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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2697-12T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JASON N. LEWIS,

Defendant-Appellant.

Submitted March 4, 2015 – Decided June 25, 2015

Before Judges Fuentes, Ashrafi, and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 07-03-0194.

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent (Sarah Lichter, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Jason Lewis appeals from his conviction by a jury for possession of eighty-five vials of crack cocaine. We reverse because the police violated defendant's constitutional rights when they searched his car without a warrant.

In March 2007, a Union County grand jury returned an indictment charging defendant with third-degree offenses: possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count one); possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (count two); and possession of cocaine with intent to distribute within a school zone, N.J.S.A. 2C:35-7 (count three).

On March 17, 2011, the court conducted a hearing on defendant's motion to suppress evidence seized from his car after the police stopped it for alleged motor vehicle violations. The court held the police had a reasonable and articulable suspicion to make the motor vehicle stop and probable cause to search the car. Adding that exigent circumstances justified the search without a warrant, the court denied defendant's motion to suppress.

Defendant was subsequently tried before a jury in 2011. The jury returned a verdict of guilty on count one of the indictment for possession of cocaine, but it found defendant not guilty on counts two and three for possession with intent to distribute the cocaine, in particular in a school zone. On September 14, 2012, the court sentenced defendant to four years imprisonment on count one.

On appeal, defendant argues:

POINT I

THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AS GUARANTEED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ART. 1, PAR. 7 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE UNLAWFUL SEARCH AND SEIZURE OF THE DEFENDANT'S VEHICLE.

A. THE POLICE REQUEST TO CONDUCT A CONSENT SEARCH WAS NOT SUPPORTED BY REASONABLE SUSPICION.

B. THE POLICE LACKED PROBABLE CAUSE TO CONDUCT THE SEARCH.

C. THE POLICE LACKED EXIGENT CIRCUMSTANCES TO SEARCH THE VEHICLE AND THE CONTAINER SEIZED FROM THE VEHICLE.

POINT II

THE DEFENDANT'S RIGHT TO REMAIN SILENT AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND NEW JERSEY COMMON LAW WAS VIOLATED BY THE ADMISSION OF EVIDENCE THAT THE DEFENDANT WOULD NOT SAY YES OR NO WHEN ASKED IF HE HAD ANYTHING ILLEGAL IN THE CAR. (Not Raised Below).

POINT III

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. 1, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE ERRONEOUS AND PREJUDICAL INSTRUCTIONS ON THE LAW OF POSSESSION OF CDS. (Partially Raised Below).

A. THE TRIAL COURT'S INSTRUCTION THAT JURORS MAY INFER POSSESSION OF CDS FROM ITS CONCEALMENT IN A DEPOSITORY OF A CAR WAS ERRONEOUS

AND PREJUDICIAL. (Partially Raised Below).

B. THE TRIAL COURT'S INSTRUCTION THAT CONSTRUCTIVE POSSESSION IS AN ABILITY TO EXERCISE CONTROL AND DOMINION IS ERRONEOUS AND PREJUDICIAL. (Not Raised Below).

C. THE TRIAL COURT'S INSTRUCTION — THAT JURORS SHOULD NOT ALTER THEIR OPINION OF THE GUILT OR INNOCENCE OF THE DEFENDANT UNLESS THEY ARE "CONVINCED" THEIR OPINION IS ERRONEOUS — IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT. (Not Raised Below).

POINT IV

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. 1, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY PROSECUTORIAL MISCONDUCT. (Partially Raised Below).

POINT V

THE SENTENCE IS EXCESSIVE.

A. THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

B. THE TRIAL COURT MADE FINDINGS OF FACT TO ENHANCE THE SENTENCE.

We find insufficient merit in defendant's arguments in Points III and V to warrant discussion in a written opinion. R. 2:11-3(e)(2). Some of the arguments defendant makes in his Points I, II, and IV have merit, and our conclusion that the

police did not have probable cause to search the car requires reversal of his conviction.

The facts of the case were developed at the pretrial suppression hearing and at the trial. At approximately 9:00 p.m. on November 15, 2006, a police detective conducting surveillance from a concealed location saw a woman standing at the corner of Arlington and West Seventh Streets in Plainfield, an area where drug selling activity was common. The detective thought the woman's behavior was suspicious because she was standing outside in the rain and appeared to be waiting for someone impatiently. After watching the woman for about ten minutes, the detective broadcast information about his observations over his police radio. He then observed defendant drive past the woman and beep his horn to get her attention. Defendant turned into the parking lot of a convenience store. The woman walked over to the driver's side of defendant's car, had a conversation with him, and the two entered the convenience store together.

Responding to the broadcast, a Plainfield police officer drove to the convenience store in an unmarked police car and parked across the street. He saw defendant and the woman come out of the convenience store and recognized both as persons previously involved in illegal drug sales. As the pair walked

toward defendant's car, their attention was drawn toward the officer's car. The woman appeared startled by the officer's presence, and she "stutter stepped" as she approached defendant's car. Defendant "looked at the ground" and tried to "avoid eye contact" with the officer. The woman "reached for the door handle [of defendant's car], took her hand away and then reached back," conduct that the officer interpreted as hesitance to get into the car. She entered the passenger side of defendant's car, and defendant drove out of the parking lot.

The officer observed defendant's car make a right turn out of the parking lot without using its turn signal. He followed and made a motor vehicle stop because defendant had failed to signal his turn and because the car had tinted windows, which the officer believed were illegal.

As the officer signaled for defendant to pull over, he saw defendant turn his whole body towards the right and reach towards the center console, movements the officer characterized as atypical. Defendant also reached up to the driver's side visor. The officer got out of his vehicle and approached defendant as he sat in his car. He saw that defendant was "trembling" and would not make eye contact with him. When the officer asked defendant for his driving credentials, defendant said he could explain the money in his car. The officer then

saw that cash had been placed above the driver's side visor. Defendant produced his driver's license, insurance card, and vehicle registration.

The officer approached the passenger's side door and asked the woman to step out so he could speak with her. Outside the car, the woman told the officer she did not know defendant's name and he had asked if she needed a ride home. The officer then spoke with defendant, who was still sitting in the car. Defendant said he did not know the woman or where she lived. Defendant said he met the woman inside the convenience store and she asked him for a ride home. Defendant also said he had about $800 on his person.

By this time, three other officers had arrived. The officer who made the stop asked defendant if there was anything illegal in the car. Defendant did not give a clear answer, and the officer asked him for permission to search the car. According to the officer, defendant's answers were "evasive . . . not really saying yes or no."

Defendant also reached towards the center console area with his right arm when the officer asked to search the car. Defendant ultimately refused to consent to a search, saying he did not know whether the woman might have placed anything illegal in the car. The officer then asked defendant to step

out so they could speak further. The officer testified that, although defendant and the woman were not "secured" or "in custody" at this point, they were "not free to leave" or to re-enter the car.

At about this time, one of the other officers saw defendant's brother, also known by the police to be a drug dealer, drive past defendant's car in the opposite direction.

The first officer then searched defendant's vehicle. He found twenty-eight vials of crack cocaine under the driver's seat and two vials of crack cocaine in a false-bottom can in the back seat. After noticing that the gearshift compartment appeared to be tampered with, the officer removed the top and found an additional fifty-five vials of crack cocaine. The officer also recovered $200 from the driver's side visor and $1,918.25 from defendant's person.

Defendant and the woman were arrested and charged. Defendant was also issued two motor vehicle tickets — for failing to use a turn signal and for illegally tinted windows. The car was towed from the scene within a half hour.

Based on this record, the trial court concluded that the officer's prior knowledge of defendant and the woman and their "suspicious" conduct before and during the stop provided probable cause to believe that defendant was "engaged in

violation of the drug laws and that contraband may be located in the motor vehicle." The court also held that the vehicle's obstruction of traffic, its location in a high crime area, and the presence of confederates were exigent circumstances justifying an immediate search of the vehicle without a warrant.

In reviewing a motion to suppress evidence, an appellate court must defer to the trial court's fact findings and "feel" of the case and may not substitute its own conclusions regarding the evidence, even in a "close" case. State v. Locurto, 157 N.J. 463, 471 (1999) (quoting State v. Johnson, 42 N.J. 146, 161-62 (1964)); accord State v. Robinson, 200 N.J. 1, 15 (2009); State v. Elders, 192 N.J. 224, 243-44 (2007). In particular, the appellate court must defer to the credibility determinations of the trial court. Locurto, supra, 157 N.J. at 474; State v. Hodgson, 44 N.J. 151, 163 (1965), cert. denied, 384 U.S. 1021, 86 S. Ct. 1929, 16 L. Ed. 2d 1022 (1966). However, an appellate court need not defer to the trial court's legal conclusions reached from the established facts. See State v. Brown, 118 N.J. 595, 604 (1990). "If the trial court acts under a misconception of the applicable law," we need not defer to its ruling. Ibid.

Both the United States and the New Jersey Constitutions protect citizens against unreasonable searches and seizures.

U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "A warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." State v. Cooke, 163 N.J. 657, 664 (2000). "The requirement that a search warrant be obtained before evidence may be seized is not lightly to be dispensed with, and the burden is on the State, as the party seeking to validate a warrantless search, to bring it within one of those recognized exceptions." Ibid. (quoting State v. Alston, 88 N.J. 211, 230 (1981)). In satisfying that burden, "the State must demonstrate by a preponderance of the evidence that there was no constitutional violation." State v. Wilson, 178 N.J. 7, 13 (2003).

Initially, we note that defendant does not argue the motor vehicle stop itself was unconstitutional. Defendant's motion to suppress in the trial court and his appellate brief before us focus on the warrantless search of the vehicle, not the initial stop. At the hearing, defense counsel asked a few questions about whether motor vehicle laws applied in the parking lot of the convenience store but did not press the issue further.[1]

[1] It seems that the statute requiring the use of a turn signal applies only in a "roadway," not in a parking lot, see N.J.S.A. 39:4-126, but that issue is not before us. In any event, illegally tinted windows could be a violation of the traffic laws, see N.J.S.A. 39:3-74; N.J.A.C. 13:20-33.7(d), giving the officer probable cause or reasonable suspicion to stop the (continued)

Consequently, the constitutional issue before us pertains to the search of defendant's car, not the motor vehicle stop.

Defendant first argues that the officer unlawfully asked defendant for consent to search the vehicle without a reasonable and articulate suspicion that it contained evidence of a crime. See State v. Carty, 170 N.J. 632, 647, modified on other grounds, 174 N.J. 351 (2002). This argument is moot because the State does not seek to justify the search based on consent. The State argues that a warrantless search without consent was justified by probable cause and exigent circumstances.

To conduct a motor vehicle search without a warrant or consent, the police must have probable cause to believe that the vehicle contains evidence of criminal activity and exigent circumstances that dispense with the need to apply for a warrant. State v. Minitee, 210 N.J. 307, 321 (2012); State v. Pena-Flores, 198 N.J. 6, 11 (2009); State v. Dunlap, 185 N.J. 543, 551 (2006).

"[P]robable cause is the minimal requirement for a constitutionally reasonable search of a readily movable vehicle . . . ." Cooke, supra, 163 N.J. at 671 (quoting Alston, supra, 88 N.J. at 231). Our Supreme Court has defined probable cause

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vehicle. State v. Cohen, 347 N.J. Super. 375, 380 (App. Div. 2002).

as a "well-grounded suspicion that a crime has been or is being committed." Ibid. It is "more than a bare suspicion but less than legal evidence necessary to convict." Alston, supra 88 N.J. at 231 (quoting State v. Patino, 83 N.J. 1, 10 (1980)).

"In determining whether there is probable cause, the court should utilize the totality of the circumstances test set forth in Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)." State v. Moore, 181 N.J. 40, 46 (2004). "That test requires the court to make a practical, common sense determination whether, given all of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Ibid. (quoting Gates, supra, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548). The court may consider the police officer's "common and specialized experience," as well as any evidence concerning the high crime reputation of an area. Ibid. (citing State v. Johnson, 171 N.J. 192, 217 (2002); Schneider v. Simonini, 163 N.J. 336, 362 (2000), cert. denied, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001)). Evidence that a suspect is associating with known narcotics offenders has also been recognized as a legitimate factor in assessing probable cause. State v. Williams, 117 N.J. Super. 372, 376 (App. Div.), aff'd o.b., 59 N.J. 535 (1971).

The State argues the following facts establish probable cause for the search of defendant's car: (1) before defendant's arrival at the convenience store, the woman was standing on the street corner in the rain, pacing, and apparently waiting for someone; (2) the incident occurred in a high crime area known for illegal narcotics sales; (3) defendant and the woman displayed alarm when they came out of the store and saw the officer in his unmarked car; (4) the officer recognized them as drug sellers; (5) defendant made erratic movements towards the center console and the visor before pulling over for the motor vehicle stop; (6) defendant appeared nervous, was "trembling," and did not make eye contact with the officer; (7) defendant and the woman gave inconsistent explanations as to how the woman came to be a passenger in the car, and they gave false information about not knowing each other; (8) without being asked, defendant volunteered that he could explain the money he had in the car; (9) defendant reached toward the center console again after the officer asked him whether there was anything illegal in the car and if he would consent to a search; and (10) defendant expressed concern that the woman may have brought contraband into the car.

While these facts were sufficient to give the police reasonable suspicion of criminal activity, they did not amount

to a "probability" that drugs were concealed in the car. Gates, supra, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548; Moore, supra, 181 N.J. at 46. The police never saw any conduct on the part of defendant and the woman that would give rise to suspicion that they had engaged in a drug transaction. See, e.g., Moore, supra, 181 N.J. at 47; Cooke, supra, 163 N.J. at 671-72; State v. Lewis, 411 N.J. Super. 483, 485, 489-90 (App. Div. 2010); see also State v. Guerrero, 232 N.J. Super. 507, 509-11 (App. Div. 1989) (probable cause existed where experienced narcotics officers conducting surveillance in a high crime area witnessed the suspect drive up, exchange money for a small package, and furtively reach down under the seat before pulling over). The police had no reliable information from a confidential source that defendant and the woman were involved in a drug transaction at that time. See, e.g., Cooke, supra, 163 N.J. at 671; see also State v. Smith, 129 N.J. Super. 430, 434 (App. Div.) (probable cause found where the officers were informed of a narcotics sale from a confidential informant and anonymous tip, the suspect had a prior narcotics record, he was present in a high crime area for a period just long enough to make a narcotics purchase, and he glanced furtively towards the officers after exiting the premises), certif. denied, 66 N.J. 327 (1974). In fact, the officer did not see anything in the

possession of defendant or the woman that would indicate they were concealing illegal drugs. See, e.g., Williams, supra, 117 N.J. Super. at 376 (probable cause where an officer observed the suspect speaking with a known narcotics offender in high crime area and saw the suspect furtively drop a package or object to the floor of his car as the officer approached).

The detective's and the officer's observations that we have described in detail, both before and after the motor vehicle stop, were insufficient to establish probable cause that either defendant or the woman were then engaged in narcotics or other criminal activity. This case resembles more closely the facts of State v. Pineiro, 181 N.J. 13, 25-28 (2004), where the Supreme Court found reasonable suspicion of illegal narcotics activity but not probable cause, rather than the facts of Moore, supra, 181 N.J. at 46-47, where the police had reasonable suspicion to detain the defendant and probable cause to conduct a warrantless search. Without probable cause, the officer violated defendant's rights under the Fourth Amendment and our State constitution when he searched the vehicle.[2] The evidence seized from defendant's car should have been suppressed.

[2] Defendant also argues there were no exigent circumstances to justify a warrantless search of the vehicle. Considering the time and the location of the vehicle, the fact that two suspects were involved, the presence of defendant's brother in the area, (continued)

We also comment briefly about the arguments defendant makes in Points II and IV of his brief. Defendant argues the State violated his Fourth and Fifth Amendment rights in presenting evidence to the jury that defendant did not answer the officer's question about whether there was anything illegal in his car and that he was initially evasive and then declined to give consent for the search of his car.

In his opening statement, the prosecutor stated:

> The officer then asked the defendant if anything illegal was in the car. The defendant didn't answer. The officer then asked the defendant for permission to search the car. The defendant puts his arm right back on that console area and he tells the officer he doesn't want his car searched because he doesn't know whether or not the woman who was in his car for roughly a minute might have secreted drugs in his car without him knowing.

During the prosecutor's direct examination of the officer, the following testimony was presented to the jury:

> Q: What happened after that?
>
> A: I asked him if there was anything illegal in the car.
>
> Q: What did he say?

(continued)
and the limited number of officers available to secure the scene, we find no error in the trial court's finding of exigent circumstances. See Pena-Flores, supra, 198 N.J. at 29; Lewis, supra, 411 N.J. Super. at 489.

A: He became nervous and evasive with his answers and, um, wouldn't say yes or no.

Q: After he wouldn't say yes or no, what did you do?

A: I asked him if I could have permission to search the car.

Q: What did he do when you asked him for permission to search the car?

A: He was still evasive with his answers and he indicated he didn't want me to search because he didn't know if [the woman] left anything in the car, and at the same time he reached towards the center console.

Defense counsel did not object to the prosecutor's opening statement or to the testimony of the officer. Instead, defense counsel attempted to elicit from the officer in cross-examination that defendant had a right to decline consent for the search of his car. Counsel also requested that the court instruct the jury that defendant had a right to refuse consent for the search. The court gave the following instruction to the jury:

Ladies and gentlemen, just so that you don't take anything negative from that, a police officer has a right to ask an individual for consent to search, and any individual has a right to refuse that consent.

The fact that if you believe [the officer's] testimony that he asked for consent and the defendant refused, you can't take that in any way, shape, or form as anything negative against the defendant. It's an absolute

> right of any citizen to refuse consent to search.

Before the closing arguments of counsel, the court on its own motion struck from the record the officer's testimony about defendant's refusal to give consent and reminded the jury "that the defendant may have refused to consent cannot in any way be held against him."

The officer's asking defendant whether he had anything illegal in the car did not violate his Fifth Amendment right against self-incrimination. See Berkemer v. McCarty, 468 U.S. 420, 435-42, 104 S. Ct. 3138, 3147-52, 82 L. Ed. 2d 317, 331-36 (1984) (roadside inquiry during a brief traffic stop does not implicate defendant's Fifth Amendment rights so that Miranda[3] warnings must be given). But it was error for the prosecutor to present evidence of defendant's refusal to answer as evidence during the trial. See State v. Muhammad, 182 N.J. 551, 569 (2005); State v. Deatore, 70 N.J. 100, 108-09 (1976). Especially where the silence was not offered to impeach defendant's subsequently-offered defense to the charges, see Brown, supra, 118 N.J. at 609-14, the State should not have presented any testimony about defendant's refusal to answer the officer about having anything illegal in the car.

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Similarly, as the trial court eventually ruled, the State may not use as substantive evidence the fact that a defendant exercised his Fourth Amendment right to decline consent for a search.

Reversed and remanded. We do not retain jurisdiction.