can be drawn that gang members would communicate with each other promptly when they are involved in a shooting with a rival gang. See Evers, 175 N.J. at 383. Such communication would be needed, for example, to alert fellow gang members of the prospect for retaliation


and escalation. It also is a "simple and sensible conclusion," ibid., that such notice to fellow gang members would be shared by electronic means.

We nonetheless caution prosecutors³ that it would be preferable if a CDW affidavit includes an express explanation, based on the affiant's training and experience, of how gang members use their cell phones to communicate with each other regarding major gang-related events, such as shootings. But even without an explicit attestation based upon training and expertise to support the specific inference that gang members use phones to communicate about such events, we are satisfied the affidavit in this case meets the "fair probability" standard, Chippero, 201 N.J. at 28, for believing defendant's phone stored communications data pertaining to the shooting.

To the extent we have not addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION

³ All search warrant applications must be reviewed and approved by an assistant county prosecutor, deputy attorney general, or assistant attorney general. See Attorney General, Approval of Search Warrant Applications, Execution of Search Warrants, and Procedures to Coordinate Investigative Activities Conducted by Multiple Law Enforcement Agencies, § 2 (Aug. 8, 2002) (Directive 2002-2).