SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3467-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

WILLIAM L. MARABLE,

Defendant-Respondent.

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Argued January 25, 2023 – Decided March 14, 2023

Before Judges Currier, Enright and Bishop-Thompson.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 19-03-0312.

John R. Mulkeen, Assistant Prosecutor, argued the cause for appellant (Esther Suarez, Hudson County Prosecutor, attorney; John R. Mulkeen, on the briefs).

Peter T. Blum, Assistant Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Peter T. Blum, of counsel and on the brief).

PER CURIAM

On leave granted, the State appeals from a December 17, 2021 order granting a suppression motion filed by defendant William L. Marable. The State also appeals from a November 16, 2020 order invalidating a domestic violence search warrant (DVSW), a December 20, 2021 order clarifying the December 17 order, and a separate December 20, 2021 order dismissing a second-degree charge against defendant for certain persons not to have a weapon, N.J.S.A. 2C:39-7(b)(1). We affirm the challenged orders.

I.

We summarize the facts and detailed procedural history of this matter from the motion and trial record. At approximately 11:30 p.m. on November 21, 2018, J.C. (Jan)[1] went to the Jersey City Police Department (JCPD) to file a complaint against defendant. She alleged defendant, a family member, threatened to shoot her and kill himself. Jan requested a temporary restraining order (TRO) and asked the police "to remove [defendant] from their shared home." She told the police she feared for her life because defendant always kept a handgun close by.

[1] We use initials and a pseudonym to protect the complainant's identity. See R. 1:38–3(c)(12).

Jersey City Police Officer Daniel Robertson called a municipal court judge, who granted Jan a TRO at 2:50 a.m. on November 22, 2018. The TRO included a "warrant to search for and to seize weapons for safekeeping," and authorized the police to search defendant's car and Jan's apartment for "a handgun involved in a domestic violence incident." The municipal court judge also found probable cause for the issuance of an arrest warrant for defendant, based on his threats against Jan.

Jan gave the police a key to her apartment, and defendant was arrested there as he was sleeping in a bedroom. The police also seized a locked safe from defendant's bedroom. On November 23, a detective from the JCPD applied for and received a criminal search warrant for the safe. A subsequent search of the safe revealed a 9mm handgun, two magazines, seventeen bullets, and various personal documents addressed to defendant.

In March 2019, a Grand Jury indicted defendant on the certain persons charge (count one), as well as second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1) (count two); and third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count three).

In August 2020, defendant moved to suppress "all physical evidence and observations obtained" from the search of his bedroom and safe. He argued the

DVSW was invalid because the State failed to produce any recording of the TRO hearing[2] or contemporaneous notes from the municipal court judge who issued the DVSW. Further, he argued the search authorized under the criminal search warrant was equivalent to an unlawful warrantless search because the criminal search warrant was tethered to the invalid DVSW.

The trial court heard argument – but no testimony – on the motion, finding there were no material facts in dispute regarding the issuance of the DVSW. On November 16, 2020, the judge entered an order with an accompanying written opinion, finding the DVSW was "invalid due to procedural inadequacies." Citing Rule 3:5-6(c), the judge stated that any judge hearing a TRO application must "not only . . . make a contemporaneous record of the application by . . . verbatim recording, or notes, but also . . . issue a confirmatory warrant as soon as possible thereafter and . . . file the warrant together with all relevant documents" so "any person claiming to be aggrieved by an unlawful search and seizure" has access to this information in discovery. The judge added, "[t]hat was not done in this case." Thus, he concluded "the search must be judged as if it were a warrantless search."

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[2] The record reflects the JCPD's policy was to retain such recordings for one year.

Next, the judge referenced the State's contentions the initial search was lawful based on Jan's consent, and that the contents of the safe were recovered based on a lawful criminal search warrant. But because defendant argued there were material facts in dispute flowing from these contentions, the judge afforded his counsel additional time to identify "what material facts [were] in dispute before [the court] determine[ed] whether a testimonial hearing [was] warranted." Thus, the judge made no decision regarding "the validity of the [criminal] search warrant."

In January 2021, defendant filed another motion to suppress the evidence seized during the November 2018 search. In June 2021, a judge recently assigned to the case — who later presided over defendant's trial — conducted a testimonial hearing to determine whether a "consent to search" exception applied to the warrantless search of defendant's bedroom, and whether the search of the safe was lawful. During the hearing, the State called Jan to testify, and the defense called Officer Robertson as its witness. Jan testified defendant was in her home when she applied for a TRO and the police were able to access her apartment to arrest him because she gave them "the key to go into [her] home."

On cross-examination, Jan could not remember what questions the municipal court judge asked about defendant. But she denied telling the

municipal court judge that defendant lived in her apartment.

During Officer Robertson's testimony about the November 2018 incident, he stated he didn't "recall anything being recorded" when he first spoke with Jan, but once she began speaking with a municipal court judge, "[p]ossibly then it should have been recorded." Robertson also testified Jan told him "a roommate had threatened her." He could not remember if she "personally handed [him] the key[]" to her apartment, but officers used the key "to open the door and go into [Jan's] home" to arrest defendant.

When defense counsel asked Officer Robertson if he told Jan she could refuse to allow a search of her apartment, he answered, "I didn't ask. If it's not in [my] report, I guess I didn't ask." Robertson also testified he was not "aware if there [were] any documents" the police "used in a consent search" and he did not recall if he "ever personally used a document as part of a consent search." Additionally, the officer stated that after the police arrested defendant, they conducted a search "and no weapons were found in the apartment or his vehicle." Robertson also stated the police found "a black safe," which they removed "and placed into evidence" before obtaining a search warrant to recover its contents.

On August 4, 2021, the trial judge entered an order denying defendant's motion to suppress. In his accompanying oral opinion, he found the State "met

its burden" in demonstrating Jan consented to the search of her apartment, so the warrantless search was lawful; he also found exigent circumstances existed to justify the search.

In December 2021, the State voluntarily dismissed count two of the indictment (unlawful possession of a weapon). That same month, the trial judge denied defendant's motion to sever his charges and granted the State's request for a bifurcated trial. Thus, defendant was to be tried first on the terroristic threats charge, and the trial on the certain persons charge was to follow.

Jury selection began on December 8, 2021. One week later, the State provided the defense with a report of an interview it conducted with Jan earlier that day. Based on this new evidence, the defense immediately moved for the court to "reopen" its August 4 suppression decision.[3] In its December 15 motion, the defense contended it was significant Jan previously indicated defendant stayed with her two to three times per week, but in her interview that day, she reported "defendant used to stay with her [fourteen] times a month."

On December 16, while defendant's motion to reopen was still pending,

[3] Pre-trial motions are to be resolved before a trial date is fixed, absent good cause, see R. 3:10-2(b). Here, jury selection already was underway when the State turned over the report of its interview with Jan and defendant moved to reopen the suppression decision.

the judge swore the jury in without objection from either party.[4] The next day, just before the parties were slated to provide opening statements, the judge issued an oral opinion, granting defendant's motion to suppress.

In his December 17 opinion the judge noted the circumstances leading up to the warrantless search. He found defendant did not call the police to his home in November 2018 nor "brandish the weapon." Additionally, the judge determined "defendant did not have magazines or ammunition on the floor leading up to his bedroom" and "[u]pon entering [Jan's apartment], police officers did not notice firearms or ammunition in plain view." Further, he found Officer Robertson "candidly admitted he did not inform [Jan] or [defendant] . . . of their rights to refuse consent."

Next, the judge considered whether Jan could consent to a search of defendant's bedroom and safe on his behalf. In that regard, he noted "a third person's consent is invalid with respect to property within the exclusive control of another." He further observed Jan's testimony did not reflect she had "any knowledge of where the safe was" as "[s]he indicated that the gun [was] either in the home — their shared apartment — or his car." Additionally, the judge

[4] "In a jury trial, jeopardy normally attaches when the jury is sworn." Pressler & Verniero, Current N.J. Court Rules, cmt. 3.6.2 on R. 3:10-2 (2023) (citations omitted).

concluded defendant:

> kept a safe in his room which was locked. There is no indication [Jan] . . . even knew the password of the safe or even knew . . . he had a password. She did not go into that room and she did not use that room when he was not there. There are no facts to show . . . that when [defendant] was not there she offered the room to any other guest. Without this information, the court cannot find that her third-party consent extended to [defendant's] room.
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> Further, based upon the police report and [Jan's] new witness interview . . ., [defendant] was the only . . . person who used that room. He had his personal belongings in that room. He was comfortable enough to keep a locked safe in that room where he kept his passport and other forms of identification. On the reports, his name is listed as a person living there — meaning the police reports generated as a result of this case. He stay[ed] there [fourteen] days out of a month on and off for five years, which I find to be a very significant amount of time. All these facts show . . . [defendant] had exclusive control of that room and his belongings. Again, the burden to show . . . there was a valid third-party consent is on the State.
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> The State in the testimonial hearing did not elicit testimony showing . . . [defendant] was no more than a transient guest. No questions were asked establishing . . . [defendant's] lack of authority over that space. . . . Frankly, [defendant's] and [Jan's] living arrangement was not fully explored sufficiently to find that the State met its burden.

Based on these findings, the judge determined Jan's "third-party consent did not extend to the search of [defendant's] room. [Jan] did not have apparent authority

or exclusive control over his room. She was not entitled to provide consent for the search of the room."

Further, the judge concluded "it was not reasonable for the officers to believe [Jan] had exclusive control over the room. The safe was located in [defendant's] room where he was sleeping . . . . [T]he safe had his exclusive possessions in it, not [Jan's]." Additionally, the judge found Officer Robertson

> never explained his reasonable belief as to consent during his testimony. In fact, given the reports with the defendant's address listed as the subject premises, the fact . . . defendant stayed there at least three times a week, and . . . was sleeping in the bedroom all are signs that point to the belief that [defendant] had authority over the room. . . .
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> [T]he amount of times [defendant] stayed with [Jan] is significant. [Defendant] stayed there [twelve] to [fourteen] days [per month]. . . . Therefore, . . . for the search to be valid, . . . [defendant], not [Jan, was] required to provide consent over the search of this room and belongings. Here, the officers did not ask [defendant] for his consent, nor did they provide him his right[] to refuse. . . .
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> Therefore, I find . . . the seizure and subsequent search of [defendant's] safe invalid.
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> I do not find that the new reports indicate change that warrants [h]earing testimony. I find the State did not meet its burden for valid consent. I changed my opinion. . . . [I]t wasn't based upon just the new information. That gave me an opportunity to re[]visit my opinion[,] to re-look at the testimony, to re[]visit

> consent, to re[]visit the refusal to consent. . . . I reverse myself and . . . the weapon is suppressed.

The State moved for a stay of the December 17 suppression order. The judge denied this request and adjourned opening statements to December 20. The State moved before us for leave to appeal the suppression ruling and a stay pending appeal. When the case resumed on December 20, the judge entered a supplemental order clarifying his reasons for granting defendant's suppression motion under the December 17 order. The clarifying order stated:

> the second search warrant to open and search the locked safe, which was a result of the [DVSW], is invalid as it is fruit[] of the poisonous tree.
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> . . . .
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> Moreover, the warrant exception of exigent circumstances, an argument not substantively brought up by either counsel, but justified by this [c]ourt in the August 4, 2021, opinion, . . . does not apply either. There was no . . . evidence . . . the gun was on the [d]efendant's person, it was not brandished toward [Jan] or in a place close to him; rather, unbeknownst to all, but the [d]efendant, the weapon was in a locked safe. In fact, [Jan] admitted she did not know for sure where the gun was located. She guessed . . . it might also be in his car or his other apartment. Without such exigency, no exception applies. This [c]ourt thus reversed its earlier decision on its finding of exigent circumstances in this matter.

Because the judge found "the State searched . . . [d]efendant's bedroom

pursuant to a defective search warrant" and it "had neither valid consent nor exigent circumstances," "all physical evidence resulting from the search and seizure . . . [must] be suppressed."

On the morning of December 20, we granted the State leave to appeal, directed it to file a brief the next day, and ordered the defense to file a brief by December 22. We also denied a stay of the trial and allowed opening arguments and testimony to proceed "without any reference to the subjects of the search." Thus, the trial judge directed the parties to open on the terroristic threats charge and refrain from mentioning the gun recovered from defendant's safe. The parties' opening statements were in accord with the judge's instructions.

When the trial resumed after the lunch recess, Jan was missing.[5] Therefore, the State voluntarily dismissed the terroristic threats charge. The judge directed the State to move forward on the remaining certain persons charge, reminding counsel we had not stayed the trial. The State again asked the judge to stay the trial, but he denied the request.

On the afternoon of December 20, the State moved before us for another emergent stay and apprised us of the dismissal of the terroristic threats charge.

[5] The State posits Jan stopped answering its phone calls and opted not to appear for trial due to her "mental health issues."

While its second emergent application was pending, the judge and counsel engaged in an extensive colloquy about how to proceed. At the end of the court day, the defense moved to dismiss the certain persons charge with prejudice. Over the State's objection and pending further briefing from the parties, the judge dismissed the charge without prejudice and pending further order, finding:

> the State admitted it was unable to prove its case without the suppressed handgun, the jury was already sworn for three days, the jury was told [it] would not be needed after December 23, 2021, the Appellate Division denied the State's request for a stay, [and] there was no likelihood [of] a decision from the Appellate Division prior to the jurors' service expiring.

Unaware of the judge's dismissal of the certain persons charge, on December 20, we issued an order granting the State's second emergent application, albeit without staying the trial, and shortened the briefing schedule on the State's interlocutory appeal of the December 17 order. We directed the parties to submit their briefs on December 21, and ordered the trial to "resume[] at 10:00 a.m. on . . . December 22."

On the morning of December 21, the State notified us about the without prejudice dismissal of the certain persons charge. Accordingly, we deemed its emergent motion for leave to appeal as "withdrawn as moot, without prejudice to a potential future appeal if it [could] be appropriately pursued."

In February 2022, the State filed a notice of appeal from the December 20 dismissal of the certain persons charge. We granted defendant's motion to dismiss this appeal as interlocutory. In June 2022, the State moved for leave to appeal the trial court's "reconsideration order"; the defense opposed the motion as "untimely." On July 14, 2022, over defendant's objection, we granted the State's application for leave to appeal as within time.

II.

The State's current challenge to the November 16, 2020, December 17, and December 20, 2021 orders is reduced to the following singular point heading in its brief: "The trial court erred in granting defendant's motion to suppress minutes before opening statements were to begin without taking additional testimony [and] after having denied it months earlier." Defendant urges us to reject this argument if we do not dismiss the State's appeal as untimely.

Considering our July 14 order, we decline defendant's invitation to dismiss the State's appeal. See Slowinski v. Valley Nat'l Bank, 264 N.J. Super. 172, 179 (App. Div. 1993) (finding the law-of-the-case doctrine applies where a different appellate panel is asked to reconsider the same issue in a subsequent appeal). Instead, we affirm the challenged orders, substantially for the reasons provided by the trial court.

We begin by outlining the standards that govern our review. First, we observe reconsideration of, and grant of relief from, an interlocutory order before final judgment is a matter committed to the sound discretion of the trial judge. Lombardi v. Masso, 207 N.J. 517, 534 (2011). A motion to reconsider an interlocutory order is governed by a more liberal standard than the standard a trial court follows when reconsidering final orders under Rule 4:49-2. Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). Accordingly, reconsideration of interlocutory orders does not "require[] a showing that the challenged order was the result of a 'palpably incorrect or irrational' analysis or . . . the judge's failure to 'consider' or 'appreciate' competent and probative evidence." Ibid. (quoting Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)). Rather, "[u]ntil entry of final judgment, only 'sound discretion' and the 'interest of justice' guides the trial court, as Rule 4:42-2 expressly states." Ibid.

Importantly, when reconsidering an interlocutory order, the judge is not "constrained . . . by the original record." Lombardi, 207 N.J. at 537 (citation omitted). Thus, when a "judge later sees or hears something that convinces [the judge] that a prior ruling is not consonant with the interests of justice, [the judge] is not required to sit idly by and permit injustice to prevail." Ibid.

It also is well settled that our review of a trial court's 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)).

Deference is particularly appropriate when a trial court's factual findings are based on its "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, 244 (2007) (citation omitted). Still, deference is appropriate regardless of whether there was a testimonial hearing, or the trial court based its findings solely on its review of documentary evidence. S.S., 229 N.J. at 379.

We also "'pay substantial deference' to judicial findings of probable cause in search warrant applications." State v. Andrews, 243 N.J. 447, 464 (2020) (citation omitted). However, a trial court's legal conclusions are reviewed de novo. State v. Radel, 249 N.J. 469, 493 (2022).

"Both the United States Constitution and the New Jersey Constitution guarantee an individual's right to be secure against unreasonable searches or seizures." State v. Minitee, 210 N.J. 307, 318 (2012) (citations omitted).

Therefore, law enforcement must obtain a warrant "before searching a person's property, unless the search 'falls within one of the recognized exceptions to the warrant requirement.'" State v. DeLuca, 168 N.J. 626, 631 (2001) (quoting State v. Cooke, 163 N.J. 657, 664 (2000)).

"When a search warrant is issued under N.J.S.A. 2C:25-28(j), the police are authorized to search for and seize weapons." State v. M.B., 471 N.J. Super. 376, 381 (App. Div. 2022). However, as our Supreme Court recently held:

> before issuing a warrant to search for weapons [under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35], a court must find . . . there is (1) probable cause to believe that an act of domestic violence has been committed by the defendant; (2) probable cause to believe that a search for and seizure of weapons is "necessary to protect the life, health or well-being of a victim on whose behalf the relief is sought[ ]"; and (3) probable cause to believe that the weapons are located in the place to be searched.
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> [State v. Hemenway, 239 N.J. 111, 117 (2019) (quoting N.J.S.A. 2C:25-28(f)).]

In Hemenway, the Court determined "the family court issued [a] search warrant for weapons based on a deficient record and without making the necessary findings to justify the warrant's issuance," so "[a]ll evidence derived from the search of [his] home . . . must be suppressed based on the defective domestic violence warrant" because "[t]he fruits of the unlawful search of the

home were used to form the factual basis for the issuance of the criminal search warrants." 239 N.J. at 139.

Years earlier, in State v. Cassidy, the Court vacated a defendant's convictions after finding the State used "evidence seized pursuant to a defectively authorized" DVSW to criminally prosecute the defendant. 179 N.J. 150, 159 (2004). Holding the PDVA "expressly incorporates compliance with the court rules governing applications made by telephonic or other electronic means of communication," the Court determined the TRO and DVSW entered against the defendant were invalid because the complainant was not sworn, and the issuing judge failed to record his conversation with the complainant or the officer who took the domestic violence complaint. Id. at 155, 158 (citation omitted). The Court explained:

> the procedural requirements for a telephonic search warrant are fundamental to the substantive validity of the warrant. Only when "all of the procedural safeguards . . . we have outlined to assure the underlying reliability of the judge's decision to authorize the search have been met," will telephonic authorization be deemed "the functional equivalent of a written warrant." . . . . [W]e do not accord appellate deference to a judge's determinations upon the issuance of a telephonic warrant when those determinations lack the assurances of trustworthiness . . . we insist upon in the decisional process. . . . The "warrant" simply is invalid.

> [Id. at 158 (quoting State v. Valencia, 93 N.J. 126, 138-39 (1983)).]

Additionally, the Court concluded "the Rule 5:7A[6] requirements for ex parte issuance of a TRO and [DVSW] . . . were not satisfied," so it deemed the ensuing search of defendant's residence—which led to the discovery of thirty-five firearms—"the equivalent of a warrantless search," and found no exceptions to the warrant requirement applied. Id. at 159-65.

Moreover, in M.B., we vacated a defendant's conviction based on the lack of a record of a telephonic TRO application to support the municipal court judge's issuance of a DVSW, noting "it is imperative that '[t]he record of the [TRO] ex parte proceeding . . . disclose a proper basis' for the TRO and accompanying [DVSW]." M.B., 471 N.J. Super. at 382 (first alteration in original) (quoting Cassidy, 179 N.J. at 164).

Guided by these principles, and considering the record is devoid of the

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[6] Under Rule 5:7A(d), when a judge issues a TRO based

> upon sworn oral testimony of an applicant who is not physically present[,] . . . [t]he judge or law enforcement officer assisting the applicant shall contemporaneously record such sworn oral testimony by means of a . . . recording device . . . ; otherwise, adequate long hand notes summarizing what is said shall be made by the judge.

factual basis or legal conclusions underlying the municipal court judge's decision to issue the DVSW, we are satisfied the trial court properly invalidated the DVSW under the November 16, 2020 order.

The State next argues the trial judge erred in granting defendant's suppression motion because law enforcement had Jan's consent to search defendant's bedroom, and because the subsequent search and seizure of defendant's safe was authorized under a lawful criminal search warrant. Again, we disagree.

Searches and seizures conducted without a warrant, "particularly in a home, are presumptively unreasonable." State v. Edmonds, 211 N.J. 117, 129 (2012) (quoting State v. Bolte, 115 N.J. 579, 585 (1989)). Therefore, the State has the burden of proving by a preponderance of the evidence that such searches and seizures are "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)). Where no such exception exists, "[t]he exclusionary rule generally bars the State from introducing into evidence the 'fruits' of an unconstitutional search or seizure." Id. at 412-13 (quoting Wong Sun v. United States, 371 U.S. 471, 485 (1963)); see also State v. Carter, 247 N.J. 488, 532 (2021). "Under the exclusionary rule, 'the prosecution is not to be

put in a better position than it would have been in if no illegality had transpired.'" State v. Smith, 212 N.J. 365, 388-89 (2012) (quoting Nix v. Williams, 467 U.S. 431, 443 (1984)).

"One well-recognized exception to the warrant requirement is consent." State v. Camey, 239 N.J. 282, 300 (2019) (quoting State v. Cushing, 226 N.J. 187, 199 (2016)). To justify a warrantless search under the consent to search exception, the State bears the burden of proving consent was given voluntarily and the person knew of the right to refuse consent. State v. Hagans, 233 N.J. 30, 39 (2018). "The scope of a consent to search includes what a reasonable person would have understood." Pressler & Verniero, cmt. 2.2 on R. 3:5-8 (citations omitted); see also State v. Johnson, 365 N.J. Super. 27, 35-36 (App. Div. 2003) (a homeowner's consent to allow police to enter his home to arrest his son did not constitute consent to search the home once the son was taken into custody).

Law enforcement officers in this State may rely on a third party's consent to search "when the consenter has common authority for most purposes over the searched space." State v. Coles, 218 N.J. 322, 340 (2014) (citation omitted). As our Supreme Court held in State v. Suazo, 133 N.J. 315, 320 (1993), under such circumstances, the appropriate inquiry is "whether the officer's belief that the

third party had the authority to consent was objectively reasonable in view of the facts and circumstances known at the time of the search." (citations omitted); see e.g., Cushing, 226 N.J. at 199-204 (where the Court held a third party lacked actual or apparent authority to consent to a search of a defendant's bedroom in his grandmother's house).

Based on these standards, we are convinced the trial judge did not abuse his discretion by reconsidering his August 4, 2021 suppression ruling and ultimately granting defendant's December 2021 suppression motion.

Here, as the judge noted, defendant's December 15 application to "reopen" the denial of his suppression motion "caused [the c]ourt to re[-]evaluate the propriety and soundness of its August 4, 2021" suppression order. When he undertook that task, the judge reviewed the exhibits and limited testimony from the June 2021 suppression hearing. He also considered new evidence, namely, the State's recent report of its interview with Jan.

In re-assessing the lawfulness of the searches conducted in November 2018, the judge also observed that investigating officers entered Jan's apartment based on a now invalid DVSW. Additionally, the judge noted he previously relied on Jan's suppression hearing testimony to find "she was authorized to provide the police with consent to search her residence" so "[t]he validity of the

[criminal] search warrant was not addressed." Once he revisited the proofs advanced by the State to support a consent exception for the warrantless search, the judge concluded the State failed to establish defendant or Jan knowingly consented to the search because there was no evidence either was informed "of their rights to refuse consent."

Next, the judge examined whether Jan's "apparent third-party consent justified the search of [defendant's] room," recognizing it was "the State's burden to prove that [Jan's] third-party consent . . . extend[ed] to his bedroom." In analyzing this issue, the judge found "there [were] not enough facts in the record to determine [defendant's] exact living situation," but it was "very significant" Jan disclosed in December 2021 that defendant stayed with her roughly fourteen days a month "on and off for five years," thus suggesting defendant "was [Jan's] co-habitant for at least half the year."

Additionally, the judge considered: Jan's reference to defendant as her "roommate" when she reported the 2018 domestic violence incident; the lack of evidence anyone else stayed in defendant's bedroom; and the fact defendant was sleeping in his bedroom when he was arrested, and kept his possessions, including a locked safe, in that location. Under these circumstances, the judge determined defendant "had exclusive control over his room and his belongings"

so Jan had no lawful authority over the area to be searched.

Next, in addressing the issue of third-party consent, the judge determined the State failed to show investigating officers had a reasonable belief in Jan's authority to consent to the search of defendant's bedroom, where the safe was found. The judge pointed out "[n]o witnesses testified . . . [t]he officers reasonably believed . . . defendant was not a resident" at Jan's apartment, and Officer Robertson "never explained his reasonable belief as to consent during his testimony." Further, the judge stated:

> the fact that defendant stayed there at least three times a week, and . . . was sleeping in the bedroom are all signs that point to the belief that he had authority over the room. There is no evidence showing that defendant and [Jan] share[d] the room. . . . This combined with the lack of [informing Jan and defendant of] the right to refuse consent . . . makes the officer's belief not reasonable.

Because these findings are well supported on the record, we decline to disturb the judge's legal conclusions. Indeed, because the State failed to show: either Jan or defendant consented to the warrantless search; Jan "possessed a common authority" over the spaces searched; investigating officers reasonably relied, from an objective perspective, on Jan's apparent authority to consent to the warrantless search; or some other exception to the warrant requirement applied, the evidence from the search was properly suppressed.

We also are convinced the trial judge correctly found the unlawful search of defendant's bedroom led to the issuance of the criminal search warrant and recovery of defendant's weapon from his locked safe. Thus, the judge rightly concluded the criminal search warrant was invalid and any evidence obtained on the basis of that warrant should be excluded as "'fruit[]' of an unconstitutional search [and] seizure." Shaw, 213 N.J. at 412-13 (citation omitted).

Finally, there is no reason to second-guess the judge's dismissal of the certain persons charge under the final December 20, 2021 order. The record shows that once the trial court properly invalidated the DVSW, suppressed the evidence resulting from the warrantless search, and excluded the weapon recovered from defendant's safe as "fruit of the poisonous tree," the State admitted it could not prove the certain persons charge. Therefore, the judge appropriately dismissed that charge.

To the extent we have not considered any additional arguments raised by the State, we are satisfied they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.