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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2407-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

V.

TERREL L. HYMAN,

Defendant-Appellant.

Submitted January 29, 2018 - Decided February 28, 2018

Before Judges Ostrer and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Indictment No.
15-05-0495.

Joseph E. Krakora, Public Defender, attorney
for appellant (Stephen W. Kirsch, Assistant
Deputy Public Defender, of counsel and on the
brief).

Gurbir S. Grewal, Attorney General, attorney
for respondent (Evgeniya Sitnikova, Deputy
Attorney General, of counsel and on the
brief).

PER CURIAM

Following denial of his motion to suppress evidence seized pursuant to a search warrant, defendant Terrel L. Hyman pled guilty

to two counts of Morris County Indictment No. 15-05-00495: third-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count seven), and second-degree possession of a firearm by a convicted felon, N.J.S.A. 2C:39-7(b)(1) (count nine). He was sentenced to a three-year term of imprisonment on count seven, and a concurrent ten-year term of imprisonment, with five years of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c), on count nine. The remaining charges were dismissed pursuant to a plea agreement. The sole issue on appeal is whether the trial judge erred in denying defendant's motion to suppress. Having reviewed defendant's arguments in light of the record and applicable legal principles, we reverse and remand.

I.

On December 18, 2014, a Law Division judge issued a warrant to search defendant's residence on South 13th Street in Newark. The judge simultaneously issued additional warrants to search defendant's person, his automobile, the person of co-defendant Lakeema Holifield, and Holifield's residence located in Morristown.

The search warrants were supported by the sworn twenty-one-page affidavit of a task force officer ("TFO") assigned to the

Special Enforcement Unit of the Morris County Prosecutor's Office.¹

In his affidavit, the TFO averred defendant and Holifield were distributing heroin from Holifield's residence in Morristown based on information provided from two reliable confidential informants ("CI"), three controlled purchases of heroin in Holifield's residence, surveillance operations, and State agency records checks.

Specifically, the TFO's affidavit sets forth information provided by a CI indicating defendant was Holifield's source of supply. During the week of November 30, 2014, defendant was present inside Holifield's residence during a controlled purchase of heroin. Law enforcement officers subsequently observed defendant exit Holifield's residence and "engage in a hand to hand transaction with an unknown white female." Defendant then entered his vehicle, drove onto the highway, but surveillance was terminated shortly thereafter.

The affidavit states further the CI participated in a controlled drug transaction with defendant in Holifield's

¹ On December 11, 2014, the TFO executed an affidavit supporting the search only of Holifield's residence, but the warrant was held in abeyance because the investigation was expanded to include defendant as Holifield's supplier.

apartment during the week of December 14, 2014. The CI continued to identify defendant as Holifield's source of supply.

On December 17, 2014, law enforcement officers observed defendant exit his residence, open the trunk of his vehicle, and place "an unknown object" into the car. Defendant drove to a gas station, parked behind a vehicle driven by an unknown black female and placed a one gallon, red fuel can into the trunk of his vehicle. Defendant drove to Holifield's residence in Morristown, engaged in a brief conversation with a known drug dealer, entered Holifield's residence and eventually drove back home. The affidavit was silent as to whether defendant brought the fuel can into Holifield's residence.

In his affidavit, the TFO detailed his training and experience, the significant criminal history of defendant and Holifield, and the residences and automobile the police sought permission to search. The TFO further represented that based on his training and experience, he believed controlled dangerous substances, including heroin, and related storing, processing and packaging materials, would be found in both residences. The affidavit did not, however, contain any reference to drug activity conducted at or near defendant's residence.

On December 18, 2014, the warrants were executed at Holifield's residence in Morristown and defendant's residence in Newark. Officers seized suspected crack cocaine and heroin, drug paraphernalia, and a Springfield XD302923 handgun loaded with six bullets from defendant's residence.

The trial court denied defendant's motion to suppress evidence seized from his apartment. Finding there was probable cause to support issuance of the warrant, the motion judge cited the officers' observations of defendant entering and exiting his Newark apartment, defendant's sale of narcotics to the CI at the Morristown apartment, defendant's criminal history, and the information provided by the CI.

On appeal, defendant raises the following issue for our consideration:

DEFENDANT'S MOTION TO SUPPRESS THE ITEMS SEIZED SHOULD HAVE BEEN GRANTED; THERE WAS NOT PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT FOR DEFENDANT'S APARTMENT. ALTERNATIVELY, THE GUN SEIZED FROM THE BASEMENT STAIRS SHOULD HAVE BEEN SUPPRESSED BECAUSE THAT PORTION OF THE SEARCH EXCEEDED THE SCOPE OF THE SEARCH WARRANT.

Specifically, defendant contends the TFO's affidavit was fatally flawed because it is devoid of any reference to criminal activity observed at, or associated with, defendant's residence. Rather, surveillance at that location merely established defendant left

his residence, traveled to Holifield's residence in Morristown, and entered that apartment empty-handed. All of the suspected criminal activity centered around Holifield's apartment.² We find defendant's argument persuasive.

II.

Pursuant to Rule 3:5-7(d), the denial of a motion to suppress evidence may be reviewed on appeal even though the judgment of conviction is entered following a guilty plea. Further, our Supreme Court has recently reaffirmed the principles by which our review here is governed:

An appellate court reviewing a motion to suppress evidence in a criminal case must uphold the factual findings underlying the trial court's decision, provided that those findings are "supported by sufficient credible evidence in the record." State v. Scriven, 226 N.J. 20, 40 (2016). The suppression motion judge's findings should be overturned "only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). However, we owe no deference to conclusions of law made by lower courts in suppression decisions, which we

² Pursuant to Rule 2:6-11(d), defendant filed a supplemental response, citing the Court's recent decision in State v. Boone, ___ N.J. ___, ___ (2017) (slip op. at 1), to further support his argument the affidavit did not contain specific reasons supporting the search of his residence. The State responded Boone was inapplicable, but did not challenge its retroactive application. Because we are satisfied Boone did not announce "a new rule of law," State v. Alfador, 151 N.J. 51, 57 (1997), defendant's reliance on Boone is proper.

instead review de novo. State v. Watts, 223 N.J. 503, 516 (2015).

. . . .

The application for a warrant must satisfy the issuing authority "that there is probable cause to believe that a crime has been committed, or is being committed, at a specific location or that evidence of a crime is at the place sought to be searched." State v. Jones, 179 N.J. 377, 388 (2004)(emphasis added) (quoting State v. Sullivan, 169 N.J. 204, 210 (2001)). . . .

A search that is executed pursuant to a warrant is "presumptively valid," and a defendant challenging the issuance of that warrant has the burden of proof to establish a lack of probable cause "or that the search was otherwise unreasonable." Watts, 223 N.J. at 513-14 (quoting State v. Keyes, 184 N.J. 541, 554 (2005)). Reviewing courts "accord substantial deference to the discretionary determination resulting in the issuance of the [search] warrant." Jones, 179 N.J. at 388 (quoting Sullivan, 169 N.J. at 211 (alteration in original)). Courts consider the "totality of the circumstances" and should sustain the validity of a search only if the finding of probable cause relies on adequate facts. Id. at 388-89.

[Boone, ___ N.J. at ___ (slip op. at 9-11.)]

The Court's decision in Boone kept intact the totality-of-the-circumstances test in determining the validity of a search. The State maintains the test was satisfied here, arguing it was reasonable for the TFO to infer, based on his training and experience, a person observed selling drugs at one location would

have evidence of drug activity in his own residence. The TFO's affidavit, however, is devoid of any such opinion.

Moreover, the State contends the Court's "common-sense approach" recognized in State v. Boyd, 44 N.J. 390 (1965), includes the inference that evidence of drug activity will be found in a drug dealer's residence. The federal cases cited by the State to support this argument, while not binding on us, undermine the State's position. See, e.g., United States v. Feliz, 182 F.3d 82, 88 (1st Cir. 1999). In Feliz, the First Circuit upheld a magistrate judge's probable cause determination for the issuance of a warrant to search the appellant's residence, even though police did not observe any drug dealing from that address because the agent's affidavit agent stated, "I know that, where, as here, an individual is demonstrated to be trafficking in drugs, it is not uncommon for there to be evidence of [his] drug trafficking activities . . . kept at the trafficker's residence." Id. at 85. The court noted the inference was supported by additional facts in the affidavit, including the fact that this suspect was confirmed as a long-time and successful drug trafficker. Id. at 87.

Conversely, here the TFO's affidavit does not state, for example, that based on his training and experience, through conversations with confidential informants, or with other

officers, suppliers of controlled dangerous substances are likely to store drugs and weapons in their residences. Perhaps equally as likely, without such a statement, is the inference a drug dealer might use a "stash house," separate from his own residence to store drugs. Thus, in this case, we agree with defendant that there was no evidence linking any drug activity to his residence. Compare State v. Myers, 357 N.J. Super. 32, 39-40 (App. Div. 2003) (finding police officers had sufficient probable cause to believe drug evidence would be found at the defendant's residence because on the same day the officers observed drug transactions at a nearby location, they observed the defendant leaving his residence and giving a brick of suspected heroin to one of the dealers at the nearby location, and police found drugs, a weapon, and ammunition at the nearby location). Further, like the affidavit in Boone, there was nothing in the TFO's affidavit to indicate how defendant's "apartment was connected to his drug dealing." Boone, ___ N.J. at ___ (slip op at 15). Thus, the TFO's affidavit was deficient because it did not contain information linking the drug deals in Morristown, or any other illegal activity, to defendant's apartment in Newark.

We conclude there was no probable cause to issue the search warrant for defendant's residence. As such, the evidence seized from that location should have been suppressed. Accordingly, the

trial court's denial of defendant's motion to suppress is reversed. In light of our decision, we need not reach defendant's remaining claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION