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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2084-07T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS W. EARLS,

Defendant-Appellant.

Submitted March 22, 2011 – Decided July 11, 2011
Remanded by Supreme Court July 18, 2013
Resubmitted January 6, 2014 – Decided February 7, 2014

Before Judges Parrillo and Kennedy.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 07-06-1340.

Joseph E. Krakora, Public Defender, attorney for appellant (Alison Perrone, Designated Counsel, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent (Brian Uzdavinis, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

This matter returns to us on remand from the Supreme Court to consider whether the "emergency aid" exception to the warrant requirement applies here to validate the State's warrantless

retrieval of cell phone location data obtained from a service provider. State v. Earls, 214 N.J. 564 (2013). For the following reasons, we hold that neither the emergency aid doctrine nor any other exception to the warrant requirement applies in this instance and that the resultant search of the motel room and seizure of evidence therein was constitutionally impermissible. Consequently, we reverse the order of the Law Division finding otherwise and remand the matter for further proceedings consistent with this opinion.

I.

According to the State's proofs at the suppression hearing, in January 2006, Detective William Strohkirch of the Middletown Township Police Department was investigating a series of residential burglaries. On January 24, 2006, a court-ordered trace of a cell phone stolen in one of the burglaries led Detectives Strohkirch and Deickman to a bar in Asbury Park. An individual at the bar told the police that his cousin, defendant Thomas Earls, had sold him the phone. He added that defendant had been involved in residential burglaries and kept the proceeds in a storage unit that either defendant or his former girlfriend, Desiree Gates, had rented.

The next day, on January 25, 2006, police found Gates at the home of her cousin, Alecia Butler, and went with her to the

storage unit, where, after securing Gates's consent to search, they found various items – including jewelry, sports memorabilia, golf clubs and flat-screen televisions – they believed were stolen.

In an effort to locate defendant, Detective Strohkirch spoke with Butler in "the late morning, early afternoon hours" of the following day, January 26, 2006. During their conversation, Butler expressed concern that she had not seen Gates since the visit to the storage facility and that defendant, having learned of Gates's cooperation with the police, threatened to harm her. Butler also mentioned a prior domestic violence incident "between the two[,]" and Detective Strohkirch was able to locate an Asbury Park police report from December 6, 2005, which outlined an allegation by Gates that defendant had assaulted her.

Later that same day, Detective Strohkirch filed a complaint against defendant for receiving stolen property and obtained an arrest warrant. Detective Strohkirch then began to search for defendant and Gates to ensure her safety and to execute the warrant. In that effort, around 6:00 p.m. that evening, Detective Deickman contacted T-Mobile, a cell phone service provider. At three different times that evening, T-Mobile provided information about the location of a cell phone the

police believed defendant had been using. At no point did the police seek a warrant for the three traces.

Specifically, around 8:00 p.m., two hours after the initial request was made, T-Mobile notified the police that defendant's cell phone was being used in the general area of a cell tower located near Highway 35 in Eatontown. The Eatontown and Ocean Township Police Departments were contacted, but they were unable to locate defendant. Then, after a second request, at around 9:30 p.m., T-Mobile notified the police that defendant's cell phone was being used near Route 33 and 18 in Neptune. After another unsuccessful search, the officers made a third request to T-Mobile for defendant's cell phone location. This trace proved successful. At around 11:00 p.m., T-Mobile informed the officers that defendant's cell phone was being used in the general location of the cell tower near the intersection of Route 9 and Friendship Road in Howell. At that point, Detectives Strohkirch and Deickman alerted the Howell and Lakewood Police Departments and decided to head home for the evening, with the understanding that if one of the police departments located defendant, they would contact the detectives.

This last trace led police to the area of Route 9 in Howell. At around midnight, Howell police located defendant's

car at the Caprice Motel on Route 9 South and then notified Detective Deickman of their discovery. Detectives Strohkirch and Deickman arrived at the motel about an hour later, set up surveillance, and waited for backup from the Howell Police Department. However, because these police units were called to several emergencies elsewhere in the area, the detectives called for additional officers from their department, two of whom arrived at around 3:00 a.m.

Once the backup was in place, the officers executed their plan to have Detective Deickman go to the motel clerk's office and call the room where defendant and Gates were staying to ask Gates to come outside. Gates answered the phone and when defendant and Gates opened the front door of the motel room, police arrested him and gave him his Miranda[1] rights. According to Detective Strohkirch, both Gates and defendant consented to a search of the motel room, from which police then seized several pieces of luggage and a flat-screen television they saw in plain view. Police also seized a pillow case tied up in a knot found in a closed dresser drawer. These items were brought back to the police station, where they were searched pursuant to defendant's written consent. Inside the luggage, police found

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

stolen property and marijuana, and inside the pillowcase, stolen jewelry.

Defendant was indicted on several charges, including third-degree burglary, N.J.S.A. 2C:18-2, third-degree theft, N.J.S.A. 2C:20-3a, third-degree receiving stolen property, N.J.S.A. 2C:20-7a, and fourth-degree possession of a controlled dangerous substance (marijuana), N.J.S.A. 2C:35-10a(3). Defendant filed a motion to suppress. The trial court found that defendant had a reasonable expectation of privacy under State law and that the police should have obtained a warrant before tracking defendant via cell-tower information from T-Mobile. Nonetheless, the court admitted the evidence under the emergency aid exception to the warrant requirement,[2] on the theory that the police were attempting to protect Gates from possible domestic violence.[3]

[2] With respect to the items seized from the motel room, however, the motion judge ruled that the State had not proven by a preponderance of the evidence that a valid consent to search the room was obtained. Accordingly, the court held that the search of the dresser drawer in the motel room and the seizure of the pillowcase from the motel room were invalid. As to the television and luggage, however, the judge concluded that they were properly seized under the plain view exception to the warrant requirement.

[3] In the trial court's judgment, recent events – including Gates's cooperation with the police, defendant's threat to harm her, her absence, and her prior domestic violence complaint against defendant – provided an objectively reasonable basis to believe that Gates was in physical danger.

Defendant pled guilty to third-degree burglary and third-degree theft and was sentenced in accordance with a plea agreement. On appeal, we affirmed the sentence and later allowed defendant to reopen his appeal to challenge the suppression ruling. In a published opinion, we affirmed on different grounds. We concluded that defendant lacked a reasonable expectation of privacy in his cell phone location information and that the police lawfully seized evidence from the motel room in plain view. State v. Earls, 420 N.J. Super. 583, 591 (App. Div. 2011), rev'd, 214 N.J. 564 (2013). Because we found that defendant had no privacy interest in his cell phone location information and that the plain view doctrine applied, we did not consider the emergency aid doctrine. Ibid.

The Supreme Court granted defendant's petition for certification "limited to the issues of the validity of defendant's arrest based on law enforcement's use of information from defendant's cell phone provider about the general location of the cell phone and the application of the plain view exception to the warrant requirement." State v. Earls, 209 N.J. 97 (2011).

The Court ultimately held "that Article I, Paragraph 7 of the New Jersey Constitution protects an individual's privacy interest in the location of his or her cell phone[,]" and

therefore "police must obtain a warrant based on a showing of probable cause, or qualify for an exception to the warrant requirement, to obtain tracking information through the use of a cell phone." State v. Earls, 214 N.J. 564, 588 (2013).[4] Having reversed our contrary ruling, the Court remanded to us "[t]o determine whether the emergency aid doctrine or some other exception to the warrant requirement applies" in this instance to validate the State's warrantless retrieval of defendant's cell phone location data from T-Mobile. Id. at 569-70.

II.

In relying on the emergency aid doctrine to validate the warrantless receipt of defendant's cell-site information, the motion judge reasoned that

> the defendant made violent threats towards [Ms. Gates] who was assisting the police in their investigation into defendant's involvement with home burglaries. Ms. Gates was last seen with the defendant and she had made a prior domestic violence complaint against the defendant.
>
> Therefore, the detectives possessed an objectively reasonable basis to believe that Ms. Gates was in physical danger. Further, although the police officers had a warrant to arrest the defendant, their primary purpose was to prevent any harm from Ms.

[4] Because its opinion announced a new rule of law by imposing a warrant requirement, the Court applied its ruling to defendant and future cases only. Id. at 591.

> Gates. And I find that as part of the facts in this particular case.
>
> Obviously there was an interest to apprehend the defendant. They had a warrant for him. But their primary concern I feel was initially in entering and trying to locate them was to find out if Ms. Gates was [alright]. Again, they were trying to arrest him. They were aware that if they arrested him there probably would be some evidence with him. But they were primarily trying to prevent her from being injured.
>
> And finally, there was a direct nexus between obtaining the defendant's location and protecting Ms. Gates from possible harm. She had been threatened with violence. She was last seen with him. And therefore I'm satisfied that the police lawfully obtained his location at the Caprice Motel.

As a threshold matter, in reviewing a trial court's decision on a motion to suppress evidence, we "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007) (internal quotation marks omitted). We "'should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). The findings below should not be disturbed merely

because our court may have reached a different conclusion. Ibid.

If we are, however, convinced that the determination below was "clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction[,] . . . then, and only then, [we] should appraise the record as if [we] were deciding the matter at inception and make [our] own findings and conclusion." Johnson, supra, 42 N.J. at 162 (citations omitted). Further, if the trial court acts under a misconception of the applicable law, then we must adjudicate the matter "in light of the applicable law in order that a manifest denial of justice be avoided." State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966).

"[B]oth the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution guarantee '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" State v. Baum, 199 N.J. 407, 421 (2009) (quoting U.S. Const. amend. IV and N.J. Const. art. I, ¶ 7). Pursuant to these constitutional provisions, "'a warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement.'" State v. Wilson, 178 N.J. 7, 12 (2003) (quoting State v. Cooke, 163 N.J. 657, 664 (2000)). The search warrant

requirement "is not lightly to be dispensed with, and the burden is on the State, as the party seeking to validate a warrantless search, to bring it within one of those recognized exceptions." Ibid. To satisfy this burden, the State must establish "by a preponderance of the evidence that there was no constitutional violation." Id. at 13.

The emergency aid doctrine is a recognized exception to the warrant requirement. The doctrine applies when "'exigent circumstances . . . require public safety officials, such as the police, firefighters, or paramedics, to enter a dwelling without a warrant for the purpose of protecting or preserving life, or preventing serious injury.'" State v. Edmonds, 211 N.J. 117, 130 (2012) (quoting State v. Frankel, 179 N.J. 586, 598, cert. denied, 543 U.S. 876, 125 S. Ct. 108, 160 L. Ed. 2d 128 (2004)).

The doctrine now involves a two-part test. Id. at 131-32. To justify a warrantless search under this exception, the State must establish that "(1) the officer had 'an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or to prevent serious injury'[;] and (2) there was a 'reasonable nexus between the emergency and the area or places to be searched.'" Id. at 132 (quoting Frankel, supra, 179 N.J. at 600) (emphasis added). Stated differently, "'if police officers possess an

objectively reasonable basis to believe that prompt action is needed to meet an imminent danger, then neither the Fourth Amendment nor Article I, Paragraph 7 demand that the officers delay potential lifesaving measures while critical and precious time is expended obtaining a warrant.'" State v. Vargas, 213 N.J. 301, 324 (2013) (quoting Edmonds, supra, 211 N.J. at 133). Consistent with the Court's recent decision in Edmonds, supra, an officer's subjective motivation for entry into the home or physical structure is no longer considered in this analysis. 211 N.J. at 131-33; contra N.J.S.A. 2A:156A-29(c)(4) (providing an exception to the statutory requirement for a court order for cell-site information when a "law enforcement agency believes in good faith that an emergency involving danger of death or serious bodily injury to the subscriber or customer" exists) (emphasis added).

Critically, the officers here were not responding to an open-line 9-1-1 call, which "by its very nature, may fairly be considered . . . a presumptive emergency, requiring an immediate response." Frankel, supra, 179 N.J. at 604. Nor had they personally witnessed any indicia of an emergency, unlike the police officers in Michigan v. Fisher, 558 U.S. 45, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2009), who, while responding to a disturbance complaint, observed broken windows, "blood on the

hood of" a smashed pick-up truck in the driveway and the defendant "screaming and throwing things" inside the house with a cut on his hand. Id. at 45-46, 130 S. Ct. at 547, 175 L. Ed. 2d at 412. Indeed, Butler never initiated any contact with the police, but instead voiced her concerns over Gates's safety only after the detectives, in pursuing their investigation into the residential burglaries, confronted her the next day after searching the storage shed, inquiring into the whereabouts of defendant.

Moreover, Butler's expression of concern was generalized in nature and unsubstantiated based on neither personal observations nor direct knowledge. Rather, it arose in part because Butler had not seen Gates since the day before; however, nothing in the record indicates this was a cause for alarm or an unusual occurrence. In fact, Butler never said that Gates was with defendant. Nor is there any competent evidence to support the motion judge's factfinding that Gates was last seen with defendant. Neither does the record contain any resolution of the domestic violence complaint Gates filed against defendant in December 2005. And nothing in the threat allegedly conveyed by defendant to Butler was specific or ever substantiated, or for that matter even suggested that Gates was in imminent danger of death or serious bodily injury.

Not only did the officers here lack any reasonable basis to believe that an "emergency" existed, but their very own actions belied any need for an immediate, urgent law enforcement response. Most significant, Detectives Strohkirch and Deickman waited approximately six hours from first hearing of Butler's concern to contact T-Mobile for defendant's cell phone location. Despite the passage of all this time, the police never obtained a warrant for this information even though they filed a complaint against defendant and secured his arrest warrant during this same period.

Even after police began requesting defendant's cell phone location data, there was no sense of urgency in their effort. Indeed, it took another two hours for the service provider to respond to the detectives' initial request. Another one-and-one-half hours elapsed before the officers made their second request. And by the time T-Mobile's tracing proved fruitful following the officers' third request, it was midnight and the detectives had already retired for the evening and had gone home. It was not until three hours later that they finally confronted defendant and arrested him. Thus, approximately fifteen hours passed from when the detectives first learned of Butler's concern for Gates's safety and defendant's apprehension. Clearly, this time-line of events does not admit

of the immediacy required for invocation of the emergency aid doctrine.

As the Court in Edmonds, supra, explained, "[o]ur constitutional jurisprudence expresses a clear preference for government officials to obtain a warrant issued by a neutral and detached judicial officer before executing a search." 211 N.J. at 129. The emergency aid exception was established to permit the police to conduct a search, without wasting precious time securing a warrant, when "prompt action is needed to meet an imminent danger," id. at 133, and "is not a general grant of authority to conduct warrantless searches." Id. at 133-34. Absent here are any specific, articulable facts giving rise to a reasonable belief that Gates was in imminent danger of death or serious bodily injury. But perhaps even more telling, the police themselves did not treat the situation as an emergency, waiting for hours after speaking with Butler to contact T-Mobile. Certainly, there was sufficient time during this interval to secure a warrant for defendant's cell-site data, and consequently, the emergency aid doctrine cannot be invoked to validate the warrantless search of the motel room and seizure of items therein.

Lastly, we have found no other exceptions to the warrant requirement applicable to these facts.

Reversed and remanded.

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

CLERK OF THE APPELLATE DIVISION