SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5495-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVINE J. RICE, a/k/a
LATEEF J. HICKS, MILL RICE,

Defendant-Appellant.

Submitted November 29, 2017 – Decided January 30, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 15-03-0732.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael Denny, Assistant Deputy Public Defender, of counsel and on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Sarah D. Brigham, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Davine J. Rice appeals the denial of his motion to suppress evidence, after which he entered a guilty plea to second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1), count twelve of an Atlantic County indictment.[1] On July 15, 2016, defendant was sentenced to five years imprisonment, subject to a five-year term of parole ineligibility. See ibid.

At the suppression hearing, the State presented one witness — Atlantic City Police Officer Ermindo Marsini. He testified that on January 2, 2015, at 12:51 p.m., he and a partner were patrolling a section of the city that he characterized as "one of the most violent areas . . . ." Marsini and his partner were in uniform and riding in a marked patrol car. They saw two men and a woman walking down the sidewalk. Marsini's attention was drawn to "the way their open hand was covering their waistband area[.]" He described the men's hands as resting flat at the waist. There was no bulge at their waistbands. When the men saw the officers, they continued to walk quickly and went out of sight between two buildings. When the officers "pursue[d] them[,] . . . they disregarded [the officers'] orders to stop and . . . [continued]

[1] The guilty plea was packaged with other charges not at issue in this appeal: an unrelated violation of probation, an amended disorderly persons simple assault, N.J.S.A. 2C:12-1(a), and third-degree drug distribution, N.J.S.A. 2C:35-5. The recommended sentence for the certain persons charge was the lengthiest term of imprisonment.

walk[ing.]" The officers followed the men, believing them to be "possibly in possession of a handgun." Marsini said the men were stopped for that reason.

Marsini described the encounter as a Terry[2] investigative stop — "[W]e had reason to believe they were possibly in possession of a handgun. We ordered them to stop to investigate it. They kept going." According to the officer, at the time of the stop, the men were not free to go. He stated unequivocally that he and his partner were not conducting a field inquiry, they were conducting an investigative stop. Once the men were detained, they would be directed to place their hands on their heads and submit to a pat-down for safety reasons.

When the officers caught up with the men, Marsini's partner grabbed co-defendant Leon Valentine's arm. The two struggled, and Marsini's partner cried out "he's got a gun." Marsini glimpsed the handle of a gun in Valentine's waistband. He held the suspect's arms, and a firearm fell to the ground. Other officers had arrived by then, and they stopped defendant before he could approach Valentine. Marsini saw defendant being arrested, and saw a second handgun and drugs removed from defendant's person.

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[2] Terry v. Ohio, 392 U.S. 1 (1968).

Defendant and Valentine filed motions to suppress. Only defendant appeared at the hearing.

Based on Marsini's testimony, the judge found that the officers intended to perform an investigatory stop and subsequent pat-down search. The judge reasoned that, pursuant to State v. Crawley, 187 N.J. 440, 460 (2006), the issue of the constitutionality of the stop was moot so long as the police were lawfully performing an official function. He also cited to State v. Williams, 192 N.J. 1, 11 (2007), for the proposition that a citizen has no right to take flight or otherwise obstruct officers in the performance of their duty. He determined that once the officers, whether justified or not, ordered the defendants to stop, and the order was disregarded, defendants' conduct "provided the officers probable cause to arrest them for obstruction."

The judge concluded that the seizure of the evidence was "sufficiently attenuated from the taint of a constitutional violation" and was thus admissible. He opined that of the three factors to be considered in making the determination, the second and third outweighed the first, the only factor which favored the defendants. The three factors were: the temporal proximity between police conduct and the challenged evidence, the presence of intervening circumstances, and the flagrancy and purpose of the police misconduct. The judge found defendant's action in ignoring

the order to stop and continuing to "retreat from the officers, as well as Valentine's physical resistance" were intervening acts that attenuated the seizure of the evidence from the Terry stop. He further found that the officers were acting in good faith while trying to perform their official duty. Accordingly, even if the investigatory stop was unconstitutional, he viewed the seizure of the evidence as attenuated from the initial stop because defendants obstructed the officers in the performance of their duty. Thus the judge held that the evidence should not be suppressed as the search of each defendant was justified incident to their arrest for violating N.J.S.A. 2C:29-1.

I.

On appeal, defendant raises the following point:

> POINT I
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> THE TRIAL COURT ERRED BY FAILING TO RULE ON THE CONSTITUTIONALITY OF THE STOP AND BY ERRONEOUSLY CONCLUDING THAT THERE WAS SUFFICIENT ATTENUATION BETWEEN THE STOP AND THE RECOVERY OF THE EVIDENCE TO AVOID SUPPRESSION
>
> A. Failure to Comply With Command To Stop Does Not Automatically Render Evidence Discovered Due To Initial Unconstitutional Seizure Admissible
>
> B. The Police Lacked the Requisite Constitutional Basis To Stop the Defendant

C. The Defendant Continuing To Walk Away From the Police Does Not Attenuate the Tainted Stop

On appeal, we review a trial court's findings of fact deferentially. State v. Elders, 192 N.J. 224, 244 (2007) ("a trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'") (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). The judge's factual findings will not be disturbed in this case.

Where we part company with the trial judge is on the question of attenuation. Our review of the trial judge's application of the law to established facts is plenary. State v. Gandhi, 201 N.J. 161, 176 (2010) (on appellate review, the reviewing court is not deferential to, or bound by, the legal conclusions of a trial court).

The seizure of the evidence was not attenuated from the initial unconstitutional stop; the motion should have been granted. The Supreme Court has defined a field inquiry as "the least intrusive" form of police encounter, occurring "when a police officer approaches an individual and asks 'if [the person] is willing to answer some questions.'" State v. Pineiro, 181 N.J. 13, 20 (2004) (alteration in original) (quoting State v. Nishina, 175 N.J. 502, 510 (2003)). "A field inquiry is permissible so long as the questions

'[are] not harassing, overbearing, or accusatory in nature.'" Ibid. (alteration in original) (quoting Nishina, 175 N.J. at 510). During such an inquiry, "the individual approached 'need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.'" State v. Privott, 203 N.J. 16, 24 (2010) (quoting State v. Maryland, 167 N.J. 471, 483 (2001)).

In contrast to a field inquiry, an investigatory stop, also known as a Terry stop, is characterized by a detention in which the person approached by a police officer would not reasonably feel free to leave, even though the encounter falls short of a formal arrest. State v. Stovall, 170 N.J. 346, 355-56 (2002); see also Terry, 392 U.S. at 19. The Terry exception to the warrant requirement permits a police officer to detain an individual for a brief period, if that stop is "based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." State v. Rodriguez, 172 N.J. 117, 126 (2002) (quoting Terry, 392 U.S. at 21). Under this well-established standard, "[a]n investigatory stop is valid only if the officer has a 'particularized suspicion' based upon an objective observation that the person stopped has been [engaged] or is about to engage in criminal wrongdoing." State v. Davis, 104 N.J. 490, 504 (1986).

The officers' observations of two men walking down the middle of the street in the middle of the day in January awkwardly holding

a hand to their side was an observation that justified a field inquiry. But the officers' suspicions were nothing more than a hunch. Therefore, the initial detention was improper.

The doctrine of attenuation does not make admissible the fruits of searches immediately flowing from improper detentions. If that were so, the exception might well consume the rule.

State v. Shaw, 213 N.J. 398 (2012) is enlightening. In that case, a fugitive special task force arrived at an apartment building as defendant and another man were leaving. Id. at 401. The officers stopped Shaw because, like "the subject of the arrest warrant[,]" defendant was an African-American man. Ibid. He was quickly determined not to be the fugitive police were seeking, however, his name appeared on a separate parole violation list. Id. at 401-02. He was arrested, and drugs found on his person were suppressed. Id. at 402.

The opinion reiterates well-settled law that "[p]eople, generally, are free to go their way without interference from the government. That is, after all, the essence of the Fourth Amendment —— the police may not randomly stop and detain persons without particularized suspicion." Id. at 409. Law enforcement personnel can lawfully conduct field inquiries, but a citizen can decline to stop or talk and is free to go on his way. Id. at 410 (citing Florida v. Royer, 460 U.S. 491, 498 (1983)). The opinion

turned on application of the attenuation doctrine enunciated in Brown v. Illinois, 422 U.S. 590, 604-05 (1975). Id. at 414-16.

The first question is the "temporal proximity between the unconstitutional detention and the discovery of the [contraband] . . . ." Id. at 416. When the time is brief between the unconstitutional detention and seizure of the contraband, it generally favors the defendant. Ibid.

The second factor is the presence of intervening circumstances, such as the discovery of the parole warrant in Shaw, id. at 417-20, or the failure to stop here that resulted in defendant being charged with obstruction. An arrest warrant may present an intervening circumstance only if incidental to the reason for the unconstitutional detention. Id. at 418-19. But if the stop occurred because officers were randomly stopping many in the hopes of arresting a few fugitives, then the attenuation diminishes. Ibid.

The purpose of the stop must be separate and unrelated to the reason for the arrest. Id. at 419. Additionally, as the Court said, "the intervening circumstances and flagrancy factors can become intertwined." Ibid. When that occurs, as it did here, that factor weighs heavily in favor of the defendant. The point of this stop was to pat down defendant and his companion. That

they attempted to flee from the officers is no distinction or intervening circumstance at all.

With regard to the third factor, the "purpose and flagrancy of the official misconduct," the Court considered the stop in Shaw to also weigh heavily towards defendant. Id. at 421. It was "[a] random stop based on nothing more than a non-particularized racial description." Ibid. Certainly there, the officers had, as the Law Division observed, no malice towards defendant and appeared to be merely doing their job. That is a different conclusion than the one required with regard to whether the officers acted in good faith within the meaning of the Fourth Amendment. They did not in Shaw or this case. Based on nothing more than a hunch — even if a hunch not based on any ill-will — they detained men walking down the street who did not appear to be engaged in criminal activity, but only holding their hands at their waist in a manner the officers found suspicious. That third factor here favors defendant.

Even if we take into account Marsini's statement that the men were in one of the most violent areas of the City, that does not elevate the hunch to something more. The evidence seized by the officers was the "product of the 'exploitation of [the primary] illegality' — the wrongful detention" and thus should have been

suppressed. Id. at 413 (alteration in original) (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

Reversed.