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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2877-13T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

SHANNON SIDOREK,

Defendant-Respondent.

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Argued September 16, 2014 – Decided October 7, 2014
Remanded by Supreme Court March 14, 2016
Resubmitted March 29, 2016 - Decided April 15, 2016

Before Judges Messano and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 13-04-0480.

Robert D. Bernardi, Burlington County Prosecutor, attorney for appellant (Jennifer B. Paszkiewicz, Assistant Prosecutor, on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent (Kevin Walker, Deputy Public Defender, of counsel and on the brief).

PER CURIAM

Defendant Shannon M. Sidorek was charged by a Burlington County grand jury in Indictment No. 13-04-0480 with: first-degree aggravated manslaughter, N.J.S.A. 2C:11-4a(1); second-degree vehicular homicide, N.J.S.A. 2C:11-5a; and third-degree

possession of a controlled dangerous substance, N.J.S.A. 2C:35-10a(1). State v. Sidorek, No. A-2877-13 (App. Div. Oct. 7, 2014) (slip op. at 1). After granting the State's motion for leave to appeal, we reversed the trial court's order granting defendant's motion to suppress. Id. at 18.

In our prior opinion, we first considered whether the warrantless, non-consensual entry into defendant's vehicle at the scene of the fatal accident, the seizure of her purse from the car floor and the seizure of bottles of pills in the purse violated defendant's constitutional rights. Id. at 9. We concluded that "an objective assessment of the totality of the circumstances known to [the police officer] before he retrieved defendant's purse demonstrate[d] probable cause to believe defendant had committed a criminal offense, and, therefore, the officer's attempts to identify an unconscious defendant were entirely reasonable." Id. at 17. We also held that the officer's "observation and subsequent seizure of the pill bottles was lawful pursuant to the plain view doctrine." Id. at 15 n.2. (citing State v. Johnson, 171 N.J. 192, 206-08 (2002)).

Having found the seizure of defendant's purse was unlawful, the motion judge concluded that the bottles, the oxycodone pills found in one of the vials and test results of blood drawn from defendant, who had been airlifted while unconscious from the

site of the crash to a hospital, should be suppressed as "the fruit of the poisonous tree." Sidorek, supra, slip op. at 17 (emphasis added). However, based upon our disagreement with the motion judge's initial conclusion, we addressed suppression of the blood test results de novo.

We observed that one year after defendant's blood was drawn and seven months before the motion hearing, the United States Supreme court decided Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). Sidorek, supra, slip op. at 17. We explained that "the McNeely Court held there was no per se rule of exigency in drunk driving cases, and that the need to obtain a search warrant before taking a blood sample was to be determined on a case by case basis." Id. at 16-17 (citing McNeely, supra, ___ U.S. at ___, 133 S. Ct. at 1563, 185 L. Ed. 2d at 709). Relying on our colleagues' decision in State v. Adkins, 433 N.J. Super. 479 (App. Div. 2013), we concluded that McNeely did not apply retroactively to this case.[1] Sidorek, supra, slip op. at 18-19. We reversed the order suppressing the evidence obtained from the blood drawn from defendant. Id. at 18.

[1] When we issued our opinion, the Court had granted certification in State v. Adkins, 217 N.J. 588 (2014), but had not yet issued its decision.

Since our opinion was filed in this case, our Supreme Court issued its decision in State v. Keaton, 222 N.J. 438 (2015), and reversed our decision in State v. Adkins, 221 N.J. 300, 317 (2015). As a result, the Court granted defendant's motion for leave to appeal, and, by order dated March 8, 2016, summarily remanded the matter for us to reconsider in light of Adkins and Keaton. For reasons that follow, we again reverse the Law Division's order suppressing the seizure of defendant's purse, the bottles of medication it contained and the contents of those bottles. However, we cannot determine whether the warrantless drawing of defendant's blood was reasonable under the circumstances presented on the record that currently exists. We are therefore constrained to remand the matter to the Law Division for further proceedings.

I.

In Keaton, supra, 222 N.J. at 442-43, the Court considered whether the warrantless entry of the defendant's overturned vehicle to obtain motor vehicle credentials, without providing the defendant with an opportunity to consent to the entry or present those credentials beforehand, was unlawful. In Keaton, when police arrived at the scene of the one-car accident, the defendant had been removed from the vehicle and was receiving treatment from emergency medical personnel. Keaton, supra, 222

N.J. at 443. The trooper never asked the defendant for his credentials or for permission to enter the vehicle. Id. at 444. After crawling in a rear window, the trooper saw an open backpack containing a handgun and a small amount of marijuana on the dashboard. Ibid.

Citing extensively to our decision in State v. Jones, 195 N.J. Super. 119, 122 (App. Div. 1984), the Court said that "under settled law, the warrantless search of a vehicle is only permissible after the driver has been provided the opportunity to produce his credentials and is either unable or unwilling to do so." Keaton, supra, 222 N.J. at 450 (emphasis added) (citing State v. Bruzzese, 94 N.J. 210, 236 (1983), cert. denied, 405 U.S 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984); State v. Slockbower, 79 N.J. 1 (1979)). The Court continued:

> Here, defendant was never provided such an opportunity. The trooper did not speak to defendant at the scene of the accident. The trooper never asked the EMTs for help in determining whether defendant was able to provide his credentials. Moreover, the trooper never asked defendant for his credentials once his injuries were tended to at the hospital. Instead, the trooper made the decision to search defendant's car for credentials only for the trooper's convenience and expediency, without ever providing defendant the opportunity to present them. Accordingly, we find that the items discovered in defendant's car do not fall within the plain view doctrine, and were illegally seized, because the trooper

> was not lawfully within the viewing area at the time of the contraband's discovery.
>
> [Ibid. (citing Bruzzese, supra, 94 N.J. at 236).]

The Court affirmed our judgment suppressing the evidence. Id. at 443. We conclude that this case is both factually and legally distinguishable from Keaton.

The sole witness at the evidentiary hearing on defendant's motion in the Law Division was Pemberton Township Police Sergeant Peter Delagarza. Sidorek, supra, slip op. at 2. When Delagarza arrived at the scene, defendant was seriously injured, unconscious and being extricated from her car, and Delagarza was unable to get near her; the other driver was fatally injured. Id. at 2-3. After speaking to an eyewitness who claimed defendant's car was weaving before impact, and based upon his expertise and observations of the scene, Delagarza concluded that defendant's vehicle had crossed over the center line and impacted the decedent's car. Ibid. He also concluded, based on computer data, that defendant was not the registered owner of the vehicle. Id. at 3. After being removed from her car, defendant was transported by ambulance to a nearby soccer field and helicoptered to a hospital without gaining consciousness. Ibid.

Although Delagarza believed that he lacked probable cause to search the vehicle, he entered defendant's car to obtain its registration and insurance information and observed defendant's purse on the floor. Id. at 3-4. He seized it, believing it contained information regarding defendant's identity, and, when opened, Delagarza was able to immediately see the contents of the purse, including defendant's wallet and three prescription pill bottles. Id. at 4. Delagarza alerted EMTs to defendant's identity and took the purse back to headquarters. Id. at 4-5. One of the bottles was not in defendant's name and purportedly was a prescription for Xanax. Ibid. Delagarza examined the pills and conducted an Internet search, ultimately concluding the pills might be oxycodone. Id. at 5.

Unlike Keaton, where the responding officer never attempted to speak to the defendant who was conscious and being treated at the scene for minor injuries, defendant in this case was unconscious, needed to be extricated from her car and helicoptered to the hospital. In short, defendant in this case, unlike the defendant in Keaton, was unable to present her credentials, and could not be asked to do so, before Delagarza entered the vehicle and seized her purse. Keaton, supra, 222 N.J. at 450.

The Court in Keaton also stated that the trooper never "asked [the] defendant for his credentials once his injuries were tended to at the hospital." Ibid. (emphasis added). However, we do not believe that statement implicitly adopted a requirement that law enforcement accompany an unconscious defendant to the hospital, wait until she regains consciousness, even though her medical condition is serious enough to require helicopter removal from the scene and then seek her consent to enter the vehicle when and if she ever does regain consciousness. Such an interpretation strikes us as unreasonable. Instead, the above-quoted language is firmly tethered to the facts presented in Keaton, namely, a fully conscious driver being treated for minor injuries at the scene, and who is capable of consenting to law enforcement's entry into the vehicle to secure his credentials or otherwise retrieve them himself.

We believe this case also differs from Keaton in that, as we noted in our original opinion, when Delagarza entered the vehicle, probable cause existed to conclude that defendant had committed a crime. Sidorek, supra, slip op. at 16.[2] As a

[2] In this regard, Delagarza's subjective assessment of whether probable cause existed does not control. See, e.g., State v. O'Neal, 190 N.J. 601, 613-14 (2007). The standard requires consideration of the totality of the circumstances from the (continued)

result, this case was also distinguishable from State v. Lark, 319 N.J. Super 618 (App. Div. 1999), aff'd, 163 N.J. 294 (2000), which defendant extensively relied upon before the Law Division.

In Lark, we reversed the trial court's denial of the defendant's motion to suppress. Id. at 624. Noting first that the case "d[id] not involve a registration search," id. at 626, we held that after making a traffic stop, "[t]he officer may not . . . absent probable cause to believe that a further offense has been committed, enter the vehicle to look for identification." Id. at 627 (emphasis added). In this case, Delagarza's search of defendant's vehicle was limited to seizing her purse, a most likely place for finding identification, and probable cause existed to believe that defendant had committed a crime, thereby further justifying this limited intrusion.

We address an issue raised by defendant in her motion for leave to appeal to the Court, in which she criticized our prior opinion, noting we "did not even attempt to explain how the criminality of the medication found in defendant's purse was 'immediately apparent,'" so as to satisfy the plain view exception to the warrant requirement. See e.g., Johnson, supra, 171 N.J. at 206-08 (explaining this element of the plain view

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(continued)
standpoint of an objectively reasonable police officer. See, e.g., State v. Basil, 202 N.J. 570, 585-86 (2010).

exception). We are uncertain that the Court's remand order mandated our consideration of this particular argument. Nevertheless, we address the issue for the sake of completeness, and to clearly indicate to the motion judge that it need not be addressed on remand.

In the Law Division, in a brief statement made at oral argument on the motion, defendant contended that Delagarza's decision to open one of the bottles that was ultimately found to contain oxycodone without a warrant was itself unconstitutional.[3] Understandably in light of his determination that Delagarza had no authority to enter defendant's vehicle, the judge indicated, without separate consideration of the plain view exception, that he was granting the motion to suppress "[t]he pill bottles, pills . . . and the blood test . . . as the fruits of the poisonous tree." Defendant's appellate brief never argued that the plain view exception did not apply to Delagarza's examination of the contents of the bottle. For the reasons that follow, we now reject the contention.

As the Court has explained,

> The plain view doctrine requires the police officer to lawfully be in the viewing area. The officer must discover the evidence

[3] In accordance with Rule 2:6-1 and 2:6-3, we did not have the benefit of defendant's brief filed in support of the motion to suppress.

> inadvertently, meaning that he did not know in advance where evidence was located nor intend beforehand to seize it. The third element . . . is that it had to be immediately apparent to the officer that items in plain view were evidence of a crime, contraband, or otherwise subject to seizure.
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> [Johnson, supra, 171 N.J. at 206-07 (internal citations omitted).]

The "immediately apparent" prong requires the court to determine whether probable cause existed to associate the item in plain view, here, the bottle, with criminal activity, before opening it. Id. at 213. "[W]hen 'determining whether the officer has probable cause to associate the item with criminal activity, the court looks to what the police officer reasonably knew at the time' . . . ." Ibid. (quoting Bruzzese, supra, 94 N.J. at 237).

Here Delagarza knew that defendant's car was weaving before it crossed the centerline and impacted the decedent's car. He knew that defendant was driving a car that was not registered to her. Delagarza further knew that defendant had three bottles of prescription drugs in her purse, only two of which were in her name. The possession of a prescription legend drug "unless lawfully prescribed" is a disorderly persons offense. N.J.S.A. 2C:35-10.5(e)(1). A person who obtains the drug "by forgery or deception is guilty of a crime of the fourth degree." N.J.S.A. 2C:35-10.5(d). In our view, Delagarza had sufficient probable

cause under the third prong of the plain view exception to open the bottle and examine its contents.

Having considered the issue again, pursuant to the Court's remand order, we reverse the Law Division's order suppressing the pill bottles and pills.

II.

McNeely was decided prior to the evidentiary hearing in the Law Division in this case, and so it controls the issue of whether the warrantless drawing of defendant's blood at the hospital offends the Fourth Amendment. Adkins, supra, 221 N.J. at 303. Under McNeely:

> dissipation of alcohol from a person's bloodstream is not the beginning and end of the analysis for exigency in all warrantless blood draws involving suspected drunk drivers. Rather, courts must evaluate the totality of the circumstances in assessing exigency, one factor of which is the human body's natural dissipation of alcohol.
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> [Adkins, supra, 221 N.J. at 312.]

Needless to say, the same principle applies here, even though there was no suspicion that defendant had imbibed alcohol before the fatal crash.

Recognizing the impact of its holding on cases like this involving warrantless blood draws taken before McNeeley, the Court made clear that on remand, law enforcement may present "their basis for believing that exigency was present in the

facts surrounding the evidence's potential dissipation and police response under the circumstances to the events involved in the arrest." Adkins, supra, 221 N.J. at 317. In such cases in which police "may have believed that they did not have to evaluate whether a warrant could be obtained, based on prior guidance from [the] Court," courts shall "focus on the objective exigency of the circumstances that the officer faced in the situation." Ibid.

Here, Delagarza believed that under the policy and procedure then in place, he was permitted to order a blood draw without obtaining a warrant. The State never explored the circumstances that might have supplied "objective exigency" supporting that decision, either with Delagarza or other witnesses. Defendant's cross-examination of Delagarza was understandably limited. Since the judge concluded the blood tests must be suppressed because of the illegality of Delagarza's intrusion into defendant's car in the first instance, he never directly addressed the issue.

Under these circumstances, we are compelled to remand the matter to the Law Division for a further evidentiary hearing at which the parties may introduce testimony and other evidence on the issue. We do not retain jurisdiction.