SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0082-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHADI ALLIE,

Defendant-Appellant.

Submitted January 11, 2023 – Decided July 26, 2023

Before Judges Accurso and Natali.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 21-11-1092.

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

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Shadi D. Allie appeals on our leave from a June 30, 2022 interlocutory order denying her motion to suppress evidence State Police seized during a warrantless search of the van in which she was a passenger. She argues the police lacked reasonable suspicion to instigate an investigatory stop. We agree and reverse.

Detective Silvestre, the arresting officer, was the only witness at the suppression hearing.[1] He testified that on November 23, 2020, he and four other State Police officers conducted an "ILP [intelligence led policing] detail" at the New Jersey Turnpike's Molly Pitcher Service Area in Cranbury

[1] Detective Silvestre's body-worn camera, which he claimed to have first activated when he approached the driver's side of the van, did not capture footage of "the initial approach" and "most of the search," a detail he failed to include in his written report of the incident. He testified variously that he learned "[a]t some point during the search" that his "body camera was not working" and that he only "learned there was some sort of malfunction with the camera" when he "went to prepare for this case, and . . . went to play [his] body-worn camera" and "noticed the first half was cut off." Silvestre testified he sent Axon, the camera manufacturer, the Division's audit trail at that point "to find out what happened to the footage." He claimed Axon advised "there was some sort of malfunction," and the missing footage was not saved. He also testified he thought "a button could have been pressed" when he was "on the floor, reaching under seats" during his search of the van. Detective Silvestre was the only officer on scene wearing a body-worn camera, as the other officers were in plain clothes. The rebuttable presumption of N.J.S.A. 40A:14-118.5 did not take effect until after this stop, making it inapplicable at the suppression hearing. See State v. Jones, N.J. Super. 520, 530-31 (App. Div. 2023).

Township. The detective described the detail as a plain-clothes "quality of life enforcement" designed "to see what kind of crimes are occurring" at the service stop and "to either deter, prevent those crimes or apprehend suspects committing these crimes." Generally, the officers looked for marijuana and heroin use, which Detective Silvestre described as "frequent," and any "suspicious activity" from motorists parked away from the building and other motorists.

Detective Silvestre testified he was in an "unmarked troop car" with three other officers in the middle of the afternoon, when they saw a silver Dodge Caravan with Illinois plates and tinted windows in the passenger area, pull into a space in either the furthest spot from the building or close to it and "drove closer to get a better look to see what was going on." The detective testified the van, a rental registered to Enterprise, "was parked illegally as it was occupying two spaces." From his vantage, approximately ten to fifteen yards away, the detective testified he could clearly see two Black women sitting in the driver and front passenger seats. As he watched, he saw the woman in the passenger seat, later identified as defendant, take "what [he] [knew] to be a marijuana cigarette," and "bring[] it up to her lips as she was licking it shut and twisting" the ends closed.

According to the detective, as the Caravan backed out of its parking space and drove toward the exit to depart, he pulled in front of the van to "block its way." Another unmarked troop car pulled alongside. Although the detective testified none of the van's occupants made any furtive movements as he and the other officers approached, he immediately smelled raw marijuana when the driver lowered her window for him.

After ascertaining that neither the driver or front seat passenger, nor any of the three Black men in the rear seats, had a medical marijuana card, and both the driver and the front seat passenger had handed over hand-rolled cigarettes, the officers removed everyone from the van and sat them on a nearby curb. Detective Silvestre testified he and the three other officers in his troop car undertook "a probable cause search" of the Caravan, in which they seized marijuana, crack cocaine and a Taurus semi-automatic handgun with no magazine.[2]

On cross-examination, defense counsel explored the bases for the detective's opinions that the hand-rolled cigarette he watched defendant prepare contained marijuana and not tobacco, and that the Caravan was

[2] Defendant was subsequently indicted for second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1), and third-degree possession of cocaine, a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1).

illegally parked. The detective testified he "knew" the "white, hand-rolled cigarette" he saw defendant lick close and place in her mouth was marijuana and not tobacco based on his "training and experience." Asked how his training and experience allowed him to differentiate between a hand-rolled tobacco cigarette and a marijuana "joint" from even ten feet away, much less the ten or fifteen yards from where he watched, the detective testified in his "training and experience, [he'd] never seen somebody rolling a tobacco cigarette."

The detective also testified he was not "aware of how hand rolled tobacco cigarettes are prepared," and although he knew "people can hand roll tobacco cigarettes" and that they are legal in New Jersey, he'd never seen anyone do it and had not received any training in how "to distinguish a cigarette that was marijuana versus a lawful tobacco cigarette." He nevertheless insisted his experience made him "one hundred percent positive that that person was rolling a marijuana cigarette," and that anyone he saw licking closed a white cigarette in the manner defendant was doing "is under the veil of suspicion."

As to the parking violation, the detective testified in response to a question from defense counsel that he'd previously written a ticket to a person

parking in two spaces. Asked what section of Title 39 he "would cite on that ticket," the detective replied that "the Turnpike is a little different. They have their own statutes. They follow Title 19 so the title I . . . write for parking would be [N.J.A.C.] 19:9-1.6."

The judge concluded the troopers "had reasonable suspicion to conduct an investigatory stop." The judge found the detective, while working a quality of life detail at the Molly Pitcher Service Area, "spotted a double-parked Dodge Caravan from about four parking spots away." Although not identifying the statute that made "double-parking" a violation, the judge found it was a violation and that it "piqued" the detective's interest. The judge further found the detective "observed two females in the front seat, one of which was holding up a white, rolled cigarette to her mouth to lick it close[d]. From his training and experience, Detective Silvestre recognized this to be a marijuana cigarette," and that those "facts alone [were] sufficient to give Detective Silvestre reasonable suspicion to conduct an investigatory stop."

Defendant appeals, reprising her arguments to the trial judge that the State failed to present evidence of a parking violation and that "observing someone using rolling papers, an item legal to possess and to use, does not

provide police with reasonable and particularized suspicion that a crime is being committed." We agree on both points.

Our standard of review on a motion to suppress is well known. State v. Gamble, 218 N.J. 412, 424-25 (2014). We defer to the trial court's factual findings, "unless they were clearly mistaken or so wide of the mark that the interests of justice required appellate intervention." State v. Elders, 192 N.J. 224, 245 (2007) (internal quotation marks omitted) (quoting N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007)). Our review of the trial court's application of the law to the facts, however, is plenary. State v. Hubbard, 222 N.J. 249, 263 (2015).

Said another way, although "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers," the trial court's "determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." Ornelas v. United States, 517 U.S. 690, 699 (1996). Applying that standard, we do not quarrel with the trial court's factual findings. As defendant notes, the facts here are undisputed. We disagree about what those facts mean for the constitutionality of this stop.

Neither the State nor defendant disputes that this was an investigatory stop, requiring the State to prove by a preponderance of the evidence, State v. Alessi, 240 N.J. 501, 518 (2020), that the troopers had "a reasonable and articulable suspicion that the driver of [the] vehicle, or its occupants, [was] committing a motor-vehicle violation or a criminal or disorderly persons offense," State v. Scriven, 226 N.J. 20, 33-34 (2016). Our role is to "assess whether 'the facts available to the officer at the moment of the seizure . . . warrant[ed] a [person] of reasonable caution in the belief that the action taken was appropriate.'" Alessi, 240 N.J. at 518 (alterations in original) (quoting State v. Mann, 203 N.J. 328, 338 (2010)).

We acknowledge, of course, that "[f]acts that might seem innocent when viewed in isolation can sustain a finding of reasonable suspicion when considered in the aggregate." State v. Nishina, 175 N.J. 502, 511 (2003). Our Supreme Court in State v. Pineiro, 181 N.J. 13, 18, 25-26 (2004), for example, held the exchange of a pack of cigarettes between a known drug dealer and a known drug user, neither of whom was smoking, in "a high drug, high crime area," both of whom reacted with "shock and surprise" and immediately turned to leave on seeing the officer, coupled with the officer's knowledge that cigarette packs are sometimes used to transfer drugs, supported a reasonable

and articulable suspicion of drug activity. Similarly, the Court in State v. Citarella, 154 N.J. 272, 275-76, 280-81 (1998), upheld an investigatory stop where the officer observed a nervous cyclist, whom he'd previously arrested on drug charges, speed away in the direction opposite the suspect's home after making eye contact with the officer, who was aware drug traffickers often used bikes to buy drugs. In State v. Valentine, 134 N.J. 536, 539-40, 553-54 (1994), the Court found an officer had reasonable suspicion to justify a pat down after observing the defendant, who had a long criminal history, approach with his hands in his pockets at midnight in a high crime area and appeared uneasy and evasive in answering the officer's questions.

What links those cases and distinguishes them from this one is that in each of those cases, the officer possessed "an objectively reasonable belief that the collective circumstances [were] consistent with criminal conduct." Nishina, 175 N.J. at 511. The Court has long been clear that even if all the facts surrounding the police encounter "were susceptible of 'purely innocent' explanations, a group of innocent circumstances in the aggregate can support a finding of reasonable suspicion," State v. Stovall, 170 N.J. 346, 368 (2002), so "long as 'a reasonable person would find the actions are consistent with guilt'" ibid. (quoting Citarella, 154 N.J. at 279-80).

Here, Detective Silvestre had no prior dealings with or knowledge of any of the occupants of the Caravan, including defendant. A rented passenger vehicle with out-of-state plates is certainly not uncommon on the Turnpike, especially in the days leading up to the Thanksgiving holiday. The encounter was in broad daylight, and while the detective claimed that marijuana and heroin use in the parking area of the service plaza was "frequent," he did not describe the Molly Pitcher Service Area as a high crime area. None of the occupants of the Caravan appeared nervous to the detective or tried to avoid him; indeed, he described them as unaware they were being observed, exhibiting none of the heightened awareness of surroundings common to those engaged in criminal conduct. When they finally became aware of his presence, they were calm and cooperative, not nervous and evasive.

Most important, of course, is the point defense counsel made repeatedly at the suppression hearing — there is nothing illegal or suspicious about a person rolling her own cigarette. And although the detective testified he'd never seen anyone do so before, it is not uncommon among certain groups of smokers, especially given the expense of commercial cigarettes. See D. Young et al., Prevalence and Attributes of Roll-Your-Own Smokers in the International Tobacco Control (ITC) Four Country Survey (2006), https://

tobaccocontrol.bmj.com/content/tobaccocontrol/15/suppl_3/iii76.full.pdf; Keith Humphreys, Why the Wealthy Stopped Smoking But the Poor Didn't, Wash. Post (Jan. 14, 2015, 11:02 AM), https://www.washingtonpost.com/news/wonk/wp/2015/01/14/why-the-wealthy-stopped-smoking-but-the-poor-didnt/. Rolling papers and loose tobacco are readily available in many places.

Having reviewed the record of the suppression hearing, we simply cannot find the detective's "one hundred percent positive" conviction that defendant "was rolling a marijuana cigarette" to have been an objectively reasonable belief under the circumstances. See Nishina, 175 N.J. at 511. Nothing in the detective's training and experience allowed him to differentiate between a hand-rolled tobacco cigarette and a hand-rolled marijuana one based only on observation from a distance of ten or fifteen yards away. The detective testified unequivocally he'd never received any training in doing so, and he'd never even seen anyone roll a cigarette with loose tobacco. Casting anyone rolling their own cigarettes "under the veil of suspicion," places individuals engaged in perfectly legal conduct "susceptible to constant police investigation," an obviously "unacceptable proposition." State v. Stampone, 341 N.J. Super. 247, 252 (App. Div. 2001).

We are also convinced there is no support in the record for the State's assertion that the Caravan was illegally parked.[3] Although the State need not prove the motor vehicle violation giving rise to a car stop, it must prove the officer had "an articulable and reasonable suspicion" the violation occurred. State v. Locurto, 157 N.J. 463, 470 (1999) (quoting State v. Smith, 306 N.J. Super. 370, 380 (App. Div. 1997)). An officer must have a legal basis for the stop. State v. Smith, 251 N.J. 244, 260 (2022) (holding the plain language of N.J.S.A. 39:3-74 proscribing "front windshield . . . or front side windows" tint "did not give rise to the reasonable and articulable suspicion" for an investigatory stop of a motorist with a tinted back windshield).

Here, N.J.A.C. 19:9-1.6, the regulation Detective Silvestre claims was violated, provides "[n]o vehicle shall be parked, stopped, loaded or unloaded or allowed to stand on the Roadway except where otherwise posted or expressly permitted by the [New Jersey Turnpike] Authority." N.J.A.C. 19:9-1.6(a). Chapter 9 defines "Roadway" as "collectively, the Turnpike and the Parkway," and the "Turnpike" as "the express highway, superhighway, or motorway known as the New Jersey Turnpike," which includes

[3] Although the court termed the van as having been double-parked, Detective Silvestre corrected a lawyer using the same term, explaining the van was illegally parked, not double-parked.

> service areas, service stations, service facilities . . . together with all property, rights, easements, and interests that may be acquired by the Authority for the construction, maintenance, or operation thereof and all other real property within the Turnpike Right-of-Way and all real property and any improvements thereon owned by or operated under the jurisdiction of the Authority.
>
> [N.J.A.C. 19:9-1.1.]

Title 27, the Authority's enabling act, empowers the Authority to promulgate regulations "prohibiting the parking of vehicles, concerning the making of turns and the use of particular traffic lanes," as well as "any and all other regulations . . . to control traffic and prohibit acts hazardous in their nature or tending to impede or block the normal and reasonable flow of traffic." N.J.S.A. 27:23-29. The Act also provides that Title 39, the Motor Vehicles and Traffic Law, applies equally to motorists on the Turnpike unless otherwise provided. N.J.S.A. 27:23-39.

Although Title 39 plainly prohibits double-parking, that is parking "[o]n the roadway side of any vehicle stopped or parked at the edge or curb of a street," N.J.S.A. 39:4-138(m), nothing in either N.J.A.C. 19:9-1.6 or Title 39 would appear to prohibit "occupying two spaces" in a parking lot in a

service area along the Turnpike.[4] The State, while asserting that parking "in the middle of two parking spots in the parking area . . . is a violation of N.J.A.C. 19:9-1.6," does not attempt to explain why that might be so, and it is certainly not obvious to us.[5]

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[4] Although no New Jersey court appears to have addressed whether parking over the line in a service area parking lot on the Turnpike is a violation of N.J.A.C. 19:9-1.6(a), N.J.S.A. 39:4-138(m), or any other parking provision, the Court of Special Appeals of Maryland in Gilmore v. State, 42 A.3d 123, 125-27, 130-31 (Md. Ct. Spec. App. 2012), rejected a similar argument that an officer could reasonably suspect criminal activity based on the defendant's parking "over one of the lines of a parking space" thereby "taking up two parking spaces." Although the officer believed it to be a "double parking" violation, the court found the Maryland Transportation Article (TA) the State cited provided no basis for the suspected violation. Id. at 130-31. The court disagreed with the State that parking over the line violated either TA § 21-1003(j), providing "[a] person may not stop, stand, or park a vehicle at any place where stopping is prohibited by an official sign," or TA § 21-1003(aa), providing "[a] person may not park a vehicle at any other place where parking is prohibited by an official sign," explaining it was "unwilling to give the parking regulations of the Transportation Article such a strained interpretation." Ibid.

[5] Detective Silvestre's misunderstanding of N.J.A.C. 19:9-1.6 will not support a reasonable suspicion that the driver of the Caravan committed a motor vehicle violation. Although the United States Supreme Court has held a car stop based on an officer's reasonable misunderstanding of the law will support an investigatory stop under the Fourth Amendment, see Heien v. North Carolina, 574 U.S. 54 (2014), our Supreme Court has declined to adopt that standard, finding it is "not reasonable to restrict someone's liberty for behavior that no actual law condemns, even when an officer mistakenly, although reasonably, misinterprets the meaning of a statute," State v. Carter, 247 N.J. 488, 504 (2021). Straddling one of the lines of a painted parking stall in a

Because the troopers lacked reasonable suspicion to have instigated an investigatory stop of the Caravan, we reverse the denial of defendant's suppression motion and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

service area of the Turnpike is not illegal. The law cited simply does not interdict being a poor parker.