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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0856-12T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL CUSHING,

Defendant-Appellant.

Argued October 8, 2013 – Decided January 23, 2014

Before Judges Messano, Hayden and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 11-08-0545.

James K. Smith, Jr., Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Smith, of counsel and on the brief).

Emily R. Anderson, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Ms. Anderson, of counsel and on the brief).

PER CURIAM

Pursuant to a plea agreement struck with the State after his motion to suppress was denied, defendant Michael Cushing pled guilty to second-degree possession with intent to distribute more than ten but less than fifty marijuana plants,

N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(1) (count two); second-degree possession with intent to distribute marijuana within 500 feet of a public park, N.J.S.A. 2C:35-7.1 (count three); third-degree possession with intent to distribute marijuana within 1,000 feet of a public school, N.J.S.A. 2C:35-7 (count four); and fourth-degree failure to register a change of employment as required by Megan's Law, N.J.S.A. 2C:7-2(d)(1) (count five). In accordance with the plea agreement, defendant was sentenced to a ten-year term of imprisonment with a forty-month parole disqualifier on count two, along with concurrent ten-year, five-year and eighteen month sentences on counts three, four and five respectively. He remains free on bail pending this appeal.

Before turning to the specific arguments defendant raises, we recap the proceedings before the motion judge. On the record, before any testimony was adduced, the judge carefully framed the issue presented by defendant's motion to suppress:

> [B]ased upon a brief conference in chambers with counsel let me propose . . . the following issues which should be addressed and answered as a result of this [N.J.R.E.] 104 hearing. One, . . . and this is a legal question, does a non-resident attorney [-]in[-]fact have the legal authority to consent to a search of premises owned and occupied by her principal? The next are questions of fact. If so, . . . was her consent to search in this case valid? The third question, if not[,] did she have apparent authority so as to justify police reliance thereon?

The prosecutor and defense counsel agreed with the judge's synopsis.

The sole witness at the evidentiary hearing was Bridgewater police officer Michael Ziarnowski. On June 24, 2011, at 3:43 p.m., Ziarnowski was dispatched to a certain one-family residence on a call of "suspected marijuana." When he arrived, Ziarnowski knocked on the door, and Lisa Mylroie answered.[1] Lisa told Ziarnowski that her mother, Betty Cushing, owned the home, and she (Lisa) was there to evict defendant, Betty's 26-year-old grandson and Lisa's nephew, who had lived in the home for twenty years. Lisa detailed a list of reasons for the eviction, which included defendant's girlfriend having moved in with him and his failure to pay rent and tend the house.

Lisa told Ziarnowski that she held Betty's power of attorney.[2] Betty was not present because the family determined she should not be there during the attempt to evict defendant, but Lisa's sister, Charlene Cushing, was present.

Lisa told Ziarnowski that she paid the household bills for Betty, and the electricity bill was "through the roof." Trying

[1] Since some of the family members share the same last name with defendant, we refer to them by their first names, intending no disrespect by this informality.

[2] No power of attorney was produced or introduced at the hearing, and there is none in the appellate record.

to ascertain whether defendant was the cause, Lisa had entered defendant's upstairs bedroom. Seeing a bright light coming from underneath the closet door, and hearing a loud humming noise, Lisa opened the door and saw what appeared to be several marijuana plants. She immediately called police.

Lisa invited Ziarnowski into the house, led him upstairs and had already opened the door to defendant's bedroom when Ziarnowski reached the second floor. Lisa then opened the bedroom closet door, and Ziarnowski observed what he believed to be marijuana plants being cultivated in the closet. Ziarnowski did not know Lisa or defendant, and, based solely upon what Lisa had told him prior to entering the bedroom, he believed he "had no reason to apply for a search warrant."

Ziarnowski did not seize any of the plants. He asked Lisa and Charlene to leave so he could secure the house, and he called his sergeant. Anticipating Betty might not consent to a search of the home, police applied for a search warrant. Before the warrant was obtained, however, Betty returned home. Another officer asked Betty to sign a consent to search form covering the residence and the shed behind it. The consent form was admitted into evidence. However, Ziarnowski acknowledged police reports indicating that Betty refused to consent to a search of

defendant's bedroom.[3] Apparently, no further search of the premises took place until after a search warrant was obtained.

The application for the search warrant was granted and, at approximately 8:30 p.m., police executed the warrant. They seized sixteen marijuana plants and other drug-related paraphernalia from the bedroom, and an additional bag of marijuana from the backyard shed.

In a comprehensive written decision that followed the hearing, the judge found "that Lisa . . . consented to the search of the home by inviting the police into . . . [d]efendant's bedroom, after summoning them to the home." He also found that Lisa "had a general power of attorney over her mother's affairs, which gave her the authority to consent to the entry of the police into [d]efendant's bedroom on behalf of the homeowner, and provided the police with a reasonable basis to rely on [Lisa's] authority."

The judge also determined that, "[i]n all respects[,] the [d]efendant's relationship with [Betty] was that of common family household members, not tenant and landlord." He further concluded that "when [Lisa,] on behalf of [Betty,] gave consent for the bedroom to be entered by . . . Ziarnowski, she was

[3] The consent to search form executed by Betty is in the record and does not exclude defendant's bedroom.

acting for [Betty] in loco parentis for [d]efendant, not as his landlord, and therefore[,] the warrantless search was lawful [pursuant to the] consent exception to the warrant requirement." The judge also determined that the search of the backyard shed was lawful pursuant to both Lisa's and Betty's consent. In summary, the judge concluded, "It is clear that [Lisa,] with actual and apparent authority, initiated the entry of . . . police into the home and, without any prompting by . . . Ziarnowski, took him into . . . [d]efendant's bedroom and into the closet to show him the marijuana growing inside." The judge denied defendant's motion.

Defendant raises the following issues for our consideration:

> POINT I
>
> BECAUSE BETTY CUSHING DID NOT HAVE AUTHORITY TO CONSENT TO A SEARCH OF DEFENDANT'S BEDROOM, AND SINCE HER DAUGHTER, AS HER AGENT, HAD NO GREATER AUTHORITY TO CONSENT, THE WARRANTLESS SEARCH OF DEFENDANT'S BEDROOM AND CLOSET VIOLATED HIS FOURTH AMENDMENT RIGHTS AND REQUIRES THAT THE FRUITS OF THE SEARCH BE SUPPRESSED.[4]

[4] Despite the judge's characterization of the limited issues to be decided by the evidentiary hearing, defense counsel specifically contended during oral argument after the testimony was completed that Betty did not have the authority to consent to any search of defendant's bedroom.

A. Lisa Mylroie Had No More Authority To Consent Than Her Mother, Who Refused To Consent To a Search Of Defendant's Bedroom.

B. It Was Not Reasonable For Officer Ziarnowski To Simply Assume That Lisa Mylroie Was Authorized To Consent To A Search Of Defendant's Bedroom.

POINT II

BECAUSE BOTH ATTORNEYS AND MOST LIKELY THE COURT MISUNDERSTOOD THE APPLICABLE SENTENCING STATUTES AS THEY APPLIED TO THE CASE, THE MATTER SHOULD BE REMANDED FOR A RESENTENCING. (Not Raised Below).

POINT III

COUNT TWO SHOULD HAVE BEEN MERGED INTO COUNT THREE, WHICH WOULD RESULT IN A REDUCTION OF THE ASSESSED FINES AND PENALTIES. (Not Raised Below).

We have considered these arguments in light of the record and applicable legal standards. We reverse and remand the matter for further proceedings consistent with this opinion.

I.

Defendant argues that Betty could not have validly consented to a search of defendant's bedroom, and therefore, Lisa had no more authority to consent to the search. He also contends that, based on the circumstances, it was not reasonable for Ziarnowski to assume Lisa was authorized to consent to the search of defendant's bedroom.

The State argues that Lisa provided Ziarnowski with "valid consent" to search the bedroom including the closet. Alternatively, the State contends that the search was valid under the "third-party intervener" exception to the warrant requirement. Lastly, the State asserts that Lisa's "tip" provided sufficient probable cause to obtain the warrant, thereby invoking application of the "independent source" doctrine to justify the ultimate search and seizure.

The State conceded at oral argument that it never asserted the third-party intervener exception before the motion judge. Early in his written decision, the judge noted that defendant specifically argued the State could not meet its burden under the independent source doctrine. Although he wrote that "[d]efendant concedes . . . Ziarnowski had probable cause to obtain a valid search warrant based upon the first hand specific information provided by Lisa," the judge never specifically decided whether the independent source doctrine applied.

A.

We first consider the issue of consent, and specifically, whether Betty herself possessed the ability to consent to the search of defendant's bedroom and closet. In doing so, however, we recognize that this is not a typical consent case. It was clear from the testimony and arguments advanced before the

motion judge, that Ziarnowski never sought Lisa's consent before making his initial observations. As the judge expressly found, Lisa invited Ziarnowski upstairs, he followed, and, without any prompting, she opened the closet door and the officer was able to clearly see its contents. Nevertheless, we agree with defendant that any search cannot be justified based upon consent, as the State asserted before the motion judge. Therefore, we address the issue.

"'[W]arrantless searches, particularly in a home, are presumptively unreasonable' and 'must be subjected to particularly careful scrutiny.'" State v. Edmonds, 211 N.J. 117, 129 (2012) (quoting State v. Bolte, 115 N.J. 579, 583, 585 (1989)). "Because a warrantless search of a home is presumptively invalid, the State bears the burden of establishing that such a search falls within one of the few well-delineated exceptions to the warrant requirement." State v. Vargas, 213 N.J. 301, 314 (2013) (citation omitted). "A search conducted pursuant to consent is a well-established exception to the constitutional requirement that police first secure a warrant based on probable cause before executing a search of a home." State v. Domicz, 188 N.J. 285, 305 (2006).

"'[C]onsent may be obtained from the person whose property is to be searched, from a third party who possesses common

authority over the property, or from a third party whom the police reasonably believe has authority to consent.'" State v. Farmer, 366 N.J. Super. 307, 313 (App. Div.) (quoting State v. Maristany, 133 N.J. 299, 305 (1993)), certif. denied, 180 N.J. 456 (2004); and see United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 250 (1974) (holding that a third party may only consent to a search if he or she possesses "common authority over or other sufficient relationship to the premises or effects to be inspected"). "Consent is a factual question determined by an examination of the totality of the circumstances." State v. Wright, 431 N.J. Super. 558, 594 (App. Div. 2013) (citation omitted).

Various factual patterns that have arisen in other cases inform our analysis. For example, our Court has specifically stated that "a landlord generally does not have authority to consent to a search of tenant's premises." State v. Coyle, 119 N.J. 194, 215 (1990) (citation omitted). Although not dispositive, the lack of any lease or payment of rent generally mitigates against the finding of a landlord-tenant relationship. Id. at 217. In this case, the judge specifically found that no landlord-tenant relationship existed between defendant and Betty, a legal conclusion reasonably drawn from and supported by

the facts. Defendant had lived in his grandmother's home since he was a child and had never paid any rent.

We have on several occasions recognized the validity of a parent's consent to the search of a child's room. See e.g., State v. Douglas, 204 N.J.Super. 265, 278 (App. Div.) (noting that "the overwhelming majority of the cases uphold the right of the parent to consent to a search of the son or daughter's room"), certif. denied, 102 N.J. 378 (1985). "Even in cases where the child has reached adulthood, courts have been reluctant to find that the son or daughter had exclusive possession of a room in the parent's home." State v. Crumb, 307 N.J. Super. 204, 243-44 (App. Div. 1997), certif. denied, 153 N.J. 215 (1998). In Crumb, we set forth several factors for consideration in determining whether the adult child had "exclusive possession" of the room. Id. at 244. These included whether others had use of "part of the . . . room for storage or other purposes," whether the child "paid rent or utility bills," and whether the "parent had ready access to the . . . room to clean it." Ibid. (citations omitted).

The judge characterized Betty as acting "in loco parentis" for defendant. "[A] person in loco parentis to a child is, a person who means to put himself in the situation of the lawful [parent] of the child, with reference to the [parent's] office

and duty of making provision for the child." F.B. v. A.L.G., 176 N.J. 201, 211 (2003) (citation omitted). We agree with the judge's legal conclusion that Betty, who had allowed defendant to live in her home for more than twenty years, was essentially his parent.

However, "[a] third party who has common authority over the premises might nevertheless lack common authority over the items therein." Coyle, supra, 119 N.J. at 217. That third-party "may lack the authority to consent to a search of specific containers found on those premises[,]" and the "third party's consent is invalid with respect to property within the exclusive use and control of another." State v. Suazo, 133 N.J. 315, 320 (1993) (citations omitted).

In State v. Younger, 305 N.J. Super. 250, 257 (App. Div. 1997), we concluded that the consent secured from the owner of the premises, the defendant's mother, "d[id] not extend to the possessions of [her son] that [were] not in plain view." Thus, because the son "ha[d] or should be reasonably believed to have an exclusive right of control or a right of privacy" to closed containers in the room he occupied in his mother's home, the warrantless search premised upon his mother's third-party consent was invalid. Id. at 257-58; and see State v. Pante, 325 N.J. Super. 336, 351 (App. Div. 1999) (considering, without

deciding, whether a mother's consent extended to a file cabinet and duffel bag found in the defendant's bedroom).

We might well conclude that Betty had the authority to provide valid third-party consent to the entry of defendant's bedroom, since he was not a tenant and she was effectively his parent. However, in this case, there was little evidence adduced as to whether defendant was in "exclusive" possession of his room. One of the stated reasons for defendant's imminent eviction was the fact that his girlfriend had moved in and was living with him in the bedroom, a fact that implies exclusivity in relation to his grandmother. While not necessarily determinative, we infer that Betty believed defendant had certain privacy expectations in his room because she refused to consent to the search when asked by police.

However, the critical issue in our mind is whether, based upon the totality of circumstances in this record, Betty could have validly consented to the search of the bedroom closet. In that regard, nothing in the record supports the conclusion that she could. Because the State failed to demonstrate that Betty could have validly consented to the search of defendant's bedroom closet, we need not consider whether Lisa could have provided valid third-party consent, either pursuant to the power of attorney or based upon the concept of apparent authority. In

other words, under the totality of the circumstances, Ziarnowski's reliance upon Lisa's consent was not "objectively reasonable in view of the facts and circumstances known at the time of the search." Suazo, supra, 133 N.J. at 320; and see Crumb, supra, 307 N.J. Super. at 243 ("[T]he officer need have . . . a reasonable belief that the consenting party has sufficient control over the property to consent to its being searched."). To the extent the State relied upon the consent exception to the warrant requirement, defendant's motion to suppress should have been granted.[5]

B.

Defendant urged at oral argument that the State should be procedurally barred from raising the third-party intervener exception to the warrant requirement for the first time on appeal. We need not decide that issue because we conclude that the third-party intervener exception does not justify the warrantless search in this case.

The third-party intervener exception was recognized by the United States Supreme Court in United States v. Jacobsen, 466

[5] We note that on October 23, 2013, the Court heard oral argument on two cases involving the validity of third-party consents to search, State v. Coles, No. A-2954-10 (App. Div. Apr. 11, 2012), certif. granted, 212 N.J. 432 (2012), and State v. Lamb, No. A-2279-10 (App. Div. June 28, 2012), certif. granted, 213 N.J. 531 (2013). The decisions in those cases are still pending.

U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) (citations omitted). There, a package, damaged during shipment, was opened by Federal Express agents "in order to examine its contents" for insurance purposes. Id. at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 92. Finding white powder inside, the agents contacted Drug Enforcement Administration officers who conducted tests on the powder, which proved to be narcotics. Id. at 112, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93. The Court held "[t]he additional invasions of respondents' privacy by the government agents must be tested by the degree to which they exceeded the scope of the private search." Id. at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95. Ultimately, the Court held there was no Fourth Amendment violation, as the constitutionally protected privacy interest "had [] already been frustrated as the result of private conduct." Id. at 125, 104 S. Ct. at 1663, 80 L. Ed. 2d at 102.

Our Supreme Court has recognized the vitality of the third-party intervener exception to the warrant requirement. See, e.g., State v. Saez, 268 N.J. Super. 250, 270-79 (App. Div. 1993) (D'Annunzio, J., dissenting), rev'd on dissent, 139 N.J. 279, 280-81 (1995). More recently, we had occasion to consider the third-party intervener exception in Wright, supra, where we held that

> the third-party intervention doctrine will not justify a warrantless search resulting

> from a landlord or other third party's entry into a private residence if it is (1) illegal or unauthorized, or (2) in violation of the resident's property rights or reasonable expectation of privacy. If such a wrongful private entry has occurred, it cannot supply the foundation for an ensuing police search of the premises, unless, of course, some other recognized exception to the constitutional warrant requirement applies. As an additional limitation, even if the private entry is not illegal or unauthorized, the third-party intervention doctrine should not apply if the intrusion by the private actor and law enforcement officials, taken as a whole, is objectively unreasonable.
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> [431 N.J. Super. at 587-88.]

As discussed above, in this case we conclude that Lisa's entry of defendant's bedroom closet was "unauthorized." Defendant did not expressly or implicitly invite entry into an area in which he maintained "reasonable privacy expectations." Id. at 588.

C.

The State also argues that the independent source doctrine applies. The doctrine had its federal genesis in the United States Supreme Court decision, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 2d 319 (1920). Pursuant to Article I, paragraph 7 of the New Jersey Constitution, our Court has recognized a more restrictive application. The Court has explained the State's burden when invoking the doctrine:

> First, the State must demonstrate that probable cause existed to conduct the challenged search without the unlawfully obtained information. It must make that showing by relying on factors wholly independent from the knowledge, evidence, or other information acquired as a result of the prior illegal search. Second, the State must demonstrate in accordance with an elevated standard of proof, namely, by clear and convincing evidence, that the police would have sought a warrant without the tainted knowledge or evidence that they previously had acquired or viewed. Third, regardless of the strength of their proofs under the first and second prongs, prosecutors must demonstrate by the same enhanced standard that the initial impermissible search was not the product of flagrant police misconduct.
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> [State v. Holland, 176 N.J. 344, 360-61 (2003).]

"[T]he government's failure to satisfy any one prong of the standard will result in suppression of the challenged evidence." Id. at 363.

In many instances, the unlawfully obtained information becomes part of the affidavit proffered in support of the search warrant. See, e.g., id. at 349-51 (describing unlawfully obtained information that was included in the search warrant application). Generally speaking, "if an affidavit submitted in support of an application for a search warrant contains lawfully obtained information which establishes the probable cause required for a search, evidence obtained pursuant to the warrant

will not be suppressed on the ground that the affidavit also contains false or unlawfully obtained information." State v. Chaney, 318 N.J. Super. 217, 221 (App. Div. 1999) (citations omitted).

The Holland Court referenced a "frequently cited federal case," Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988), in which the law enforcement officers did not disclose to the issuing judge that they had already made observations prior to their application. Holland, supra, 176 N.J. at 355. In Murray, after receiving a tip, federal agents conducted a surveillance of a warehouse and observed the defendant and a co-conspirator drive to and from the location in separate vehicles only to transfer the vehicles thereafter to other drivers. Murray, supra, 487 U.S. at 535, 108 S. Ct. at 2532, 101 L. Ed. 2d at 479. The agents arrested the other drivers and found marijuana in the vehicles. Ibid. Agents then entered the warehouse without obtaining a warrant and observed bales of marijuana. Ibid. They then applied for and obtained a search warrant without disclosing that they had already been inside the warehouse. Id. at 535-36, 108 S. Ct. at 2532, 101 L. Ed. 2d at 479.

In a four-to-three decision, the Supreme Court remanded the matter to the district court for a "determination whether the

warrant-authorized search of the warehouse was an independent source of the challenged evidence." Id. at 543-44, 108 S. Ct. at 2536, 101 L. Ed. 2d at 484. The Supreme Court noted "[t]he ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the . . . tangible evidence at issue here." Id. at 542, 108 S. Ct. at 2536, 101 L. Ed. 2d at 483 (internal citation and footnote omitted).

It is unclear whether the State ever asserted the independent source doctrine before the motion judge. As we have already noted, defendant argued that the doctrine did not apply. In his written opinion, the judge took note of defendant's argument but did not address the issue, presumably concluding that the motion could be fully resolved by deciding the consent issue.[6] Under the circumstances, we conclude that it is appropriate to remand the matter for consideration of whether the independent source doctrine applies to the facts of this case. We reach this conclusion for a number of reasons.

Initially, defendant argues that no probable cause existed to obtain a search warrant prior to Ziarnowski's entry of the

[6] We add that our decision should not be interpreted as critical of the judge's handling of the motion. Before the N.J.R.E. 104 hearing commenced, defense counsel and the prosecutor assented to the judge's description of the issues posed and his proposed analytic framework.

premises, citing specifically to the officer's testimony that he entered Betty's house to "further investigate" and that, for all he knew, Lisa "could have seen basil growing in the closet." However, this is contrary to the position that defendant advanced when the motion was heard. In his written decision, the judge specifically noted that defendant conceded police had probable cause to obtain a warrant before Ziarnowski ever saw the contents of the bedroom closet. Such a concession is obviously important in establishing the first prong of the State's burden under Holland.

More importantly, critical to successful invocation of the independent source doctrine is proof by clear and convincing evidence "that the police would have sought a warrant without the tainted knowledge or evidence that they previously had acquired or viewed." Holland, supra, 176 N.J. at 361. The fact that police in this case ultimately applied for a warrant is not dispositive, but, we note that Ziarnowski testified that the officers applied for a warrant out of concern that Betty might not consent. That may imply an intention to have moved for the warrant even if the contents of the closet had not been seen.

Lastly, in this case, it is not entirely clear whether police obtained a warrant to search Betty's premises, including defendant's bedroom, without disclosing that Ziarnowski had

already made his observations of the marijuana plants. During cross-examination at the evidentiary hearing, Ziarnowski was questioned about securing the warrant and shown a transcript of recorded proceedings before the issuing judge. Ziarnowski acknowledged that he and the other affiant for the warrant, Detective Sean O'Neill, did not tell the judge that police had already observed marijuana plants in the bedroom closet.[7] But, he also acknowledged that the assistant prosecutor who posed questions during the proceedings before the issuing judge implied that O'Neill had already seen the contents of the closet.[8]

In any event, we are unable to resolve whether the independent source doctrine applies based on the record before

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[7] The transcript reveals that the assistant prosecutor did ask O'Neill if police had entered the bedroom, to which O'Neill responded in the affirmative.

[8] One of the last questions posed by the assistant prosecutor to O'Neill was:

> And you . . . believe you have [p]robable [c]ause that you will find in that bedgroom [m]arijuana plants and you want to search and seize [m]arijuana plants and any and all . . . controlled dangerous substances that [are] found and all paraphernalia associated with the growing and packaging of [m]arijuana and other CDS, to include the lamps and reflective metal sheets that you have already observed.

O'Neill simply answered, "Correct."

us. We therefore remand the matter to the trial court to conduct a hearing on whether the seizure of the marijuana plants and paraphernalia in defendant's bedroom closet was lawful pursuant to an independent source, i.e., the search warrant actually secured by police.[9]

If defendant prevails and the evidence is suppressed, defendant's guilty pleas shall be vacated, and the matter shall proceed thereafter. If the State prevails and the evidence is not suppressed, we affirm defendant's conviction, but remand the matter for resentencing for the reasons that follow.

II.

Defendant argues that, regardless of the outcome of the motion to suppress, we must remand the matter for resentencing because the attorneys, and possibly the judge, were under the misimpression that mandatory minimum sentences were required to be imposed for the crimes to which defendant pled guilty. The State counters by arguing that the sentence imposed was in accordance with the plea bargain, and since defendant never sought reconsideration of his sentence, he is procedurally-barred from raising it now on appeal.

[9] We affirm the order denying defendant's motion to suppress evidence seized from the shed. Any arguments raised to the contrary lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2). It suffices to say that Betty had authority to consent to the search of the shed, and she did.

The plea form signed by defendant at the time of the allocution indicates that he was pleading guilty to a crime that required a mandatory period of parole ineligibility, and that the prosecutor intended to specifically recommend that he serve a ten-year term of imprisonment with a forty-month period of parole ineligibility.[10] Additionally, the record contains the prosecutor's Brimage[11] worksheet, which, presumably, served as the basis for the plea offer.

At sentencing, defense counsel noted that the plea agreement was "a Brimage offer and . . . the court is relatively constrained . . . ." The judge found aggravating factors three, six and nine, and no mitigating factors. See N.J.S.A. 2C:44-1a(3) (the risk of re-offense); (6) (the extent of defendant's prior record); and (9) (the need to deter defendant and others). The judge found the plea offer to be fair and sentenced accordingly.

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[10] The plea was taken by a judge other than the one that heard and decided the motion to suppress, and that second judge also imposed sentence upon defendant.

[11] In State v. Brimage, 153 N.J. 1, 22 (1998), the Court required the Attorney General to promulgate guidelines to "avoid arbitrariness with respect to decision-making among individual prosecutors" as to those crimes subject to N.J.S.A. 2C:35-12. That statute obligates the judge to impose the mandatory sentence and minimum term for certain drug offenses, unless "a negotiated agreement . . . provides for a lesser sentence[or] period of parole ineligibility . . . ." Ibid.

There is ample circumstantial evidence that the attorneys were under a misimpression that defendant faced the imposition of a mandatory minimum period of parole ineligibility. The plea form demonstrates that defense counsel believed so. Moreover, the computation of a Brimage offer by the prosecutor is only required when the defendant faces a mandatory sentence for a drug offense, and the plea bargain contemplates a recommendation of a lesser mandatory minimum sentence.

The judge did not explicitly state she was bound by the plea offer, as she might if defendant faced a mandatory minimum period of parole ineligibility under our drug laws. But, we note this was defendant's first adult conviction, although he had several serious juvenile adjudications, and the judge imposed the maximum sentence, ten years, for the second-degree possession with intent charge.

In any event, it is clear that none of the crimes to which defendant pled guilty actually mandate the imposition of a period of parole ineligibility. The State argues that defendant faced a mandatory minimum period of parole ineligibility on count four, the school-zone offense, N.J.S.A. 2C:35-7. However, prior to the date of the crimes in this case, the Legislature amended the statute. See L. 2009, c. 192, § 1 (eff. Jan. 12, 2010). As a result, the school-zone offense no longer requires

that the judge impose a term of imprisonment and concomitant period of parole ineligibility. Currently, pursuant to N.J.S.A. 2C:35-7b(1), notwithstanding the provisions of N.J.S.A. 2C:35-12 . . . the judge "may waive or reduce the minimum term of parole ineligibility . . . or place the defendant on probation . . . ."

We therefore remand the matter for resentencing without regard to the outcome of the hearing on defendant's motion to suppress. In doing so, we express no particular opinion as to an appropriate sentence to be imposed.

Lastly, in Point III, defendant contends that the conviction for possession with intent (count two) should have merged into the conviction for possession with intent within five hundred feet of a public park (count three). See State v. Gregory, 336 N.J. Super. 601, 608 (App. Div. 2001). The State concedes merger was required. Because we have remanded the matter for resentencing, the judgment of conviction shall reflect that the conviction on count two merges into the conviction on count three.

In sum, we remand the matter for a further hearing on defendant's motion to suppress, the purpose of which shall be to decide whether the State can demonstrate application of the independent source doctrine. Regardless of the outcome of that

hearing, we also remand the matter for resentencing. We do not retain jurisdiction.