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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3321-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HARRIS FRAZIER, a/k/a
ANDRE I. FRAZIER, ANDRE
FRAZIER, HARRIS A.
FRAZIER, FRAZIER HARRIS,
TEHRAN T. HUNTER, and
ERIC SHAW,

Defendant-Appellant.

Submitted December 6, 2022 – Decided February 17, 2023

Before Judges Berdote Byrne and Fisher.

On appeal from the Superior Court of New Jersey, Law
Division, Somerset County, Indictment No. 19-07-
0409.

Joseph E. Krakora, Public Defender, attorney for
appellant (Laura B. Lasota, Assistant Deputy Public
Defender, of counsel and on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Frank Muroski, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

In this appeal, we are asked to consider whether the trial court erred in denying defendant's motion to suppress heroin found on his person during a traffic stop. Because we find the trial court did not err in determining law enforcement lawfully conducted a pat-down search of defendant, we affirm.

On March 1, 2019, a North Plainfield police officer observed defendant drive through a red light at a high rate of speed. Eventually, the officer caught up to defendant and initiated a traffic stop after observing defendant unlawfully drive straight through the left-turn only lane of a two-lane road. When defendant came to a stop on the side of the road, the officer observed the driver-side door open and defendant look out of the side of the door back at him. The officer instructed defendant to get back into the vehicle, which he did. The officer then approached the car, walked up to the driver-side door, and knocked on the window. Defendant opened the door to speak because the window did not work. The officer asked defendant for his driving credentials and told defendant he stopped him because he drove through the red light at a high rate of speed.

At the suppression hearing, the officer testified that, as he was speaking to defendant, he noticed defendant appeared nervous, was stuttering, and shaking. The officer noticed a bulge in defendant's left-hand jacket pocket and defendant kept placing his arm over the bulge.

Following a dialogue, the officer ordered defendant to step out of the vehicle. Defendant lowered his arms a few times once outside the vehicle despite being ordered to keep his arms in the air. As the officer was completing the pat-down, he felt a rectangular object in the left-hand zipper pocket of defendant's jacket. Believing the object to be a weapon, the officer shined his flashlight inside the pocket and found heroin. Defendant was then placed under arrest, and the officer found additional heroin in defendant's right-hand jacket pocket after searching defendant incident to his arrest.

Defendant was charged with third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and -5(b)(3). Defendant filed a motion to suppress the heroin, which the trial court denied.

The trial court found the arresting officer's testimony credible and consistent with all other evidence. Further, the trial court noted neither party contested the legality of the traffic stop. The trial court stated, "A police officer's observations of a motorist can supply the objectively reasonable basis

for heightened caution that justifies a pat-down search." See State v. Smith, 134 N.J. 599, 618-20 (1994). The trial court then found the officer had a reasonable fear for his safety considering "the officer's observations, the defendant's hands over his jacket pocket, . . . the defendant's nervous demeanor[,] " as well as the officer's belief the object he was feeling was a weapon. The trial court concluded the search was lawful.

As part of a plea agreement, defendant pled guilty to one count of possession of a CDS with intent to distribute. The trial court sentenced defendant to a term of six years imprisonment with a three-year parole-ineligibility period.

Defendant appeals, challenging the trial court's denial of the motion to suppress, arguing the trial court erred in applying a "heightened caution" standard rather than a reasonable suspicion standard in evaluating the constitutionality of the pat-down search. Defendant also argues the officer's pat-down search of his left-hand jacket pocket was not supported by reasonable and articulable suspicion defendant was armed and dangerous.

We afford great deference to a trial court's factual and credibility determinations when reviewing an order in a suppression motion, recognizing the trial court has "the 'feel' of the case[,] " which we do not have upon viewing

a cold record. State v. Gonzalez, 227 N.J. 77, 101 (2016) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)); State v. Elders, 192 N.J. 224, 244 (2007). The trial court's decision must be affirmed if it is "supported by sufficient credible evidence" and not "so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Scriven, 226 N.J. 20, 32-33 (2016) (quoting Elders, 192 N.J. at 243-44). A trial court's conclusions of law "and its view of 'the consequences that flow from established facts' are reviewed de novo." State v. Goldsmith, 251 N.J. 384, 398 (2022) (quoting State v. Hubbard, 222 N.J. 249, 262 (2015)).

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution protect citizens from unreasonable searches and seizures. One exception to the warrant requirement is a protective search conducted during an investigative stop, also known as a Terry stop and frisk. See Terry v. Ohio, 392 U.S. 1, 26-27 (1968).

Pursuant to Terry and its progeny, in addition to an investigative stop, a police officer may conduct a protective search (or pat-down) without a warrant when the officer believes the individual whom they have detained is armed and dangerous. Terry, 392 U.S. at 27; State v. Roach, 172 N.J. 19, 27 (2002). This "exception allows a law enforcement officer 'to take necessary measures to

determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.'" Roach, 172 N.J. at 27 (quoting Terry, 392 U.S. at 23). The officer is then permitted to perform "a carefully limited search of the outer clothing" to determine solely whether weapons are present. Ibid. (quoting Terry, 392 U.S. at 30). "Therefore, in order to conduct a protective search, an officer must have a 'specific and particularized basis for an objectively reasonable suspicion that defendant was armed and dangerous.'" Ibid. (italicization removed) (quoting State v. Thomas, 110 N.J. 673, 683 (1988)).

Defendant argues the trial court erred in applying a "heightened caution" standard in evaluating whether the officer's decision to conduct a protective search of defendant was reasonable. In addition, defendant argues the officer did not have a reasonable and articulable suspicion to believe defendant was armed and dangerous, rendering the search of his left-hand jacket pocket unlawful.

Although the trial court erroneously alluded to the "heightened caution" standard enunciated in Smith,¹ it did so with respect to whether ordering the

¹ In Smith, our Supreme Court concluded Pennsylvania v. Mimms—which held once a vehicle is lawfully stopped, a police officer may request the driver exit the vehicle, 434 U.S. 106, 111 (1977)—did not violate Article I, Paragraph 7 of the New Jersey Constitution. Smith, 134 N.J. at 611; State v. Bernokeits, 423

defendant to exit the vehicle was in error, not the legal basis for the Terry search. Because the vehicle was lawfully stopped, the officer did not need an independent basis to order the driver out of the vehicle. See Smith, 134 N.J. at 611.

In contrast, "[a] pat-down of the person ordered from the car is a separate Fourth Amendment event and must be evaluated under the Terry standard." Id. at 609. In its evaluation of whether the protective search was justified, the court articulated the correct Terry standard, finding a "furtive movement that created a reasonable concern for the officer's safety" when defendant continued moving his arm to hide the bulge in his jacket pocket. The court also noted defendant was "shaking like a leaf" and, when "evaluated in light of the totality of the circumstances" justified the pat-down search for a weapon.

N.J. Super. 365, 370-71 (App. Div. 2011). Smith also declined to extend Mimms to passengers of a vehicle "because the passenger has not engaged in the culpable conduct that resulted in the vehicle's stop." Smith, 134 N.J. at 615. Instead, the Court concluded, as it pertains to the passenger of a vehicle, "an officer must be able to point to specific and articulable facts that would warrant heightened caution to justify ordering the occupants to step out of a vehicle detained from a traffic violation." Id. at 618; see also State v. Bacome, 228 N.J. 94, 96-97 (2017) ("We underscore that the heightened-caution standard . . . remains the proper test for determining the appropriateness of ordering a passenger from a car.").

Given the great deference afforded a trial court in its credibility determinations, we conclude defendant presents insufficient evidence the officer lacked a reasonable, articulable concern that he was armed and conclude the protective search was lawful.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION