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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4703-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD J. SABATINO,

Defendant-Appellant.

Submitted September 18, 2017 – Decided October 13, 2017

Before Judges Messano and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Morris County,
Indictment No. 15-04-0376.

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

Frederic M. Knapp, Morris County Prosecutor,
attorney for respondent (Paula Jordao,
Assistant Prosecutor, on the brief).

PER CURIAM

Following the denial of his motion to suppress evidence and
statements made to law enforcement, defendant Richard J. Sabatino
pled guilty to third-degree possession of heroin, N.J.S.A. 2C:35-

10(a)(1). The judge sentenced defendant to a one-year term of probation with certain conditions. Defendant argues on appeal:

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE FOUND IN HIS CAR DURING A ROUTINE TRAFFIC STOP.

A. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE CONSENT TO SEARCH OBTAINED FROM THE DEFENDANTS WAS THE FRUIT OF THEIR ILLEGAL DETENTION.

B. THE CONSENT TO SEARCH OBTAINED FROM THE DEFENDANTS WAS NOT VALID BECAUSE IT WAS DERIVED FROM AN ILLEGAL SEARCH OF THE DRIVER'S PERSON.

C. SUPPRESSION OF THE EVIDENCE WAS ALSO REQUIRED BECAUSE THE CONSENT TO SEARCH OBTAINED FROM THE DEFENDANTS WAS NOT VALID.

Having considered these contentions in light of the record and applicable legal standards, we reverse.¹

I.

The judge issued a comprehensive written opinion summarizing her factual findings following the evidentiary hearing on

¹ Following the hearing, the judge also granted the State's motion to admit certain statements made by defendant and his co-defendant, Judith Crane. Crane participated in the motion hearing with separate counsel. Defendant does not appeal from that portion of the order permitting the State to introduce his and Crane's statements into evidence.

defendant's motion at which Roxbury Police Officer David Togno was the sole witness. The judge found the officer to be credible. We defer to the judge's factual findings, quoting from her opinion as necessary. See State v. Gonzales, 227 N.J. 77, 101 (2016) (citing State v. Elders, 192 N.J. 224, 243-44 (2007) ("We are obliged to uphold the motion judge's factual findings so long as sufficient credible evidence in the record supports those findings.")).

Togno was patrolling Route 80 at approximately 2:00 p.m. when he stopped a Toyota Corolla because of a faulty brake light and failure to maintain travel in the center lane. Crane was driving and defendant was in the front passenger seat. Crane proffered a valid license; defendant obtained a valid registration and insurance card from the glove compartment and tendered them to the officer.² When the officer asked Crane why the car was swerving, she looked to defendant, who said they were tired. Crane appeared nervous, her hand shook as she handed over her license and her pupils were constricted. Togno asked her to exit the car, which she did, and he questioned her further at the rear of the vehicle.

Togno's initial suspicions that Crane might have been impaired were dispelled after a short discussion. Crane said she

² The car was apparently registered to defendant's father.

was nervous because of prior interactions with police and prior arrests for heroin. Togno asked if she was clean, and Crane responded affirmatively. Togno continued the conversation, asking if Crane "'snort[ed] it'" or "'sh[ot] it.'" Crane admitted she used to inject heroin and Togno asked in a "conversational" tone if Crane would show him where she injected herself with heroin. Togno testified Crane was free to refuse, but she did not and rolled up her sleeve. Togno observed fresh track marks.

Togno believed Crane had lied about being "clean," and, given her demeanor, concluded, "some sort of drug activity [was] going on." He questioned Crane about where she was coming from and what stores she and Sabatino had visited at the mall, before asking her to return to the car. Although Crane was not formally under arrest at this point, Togno said she was not free to leave.

Defendant was still seated in the car, and Togno engaged him in conversation, explaining he believed Crane had "used drugs recently." Defendant expressed surprise, admitted being a former heroin addict but claimed he was "clean" for several months. After similarly asking whether defendant injected his heroin and if so where, Togno asked if defendant would show him, and defendant rolled up his sleeves.³ The officer then questioned defendant

³ Togno apparently made no observations of note regarding defendant's arms.

about where he had been and what stores he and Crane had visited. Contrary to Crane, defendant told the officer they had visited only one store.

Togno reapproached Crane, confronted her with this inconsistency and asked "what was going on." Crane admitted she and defendant were coming from Paterson where they had purchased heroin. After administering Miranda⁴ rights to Crane, Togno questioned her further. She admitted defendant had purchased drugs from his dealer and the drugs were still in the car. When backup officers arrived, Togno read defendant his Miranda rights. Ultimately, both Crane and defendant executed consent forms to permit a search of the vehicle. Police found heroin, syringes and Xanax pills in the rear upholstery.

The judge reasoned that Togno's observations provided reasonable suspicion that a motor vehicle offense had been committed, thereby permitting him to stop the car. She rejected defendant's argument that the investigatory stop "was so prolonged as to exceed the bounds authorized by Terry."⁵ The judge also concluded that "the scope of the stop . . . was reasonable, based

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁵ Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)).

on the officer's personal observations and the initial responses defendants gave to his questions after the stop."

The judge rejected any claim that defendants were in custody when questioned by Togno or that the officer intimidated or threatened them. Critically, the judge concluded, "[N]either party indicated an unwillingness to continue speaking with [Togno] or an unwillingness to roll up their sleeves when asked if they 'would mind' showing him where they used to inject heroin."

The judge recognized that the State needed to show Togno had a reasonable suspicion of criminality afoot before requesting defendants' consent. See State v. Carty, 170 N.J. 632, 635 (2002) ("[I]n order for a consent to search a motor vehicle and its occupants to be valid, law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle."). But, focusing on the voluntariness of each defendant's consent and the lawfulness of the original stop, the judge rejected defendants' argument that the reasonable suspicion supporting Togno's request for consent was premised upon unlawful conduct, i.e., statements made by defendants in violation of Miranda or Togno's observations

of track marks on Crane's arms.⁶ Finally, citing State v. Chapman, 332 N.J. Super. 452, 466 (App. Div. 2000), the judge noted she would reach the same result even if "the initial detention was unlawful," because "defendants' consent broke any chain of causation that could give rise to a fruit of the poisonous tree argument."

II.

We begin by noting that "[w]e owe no deference . . . to the 'trial court's interpretation of the law . . . and the consequences that flow from established facts[,]'" which we review de novo." State v. L.S., 444 N.J. Super. 241, 248 (App. Div. 2016) (third and fourth alterations in original) (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)). That said, we agree with several of the judge's initial legal conclusions.

"To be lawful, an automobile stop 'must be based on reasonable and articulable suspicion that an offense, including a minor traffic offense, has been or is being committed.'" State v. Bacome, 228 N.J. 94, 103 (2017) (quoting Carty, supra, 170 N.J. at 639-40). Here, the initial stop of defendant's vehicle was

⁶ The judge referenced observations of track marks on "defendants' arms." However, as already noted, Togno never testified to seeing fresh track marks on defendant's arms.

based on Togno's objectively reasonable suspicion that the motor vehicle laws had been violated.

Based on the lawfulness of the stop and nothing else, Togno was permitted to order the vehicle's driver, Crane, out of the car. State v. Smith, 134 N.J. 599, 611 (1994). Moreover, "[i]f during the course of the stop or as a result of reasonable inquiries initiated by the officer, the circumstances 'give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those suspicions.'" State v. Baum, 393 N.J. Super. 275, 287 (App. Div. 2007) (alteration in original) (quoting State v. Dickey, 152 N.J. 468, 479-80 (1998)), aff'd. as mod., 199 N.J. 407 (2009).

"When the officer's stop is justified at its inception, the question becomes whether the ensuing investigation is 'reasonably related in scope to the circumstances which justified the interference in the first place.'" Baum, supra, 393 N.J. Super. at 286 (quoting Terry, supra, 392 U.S. at 20, 88 S. Ct. at 1879, 20 L. Ed. 2d at 905). "[P]olice may question the occupants [of a car], even on a subject unrelated to the purpose of the stop, without violating the Fourth Amendment, so long as such questioning does not extend the duration of the stop." State v. Hickman, 335 N.J. Super. 623, 636 (App. Div. 2000). However, "[e]ven a stop that lasts no longer than necessary to complete the

investigation for which the stop was made may amount to an illegal arrest if the stop is more than minimally intrusive." Dickey, supra, 152 N.J. at 478 (internal quotations omitted).

Here, unlike the defendants in Hickman and Chapman, Crane and defendant furnished valid credentials. Furthermore, Togno acknowledged that any suspicions about Crane's possible impairment were fully dispelled after a brief conversation at the rear of the car. Yet, Togno continued to question Crane about her nervousness, and she admitted having prior dealings with police and her prior use of heroin. This questioning alone may not have violated the Fourth Amendment. See State v. Pegeese, 351 N.J. Super. 25, 31-32 (App. Div. 2002) (citing Hickman and Chapman and holding that brief questioning about recent whereabouts while awaiting computer check of credentials did not violate the state or federal constitutions). However, we focus on what happened next.

We agree with defendant that Togno's request to have Crane show her arms exceeded the proper scope of an investigative detention. See State v. Privott, 203 N.J. 16, 31 (2010) (officer's decision to lift suspect's shirt led to observations of drugs and exceeded scope of investigative detention). That Togno made the request in a conversational tone and did not issue a command, or that Crane did not protest and rolled up her sleeves willingly, are inconsequential facts. "To establish that defendant waived

h[er] Fourth Amendment rights, the State must show that defendant had 'knowledge of the right to refuse consent.'" State v. Legette, 227 N.J. 460, 474-75 (2017) (quoting State v. Johnson, 68 N.J. 349, 353-54 (1975)). Clearly, there was no evidence in the record and the judge did not find that Crane knew she could refuse to show the officer her arms.

The result of Togno's improper request and observations of Crane's arms led to further detention and investigation, questioning of Crane and then defendant and ultimately obtaining their consent to search.⁷ In Carty, supra, 170 N.J. at 647, the Court held for the first time "that consent searches following a lawful stop of a motor vehicle should not be deemed valid . . . unless there is reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity." Any reasonable suspicion formed by Officer Togno was wholly inseparable from the unlawful request that Crane show her arms without advising her that she could refuse.

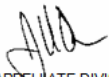
The State has not argued, nor did it argue before the motion judge, that the consent to search was sufficiently attenuated from

⁷ Crane may have indeed been under arrest, because Togno testified that she was no longer free to leave after he ordered her back to the car.

the unlawful conduct. Relying on Chapman, supra, 332 N.J. Super. at 466, however, the judge concluded the consent broke the chain of events resulting from any possible illegality of the stop. However, there is no attenuation issue presented when, in the first instance, police improperly obtain the information that supports the reasonable suspicion underlying a request for consent to search. See, e.g., State v. Smith, 155 N.J. 83, 101 (1998) ("A consent to search that is attributable to police misconduct involving the violations of constitutional rights may be regarded as the product of that unconstitutional conduct and an invalid basis on which to justify a search.") (citing State v. Johnson, 120 N.J. 263, 288 (1990)).

Reversed.

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



CLERK OF THE APPELLATE DIVISION