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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0733-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

MARESE WASHINGTON, JR.,

Defendant-Respondent.

APPROVED FOR PUBLICATION
April 5, 2023
APPELLATE DIVISION

Submitted March 14, 2023 – Decided April 5, 2023

Before Judges Gilson, Rose and Gummer.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 22-05-0340.

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for appellant (Charles J. Wettstein, Assistant Prosecutor, of counsel and on the brief).

Ronald B. Thompson, attorney for respondent.

The opinion of the court was delivered by

ROSE, J.A.D.

By leave granted, the State appeals from a September 12, 2022 Law Division order granting defendant Marese Washington, Jr.'s motion to suppress

evidence seized from a motor vehicle that police believed he used during the commission of a fatal shooting. The State maintains police were permitted to seize the vehicle pursuant to the plain-view exception to the warrant requirement while they awaited issuance of a warrant to search the car. Because we conclude the motion judge erroneously granted defendant's motion by reintroducing the inadvertence prong of the plain-view exception to the warrant requirement, we reverse the court's order and remand for further proceedings.

I.

We summarize the pertinent facts and procedural history from the limited record presented on appeal. During the two-day suppression hearing, the State produced the testimony of Detective Mario Nocito and Detective Sergeant Michael Hughes, members of the New Jersey State Police. The State also introduced in evidence seven photographs, including stills taken from surveillance video. Defendant neither testified nor produced any evidence.

Just after midnight on July 24, 2020, State Police responded to a single car crash involving a BMW on State Highway 55 in Millville. The front end of the BMW sustained heavy damage during the crash; the driver's side "appear[ed] to have been struck by gunfire." Police recovered five spent .40 caliber shell casings in the roadway. Kesean Bey, the driver and sole occupant

of the BMW, sustained a gunshot wound to his forehead. He was hospitalized in critical condition.

Detectives assigned to the State Police Major Crimes Unit investigated the shooting. Surveillance video obtained from a Wawa convenience store in Millville depicted Bey's BMW leaving the parking lot around 12:10 a.m. followed by a white Kia Optima. The cars were headed in the direction of State Highway 55. One of the Kia's headlights was unlit, and a front license plate was not affixed to the car. Additional surveillance video recovered from a Best Buy located near a State Highway 55 onramp depicted Bey's car followed by the Kia.

A ballistics examination of the .40 caliber shell casings recovered at the crash scene revealed a possible match to shell casings recovered from a June 30, 2020 shooting in Millville. During that investigation, officers assigned to the Millville Police Department and Cumberland County Prosecutor's Office were provided information that revealed: a white four-door sedan was involved in the shooting; defendant was one of the shooters; and defendant's Facebook account was held in the name, "Spartan Jihadist." Viewing the public portion of that user's Facebook page, police found a photograph depicting defendant standing in front of a white Kia Optima without a front

license plate. The photo had been "loved" by a Facebook user named, "Ameena Jones."

State Police detectives in the present matter also learned that the Vineland Police Department was investigating a shooting that occurred on June 27, 2020. As part of that investigation, Vineland police officers spoke with defendant and Jones, and identified a 2019 white Kia Optima with temporary registration number V254223 as a vehicle of interest in the shooting.

From surveillance footage, detectives identified a decal affixed to the Kia indicating it was purchased from Autotec, a car dealership located in Vineland. On July 28, 2020, Autotec's manager told Hughes and Trooper Travis Spadafora that Jones had purchased a white 2019 Kia Optima on May 4, 2020, which was assigned temporary registration number V254223, and Jones had not yet picked up the car's permanent license plates. The manager also explained that Jones had returned to the dealership in June 2020, claiming the Kia had sustained front-end damage when her sister "struck a deer." The manager referred Jones to a repair shop.

At some point on July 28, 2020, after they left the dealership, Hughes and Spadafora responded to Jones's apartment complex. Hughes testified he observed a 2019 white Kia Optima parked in the parking lot of Jones's

apartment building "in the area of apartment XX."[1] No special access was required to enter the parking lot, which "was . . . open to the public." As such, "anybody could go into the parking lot and make observations." Upon observing the vehicle, Hughes noticed "the temporary reg[istration]"; "the decals on the vehicle"; and "damage to the front passenger side." After conferring with other detectives assigned to the case, the decision was made "to impound the vehicle as evidence." Following the arrival of the tow truck and additional officers, Jones exited her apartment; she was not present at the scene beforehand.

Police informed Jones they were impounding the car and requested that she accompany them to the police station to speak about the investigation. Jones declined and objected to the seizure of her car, stating "something similar" to "you can't just take somebody's car without a warrant."

That same day, Nocito authored the affidavit that accompanied a warrant to search the Kia. After obtaining the warrant, a search of the Kia's interior revealed: two .40 caliber shell casings that matched the shell casings recovered on the roadway near Bey's car; lead that was "consistent with a firearm being discharged[] within the vehicle"; and "[p]ersonal identification

[1] We omit Jones's apartment number for privacy purposes. We glean from the record that Hughes was referencing the parking spot assigned to Jones's apartment.

and mail belonging to [defendant] was located in the driver's side pocket and the center console." Police also determined that the Kia's front passenger's side daytime running headlight was nonfunctional.

In February 2021, a Cumberland County grand jury charged defendant with conspiracy, attempted murder, and aggravated assault for his part in the July 2020 shooting of Bey, who initially survived the incident. In February 2022, Bey died from complications of a gunshot wound to his head. Thereafter, another Cumberland County grand jury returned a three-count superseding indictment against defendant, charging him with first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:11-3(a); first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (a)(2); and second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1).

Defendant moved to suppress the warrantless seizure of the Kia and the evidence seized during the ensuing search. Following the testimony summarized above, defendant argued "police knew all there was to know before they went to [Jones's apartment complex]." Juxtaposing the seizure of the Kia with the circumstances surrounding a roadside stop, defendant claimed police were required to obtain a warrant to seize the car, which was immobile and "on private property." According to defendant, "theoretically, a trooper

could have remained" in the parking lot and "prevented anyone from driving the vehicle" while police applied for a seizure warrant.

The State countered that the plain-view exception to the warrant requirement permitted police to seize the car without a warrant while they awaited a warrant to search the car. Specifically, police had "probable cause to associate the vehicle with evidence of criminal activity that occurred on July 24, 2020 and they were lawfully in the viewing area" when they observed the car. The State noted access to the apartment complex's parking lot was not restricted.

Immediately following oral argument on September 7, 2022, the motion judge issued a decision from the bench. Referencing State v. Gonzales, 227 N.J. 77 (2016), the judge recognized the Court "dispense[d] with the inadvertence prong of the plain-view exception to the warrant requirement." In that context, the judge did not reject the State's contention that it satisfied the remaining prongs of the plain-view exception. However, the judge was persuaded a seizure warrant was required pursuant to the Court's warning in Gonzales that "in the case of a car suspected of containing drugs parked in a driveway, if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies. In short, when the

police have sufficient time to secure a warrant they must do so." Id. at 104-05 (quoting State v. Witt, 223 N.J. 409, 448 (2015)).

Explaining the "issue here [was] . . . one of spontaneity," the judge reasoned this was "not a spontaneous situation." Noting that at the time the officers seized the Kia, they knew, among other things, its make and model, its temporary registration number, where it was located, and who owned it, the judge concluded there was no suggestion in the record "that the police didn't have sufficient time to secure a warrant" before impounding the car. On September 12, 2022, the judge entered an order granting defendant's suppression motion. We granted the State's ensuing motion for leave to appeal.

On appeal, the State contends the motion judge erroneously determined the Kia was unlawfully seized. The State maintains it satisfied both prongs of the plain-view exception to the warrant requirement, and the judge inappropriately determined that because the circumstances giving rise to probable cause to seize the car were not unforeseeable and spontaneous, a warrant was required to impound the car. The State further asserts the "unforeseeability and spontaneity" requirement espoused in Witt applies to the automobile – not the plain-view – exception to the warrant requirement.

II.

Our circumscribed review of a trial court's decision on a suppression motion is well established. We defer to the court's factual and credibility findings provided they are supported by sufficient credible evidence in the record. State v. Dunbar, 229 N.J. 521, 538 (2017). "But when the facts are undisputed, as they are here, and the judge interprets the law on a non-testimonial motion to suppress, our review is de novo." State v. Smart, ___ N.J. ___, ___ (2023) (slip op. at 10).

The principles guiding our review are deep rooted. Pursuant to "both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of our State Constitution, searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." State v. Elders, 192 N.J. 224, 246 (2008) (citing State v. Pineiro, 181 N.J. 13, 19 (2004)). "Compliance with the warrant requirement is not a mere formality but – as intended by the nation's founders – an essential check on arbitrary government intrusions into the most private sanctums of people's lives." State v. Manning, 240 N.J. 308, 328 (2020). "Because, under our jurisprudence, searches and seizures without warrants are presumptively unreasonable, the State bears the burden of demonstrating by a preponderance

of the evidence that an exception to the warrant requirement applies." Id. at 329.

Pertinent to this appeal, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." State v. Marshall, 123 N.J. 1, 67 (1991) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)). "The [F]ourth [A]mendment prohibits not all searches and seizures but only those that are deemed unreasonable." Ibid. Notably, there is a decreased invasion of privacy during the seizure of property. This is so because

> the seizure of an object in plain view does not involve an intrusion on privacy. If the interest in privacy has been invaded, the violation must have occurred before the object came into plain view and there is no need for an inadvertence limitation on seizures to condemn it. The prohibition on general searches and general warrants serves primarily as a protection against unjustified intrusions on privacy. But reliance on privacy concerns that support that prohibition is misplaced when the inquiry concerns the scope of an exception that merely authorizes an officer with a lawful right of access to an item to seize it without a warrant.
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> [Horton v. California, 496 U.S. 128, 141-42 (1990).]

Although our Supreme Court has not always applied the same privacy expectation as the United States Supreme Court in construing protections under the New Jersey Constitution, we believe the privacy exception discussed

in Horton is applicable to the plain-view seizure exception under both the federal and New Jersey constitutions.

In the present matter, the State maintains police were permitted to seize the Kia pursuant to the plain-view exception to the warrant requirement while they awaited issuance of a warrant to search the car. Following the Court's decision in Gonzales, police may seize contraband in plain view and without a warrant if two requirements are met: (1) they are lawfully in the viewing area when observing and seizing the evidence; and (2) the incriminating nature of the evidence is "immediately apparent" to the officers. 227 N.J. at 101.

In Gonzales, the Court prospectively held "an inadvertent discovery of contraband or evidence of a crime is no longer a predicate for a plain-view seizure." Id. at 82; see also Horton, 496 U.S. at 130 (rejecting the inadvertence prong of the then three-prong, plain-view doctrine). Adopting the United States Supreme Court's reasoning in Horton, our Supreme Court "reject[ed] the inadvertence prong of the plain-view doctrine because it require[d] an inquiry into a police officer's motives and therefore is at odds with the standard of objective reasonableness that governs our analysis of a police officer's conduct under Article I, Paragraph 7 of our State Constitution." Gonzales, 227 N.J. at 99; see also Horton, 496 U.S. at 138.

Similar to the motion judge, we are satisfied the State satisfied both requirements of the plain-view exception to the warrant requirement to seize the Kia. The officers: (1) were lawfully in the parking lot of Jones's apartment complex when they observed the car; and (2) readily observed the Kia's condition – including its temporary registration, decals, and front-end damage – indicating the vehicle was evidence of the shooting of Bey. Gonzales, 227 N.J. at 101.

We part company, however, with the motion judge's determination that because probable cause was not spontaneous or unforeseeable, police impermissibly towed the Kia, and as such, the evidence seized following issuance of a warrant to search the car constituted fruit of the poisonous tree. To support his conclusion, the judge cited the final paragraphs of the Court's decision in Gonzales:

> We conclude with two final points. Plain view, in most instances, will not be the sole justification for a seizure of evidence because police must always have a lawful reason to be in the area where the evidence is found. Thus, when necessary, the police will also be required to comply with the warrant requirement or one of the well-delineated exceptions to that requirement.
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> Moreover, the warrantless seizure of the parked car from the driveway in Coolidge [v. N.H., 403 U.S. 443 (1971)] would not be permissible under our state-law jurisprudence because the police had sufficient time—days—to secure a valid warrant. In Witt, . . .

> we specifically noted that, in the case of a car suspected of containing drugs parked in a driveway, "if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies." 223 N.J. at 448. In short, when the police have sufficient time to secure a warrant, they must do so.
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> [227 N.J. at 104-05.]

Unlike the motion judge, we are not persuaded that the Court's closing comments in Gonzales invalidate the warrantless seizure of the Kia in the present matter.

We first consider the circumstances presented in Coolidge. Similar to the facts presented here, the defendant in Coolidge utilized an automobile during the commission of a homicide. 403 U.S. at 445-46. Unlike the present matter, however, the plain-view exception was one of three theories proffered by the State of New Hampshire "in support of the warrantless seizure and search of the . . . car," id. at 464, which had been parked in the defendant's driveway, id. at 460. The United States Supreme Court first deemed the warrant that had been issued to search the car constitutionally invalid because it was not issued by a "neutral and detached magistrate," id. at 449, and then dismissed the State's theory that exigent circumstances justified the warrantless search because, among other factors, "[the car] was regularly parked in the driveway of [the defendant's] house," id. at 460.

In rejecting the State's plain-view theory, the Court "assume[d] that the police had probable cause to seize the automobile." Id. at 464. However, the Court concluded the seizure of the car did not satisfy the inadvertence requirement of the plain-view exception. Id. at 472-73 The Court noted the officers "had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; [and] they intended to seize it when they came upon Coolidge's property." Id. at 472.

Although the United States Supreme Court in Horton later rejected the "inadvertent" requirement to justify a plain-view seizure of evidence, it distinguished its prior holding in Coolidge. Horton, 496 U.S. at 137. The Horton Court suggested that although the car in Coolidge was observed by police in plain view, its "probative value remained uncertain until after the interior[] w[as] swept and examined microscopically," and the car was seized "by means of a warrantless trespass on the defendant's property." Ibid. Accordingly, the Horton Court concluded "the absence of inadvertence was not essential to the [C]ourt's rejection of the State's 'plain view' argument in Coolidge." Ibid. Conversely, in the present matter, the Kia's evidentiary value, was immediately apparent. Nor did police trespass on the apartment complex's parking lot when they observed the Kia.

We turn to the warrant at issue in Witt. Unlike the present matter, the State in Witt argued the roadside search of the defendant's car was justified under the automobile exception to the warrant requirement. 223 N.J. at 420. Readdressing the constitutional standard for a warrantless search of an automobile, our Supreme Court departed from the "pure exigent-circumstances requirement" it had established in State v. Cooke, 163 N.J. 657, 671 (2000), and State v. Pena-Flores, 198 N.J. 6, 11 (2009). Witt, 223 N.J. at 414, 447-49. Returning to the standard it had iterated in State v. Alston, 88 N.J. 211, 233 (1981), the Witt Court held: "Going forward, searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible. However, when vehicles are towed and impounded, absent some exigency, a warrant must be secured." Id. at 450. The Court expressly "limit[ed] the automobile exception to on-scene warrantless searches." Id. at 449. Notably, the Court did not extend its holding to the plain-view exception to the seizure warrant requirement.

Distinguishing its holding from "the United States Supreme Court's interpretation of the automobile exception under the Fourth Amendment," the Witt Court stated police are required to obtain a warrant if the "officer has probable cause to search a car and is looking for that car." Id. at 447. In that context, the Court referenced its prior observation in Cooke: "In the case of

the parked car, if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies." Id. at 448; see also Cooke, 163 N.J. at 675-76 (stating "a car parked in the home driveway of vacationing owners, without more, does not give rise to exigency").

However, the crux of the issue presented in Cooke and Witt was the warrantless search of the motor vehicles pursuant to the automobile exception; not the seizure of those cars under the plain-view exception advanced by the State in this case. Moreover, the requirements of foreseeability and spontaneity commanded by the Court in Witt only apply to on-the-scene searches of automobiles where there is probable cause that the vehicle contains contraband or evidence of a crime. 223 N.J. at 449. Stated another way, foreseeability and spontaneity are requirements of the automobile exception. Conversely, only probable cause is needed to tow and impound a car. See ibid.; see also Smart, ___ N.J. at ___ (slip op. at 23) (recognizing the propriety of impounding the defendant's car following an investigative stop under the automobile exception to the warrant requirement while police sought a search warrant).

Because the Kia was seized at the scene – and not searched – the requirements of the automobile exception were not applicable in this case. To hold otherwise would impermissibly reintroduce the inadvertence prong of the

plain-view exception to the seizure warrant requirement. We therefore conclude the motion judge erroneously conflated the discrete rules for the warrantless search and seizure of an automobile.

Reversed and remanded. We do not retain jurisdiction.