NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1026-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MIKE WEBB, a/k/a THOMAS NATHANIEL, ANDRE WEBB, GREGORY E. WEBB, LAMONT WILSON, and NATE WORKMAN,

Defendant-Appellant.

Submitted February 10, 2015 – Decided February 12, 2016

Before Judges Ostrer and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 10-11-2720.

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

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

The opinion of the court was delivered by

SUMNERS, JR., J.A.D.

Defendant Mike Webb appeals his conviction for third-degree unlawful possession of a CDS (cocaine) with the intent to distribute, N.J.S.A. 2C:35-10(a)(1). He pled guilty to the

offense following the Law Division's order denying his motion to suppress evidence. For the reasons that follow, we reverse.

I

We discern the following facts from the suppression hearing held on May 4, 2011.[1] As the search in question was warrantless, the State sought to meet its burden to show the search was legal through the testimony of two witnesses, Detective Michael Ruzzo and Sergeant Andrew Leonard of the Atlantic City Police Department. See State v. Pineiro, 181 N.J. 13, 19 (2004). No witnesses were presented by the defense.

On June 16, 2010, Ruzzo, Detective Nieberg,[2] and Leonard were conducting surveillance of room 104 of an Atlantic City motel[3] based upon a confidential informant's report that illegal drug sales and possible prostitution activity were occurring therein. Ruzzo testified that, from a hidden vantage point in a building across the street, he observed people moving back and forth between rooms 104 and 106, and witnessed one suspect in

[1] Co-defendant Lamar Cherry also moved to suppress, but is not a party to this appeal.

[2] The record only mentions the Detective's last name.

[3] With one or two exceptions, the record refers to the establishment as a "hotel." However, based on the ability to observe individuals going in and out of rooms from a surveillance point across the street, it is more apt to refer to the establishment as a "motel."

particular, later identified as Lamar Cherry, "peeping out of the curtain" of room 104, appearing to be a lookout.

At some point, Ruzzo reported to Leonard that Cherry walked out of room 106, holding what appeared to be a green gun case beneath a pair of sneakers, and into room 104. This led Leonard to speak with the hotel manager to find out who rented the two rooms. While Leonard was speaking with the manager, Ruzzo witnessed an unidentified male walk up to room 104, knock, enter the room, and leave within less than a minute, examining an object in his palm as he walked away. Ruzzo believed that he had just witnessed a drug transaction, but the suspected buyer was not stopped by the police.

Meanwhile, Leonard was informed that one of the rooms was registered to Cherry; however, Leonard testified that he could not recall which room Cherry rented nor the name of the person who rented the other room. The manager also gave Leonard a key to room 104 and a photograph of Cherry. Leonard returned to the surveillance location, and showed the photograph to Ruzzo, who confirmed that Cherry was one of the men observed going back and forth between the two rooms. Leonard then went to the police

station to obtain information about Cherry, learning that Cherry had an active arrest warrant from Camden City Municipal Court.[4]

Shortly thereafter, according to Leonard, "we made a decision to approach the room to attempt to place [] Cherry in custody [due to the arrest warrant]."[5] He further added, "the plan wasn't to go in there and search the room[,]" but to execute the arrest warrant on Cherry.

However, Ruzzo's explanation as to why they went to the room was not as certain. Ruzzo initially stated on cross-examination that he went into room 104, "to grab [Cherry] and place him into custody." He furthered commented that he did not go to the room to see what he could find. However, on further cross-examination, when asked whether the police were going to the room more because of the outstanding warrant than the suspected drug transaction, Ruzzo stated,

> I think it was a little bit of both, but if you want to put more on Cherry, I mean, that's our reason for going there, but I also saw what I believed to be a transaction so . . . I would think there was going to

[4] The warrant was issued on May 25, 2010, for "failure to comply with sentence or time payment order."

[5] Although the record is not clear how long the surveillance had taken place before it was decided to approach the room, Leonard believed that a half-hour transpired from when he left to go to the police station and when they approached the room to arrest Cherry.

> be drugs involved as well, but . . . I don't know how to answer that. I was kind going there for both reasons.

As the police approached, they saw Cherry outside the rooms, but he went back inside room 104 before they could apprehend him. Ruzzo testified that he banged on the closed, locked motel room door, announcing police, and was about ready to use the room key until Cherry opened the door. On cross-examination, Ruzzo explained what happened next:

> Q. When Mr. Cherry opened the door, did you recognize him as Lamar Cherry?
>
> A. Yes.
>
> Q. Did you ask him to step out?
>
> A. No.
>
> Q. Did you advise him that there was a warrant for his arrest?
>
> A. We walked right in, in the threshold of [the] door and placed him into custody.
>
> Q. You didn't advise him there was a warrant for his arrest?
>
> A. I don't know if we did or we didn't.
>
> Q. And you didn't ask him to step outside the room at all?
>
> A. No.
>
> Q. At that point you just crossed the threshold and entered into the room?
>
> A. He was in the threshold, yes.

> Q. But you didn't give him the opportunity to step out, correct?
>
> A. No, didn't ask him to step out.
>
> Q. When you entered the room, do you know who made the observation of the CDS?
>
> A. I saw it and also did [sic] Detective Nieberg.
>
> Q. Where was it in relation to the door?
>
> A. Right at the foot of the bed. The room is a square room, it has two beds in it; it was right there on the floor.

Leonard's testimony was different as to where Cherry was when the room door opened. He stated that Cherry was "right inside the doorway." Yet, he confirmed Ruzzo's account that they "entered the room and placed [] Cherry in custody," then "observed a package on the floor by the bed which was consistent with CDS."

After police suspected there was heroin on the floor, the other occupants in the room, including defendant, were placed in custody, frisked, and read their Miranda[6] rights. Upon police questioning, no one claimed ownership of the CDS. The officers conducted a search incident to arrest each occupant for constructive possession of the CDS, and found cocaine on defendant's person.

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

After hearing testimony from Ruzzo and Leonard, and counsel's argument, the court issued an oral decision denying the suppression motion. In recounting the testimony, the judge stated the police claimed that when they made their plain view observation of contraband, they "indicated they were able to clearly see [what turned out to be heroin] from the doorway looking into the [room][7]." The judge also stated that both rooms 104 and 106 were being utilized by the individuals under surveillance "together or interchangeably," but made a factual finding that room 106 was registered to Cherry because the State did not prove that Cherry rented room 104. However, the judge found that regardless of what room Cherry rented, Cherry had "constructive occupancy" of both rooms, and reasoned that the police did not need a search warrant to enter room 104, which Cherry did not rent, in order to arrest him. In his view, the police

> didn't need to get a search warrant because they saw what they considered to be drug activity; they saw somebody carrying out what they felt was a gun case, and now they have an arrest warrant that a person who's been identified by picture by the hotel clerk, is [] Cherry who has the arrest warrant; so rather than take an hour, two hours, three hours and perhaps they leave or

[7] The transcript states "door" but it would appear from the context of the situation, that the judge actually said or meant to say "room."

> lose the surveillance on them, we're going to go execute the arrest warrant on Cherry.

The motion judge considered the facts of this case similar to the situation in State v. Cleveland, 371 N.J. Super. 286 (App. Div.), cert. denied, 182 N.J. 148 (2004). In that case, we rejected the defendant's constitutional challenge to police officers' execution of a parole arrest warrant by entering a hotel room registered to another occupant, on the grounds that there was no expectation of privacy inside the room where the door was left open allowing anyone to see inside the room. Id. at 301-02. The judge here found no "major distinction in the ultimate result between a door that is slightly ajar and the police go in, [as in Cleveland,] and a door that is voluntarily opened, i.e., consent given by an occupant inside to come in[, as in the present situation]." The judge determined that since the police "had direct and actual knowledge of defendant's presence through personal observation," it was therefore not necessary to obtain a search warrant before entering a third-party's room to arrest defendant. Further, the judge found that by opening the door at the command of the police, Cherry gave the police consent to enter the room.

The judge noted that he understood our ruling in State v. Miller, 342 N.J. Super. 474 (App. Div. 2001), which sets forth the factors to consider for executing an arrest warrant at a

dwelling. However, without explanation, he rejected Miller's application here, finding that "Cleveland is more dispositive" of whether entry into the motel room to execute the warrant was constitutional.

On March 12, 2012, defendant entered a conditional plea of guilty to third-degree possession of cocaine. On June 18, 2012, he was sentenced to a five-year probation period, conditioned upon a six-month stay in an in-patient drug treatment facility. On November 2, 2012, defendant pled guilty to a violation of probation, and was sentenced to a three-year term of imprisonment, concurrent to a sentence he had been serving on an unrelated matter. This appeal followed.

Before us, defendant raises the following single argument:

> POINT I
>
> BECAUSE THE POLICE ENTERED A THIRD-PARTY'S ROOM TO EXECUTE THE MUNICIPAL COURT ARREST WARRANT AGAINST CHERRY, THE EVIDENCE SEIZED IS THE FRUIT OF A POISONOUS TREE AND MUST BE SUPPRESSED.

II

We begin by noting our standard of review. It is well understood that when considering a trial court's ruling on a motion to suppress evidence, "[w]e conduct [our] review with substantial deference to the trial court's factual findings, which we 'must uphold . . . so long as those findings are

supported by sufficient credible evidence in the record.'" State v. Hinton, 216 N.J. 211, 228 (2013) (quoting State v. Handy, 206 N.J. 39, 44 (2011)). "When . . . we consider a ruling that applies legal principles to the factual findings of the trial court, we defer to those findings but review de novo the application of those principles to the factual findings." Ibid. (citing State v. Harris, 181 N.J. 391, 416 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005)). However, despite our deferential standard, "if the trial court's findings are so clearly mistaken 'that the interests of justice demand intervention and correction,' then the appellate court should review 'the record as if it were deciding the matter at inception and make its own findings and conclusions.'" State v. Mann, 203 N.J. 328, 337 (2010) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

In accordance with the Fourth Amendment to the United States Constitution and Article 1, paragraph 7 of the New Jersey Constitution, "police officers must obtain a warrant . . . before searching a person's property, unless the search 'falls within one of the recognized exceptions to the warrant requirement.'" State v. DeLuca, 168 N.J. 626, 631 (2001) (quoting State v. Cooke, 163 N.J. 657, 664 (2000)); see also State v. Robinson, 200 N.J. 1, 3 (2009) ("The warrant

requirement embodied in both the [State and Federal Constitutions] limits the power of the sovereign to enter our homes and seize our persons or our effects."). Indeed, it has been said that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States Dist. Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752, 764 (1972). Under the exclusionary rule, evidence obtained in violation of an individual's constitutional rights will be excluded as "fruit of the poisonous tree." State v. Faucette, 439 N.J. Super. 241, 266 (App. Div.), certif. denied, 221 N.J. 492 (2015).

Law enforcement does not have an unfettered right to execute an arrest warrant in a dwelling. In Miller, we held that "in the absence of consent or exigency, an arrest warrant is not lawfully executed in a dwelling unless the officers executing the warrant have objectively reasonable bases for believing that the person named in the warrant both resides in the dwelling and is within the dwelling at the time." Miller, supra, 342 N.J. Super. at 479.

The fact that the search in question occurred in a motel room is of no consequence. While "the reasonable privacy expectations in a hotel room differ from those in a residence[,]" United States v. Agapito, 620 F.2d 324, 331 (2d

Cir.), cert. denied, 449 U.S. 834, 101 S. Ct. 107, 66 L. Ed. 2d 40 (1980), occupants of a hotel room are nevertheless entitled to the protection of the Fourth Amendment. See Hoffa v. United States, 385 U.S. 293, 301, 87 S. Ct. 408, 413, 17 L. Ed. 2d 374, 381 (1966); State v. Alvarez, 238 N.J. Super. 560, 571 (App. Div. 1990). "[A]n individual's Fourth Amendment rights do not evaporate when he rents a motel room . . . ." United States v. Jackson, 588 F.2d 1046, 1052 (5th Cir.), cert. denied, 442 U.S. 941, 99 S. Ct. 2882, 61 L. Ed. 2d 310 (1979). Thus, such warrantless searches are prohibited by the Fourth Amendment absent probable cause and exigent circumstances. Welsh v. Wisconsin, 466 U.S. 740, 749, 104 S. Ct. 2091, 2097, 80 L. Ed. 2d 732, 743 (1984); Alvarez, supra, 238 N.J. Super. at 571. The burden rests with the State to prove that the search "'falls within one of the few well delineated exceptions to the warrant requirement.'" Pineiro, supra, 181 N.J. at 19 (quoting State v. Maryland, 167 N.J. 471, 482 (2001)).

One of the exceptions to the warrant requirement is plain view. Under this doctrine, a warrantless search is allowed where three conditions are met: 1) the police officer must lawfully be in the viewing area; 2) the discovery of the evidence must be inadvertent; and 3) it must be immediately apparent to the police that the items in plain view were

evidence of a crime. State v. Bruzzese, 94 N.J. 210, 236 (1983) (citations omitted); see State v. Johnson, 171 N.J. 192, 206-07 (2002) (citations omitted). In addition, it is well-settled that a search warrant is unnecessary where a person consents to the search. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2044, 36 L. Ed. 2d 854, 858 (1973); State v. King, 44 N.J. 346, 352 (1965). "To justify a search on the basis of consent, the State must prove that the consent was voluntary and that the consenting party understood his or her right to refuse consent." State v. Maristany, 133 N.J. 299, 305 (1993) (citing State v. Johnson, 68 N.J. 349, 353-54 (1975)). Another exception is that once a person is under arrest, the police have the right to conduct a custodial search of defendant incident to the arrest. State v. Minitee, 210 N.J. 307, 318 (2012).

III

Applying these principles, we are constrained to disagree with the judge's determination denying defendant's motion to suppress. We conclude that the officers did not have the authority to enter the motel room to execute an arrest warrant on Cherry, and thus, their observation of CDS did not satisfy the plain view exception. Hence, the arrest and custodial search of defendant should be suppressed as fruits of the poisonous tree.

The initial focus of our inquiry is whether the motion judge erred in finding that the police were lawfully present in the motel room to execute the arrest warrant. Defendant argues that the police had no legal authority to enter the motel room. There was no exigency or consent for the police to enter a third-party's motel room to execute the arrest warrant against Cherry. Defendant asserts the motion judge misapplied Cleveland. There, the motel room door was opened, thus eliminating any expectation of privacy. In this case, the door was closed, and Cherry's opening it at law enforcement's command cannot be construed as consent. Citing Johnson, supra, 68 N.J. at 355, defendant argues that there is no evidence that Cherry made a knowing relinquishment of his right to refuse consent to enter the room.

In addition, defendant argues that under Miller, police had no right to request entry into the room to execute the warrant against Cherry, because there was no reason to conclude he was residing in the room. The motion court found there was insufficient proof that Cherry rented room 104. Defendant argues that the registered renter of the room had a reasonable expectation of privacy sufficient to merit police obtaining a search warrant before entering the room to arrest Cherry on the municipal court arrest warrant. While the registered guest of

the room may have allowed Cherry to enter the room freely, it does not mean that police had the same right.

We agree with defendant. We find fault with the motion judge's analysis of the facts and the legal implications drawn therefrom. First, we part company with the judge's finding that Miller is not dispositive of whether the police had the right to request entry into room 104 to arrest Cherry, which formed the linchpin to the State's claim that a plain view observation led to a custodial search of defendant. We decided in Miller that absence consent or exigency, police cannot execute an arrest warrant at a residence unless there is an objectively reasonable belief that the subject of the warrant resides in the dwelling and is present at the time. Miller, supra, 342 N.J. Super. at 479. As noted, for purposes of constitutional protections against illegal searches and seizures, a motel room is considered a residence, albeit a temporary one. Based on the record, we conclude the State has not met its burden in satisfying the Miller requirements.

In so doing, we disagree with the motion judge's conclusion that Cherry consented to entry into the motel room. The officers testified they banged on the door, ready to use the room key provided by the motel manager if the door was not opened, in order to apprehend Cherry due to the arrest warrant.

When Cherry opened the door, the police did not request permission to enter the room. Ruzzo testified that they did not ask Cherry, who opened the door, to step outside or if they could enter the room. Ruzzo was not even certain if Cherry was advised that there was a warrant for his arrest before he was actually taken into custody. Both Ruzzo and Leonard acknowledged that they entered the room to arrest Cherry upon seeing him in the doorway. To fulfill their mission to execute the warrant, it is apparent that the police did not seek consent to enter the room. Furthermore, even if one were to construe Cherry's opening of the door as consent to enter, there is no evidence that Cherry understood his right to refuse consent and voluntarily waived such right. State v. Carty, 170 N.J. 632, 639 (2002) (citation omitted). Thus, we cannot conclude that the police had consent to enter the room.

We also conclude there was no exigency for the police to enter the room to execute the warrant. Compare State v. Padilla, 321 N.J. Super. 96, 107-08 (App. Div.), certif. denied, 162 N.J. 198 (1999) (stating non-coercive knock, and request for permission to speak to occupant did not rise to a seizure, and teenager who opened door consented to officers' entry), with United States v. Mowatt, 513 F.3d 395, 400 (4th Cir. 2008) ("It is well established that a search occurs for Fourth Amendment

purposes when officers gain visual or physical access to a . . . room after an occupant opens the door not voluntarily, in response to a demand under color of authority.") (citation omitted). Cherry was not a fleeing suspect who entered the motel room to avoid apprehension. See State v. Jones, 143 N.J. 4, 19 (1995) ("Police officers acting pursuant to a valid arrest warrant have the right to follow a fleeing suspect into a private residence."). As soon as Cherry opened the door, the police knew he was the subject of the arrest warrant. They could have arrested him right there without crossing the threshold. Had the record indicated that Cherry attempted to leave the doorway and retreat into the room to avoid apprehension, there would have been cause for entry. Further, the arrest warrant was for failure to comply with sentence or time payment order for municipal court. The warrant did not indicate that Cherry was armed and dangerous. And, despite testimony that Cherry was seen carrying what looked like a gun case, there was no testimony the room was entered out of concern that a weapon might be used by Cherry or someone else in the room to thwart his apprehension. Thus, there were no special circumstances which necessitated entry into the motel room in order to prevent a violent altercation. See, e.g., State v. Craft, 425 N.J. Super. 546, 555 (App Div. 2012) (where police

were given consent to enter home to execute an arrest warrant against a resident for a shooting, who was potentially dangerous, they had the right to enter a room without a search warrant and apprehend him, as there was reason to believe he was in the room). Contrary to the motion court's finding, the police entered the room to execute the warrant, not to seize any CDS based upon a suspicion that a drug transaction had occurred. Thus, we cannot conclude that there was an exigency basis for the police to enter the room.

Having concluded there was no consent or exigency to enter the room in order to execute the warrant, we next address whether there was an objectively reasonable belief that Cherry resided in room 104 sufficient to justify execution of the warrant. Although Cherry moved freely between rooms 104 and 106, there was no proof that he resided in room 104 or had some form of control over the room during his presence at the motel. Despite inquiring with the hotel manager, the State could not even establish that Cherry rented room 104. The police did not establish that, based upon their surveillance or other reliable information, they had a reasonable belief that Cherry was residing in room 104. In fact, the testimony that the police initially attempted to grab Cherry outside the room clearly demonstrates that their plan was not to enter the room. In

addition, we perceive no factual or legal basis for the motion judge's finding that Cherry had "constructive possession" of the room. Thus, under Miller, the police did not have the right to enter the room to execute the warrant.

Given our determination that the police did not have the right to enter room 104 to execute Cherry's arrest warrant, they were not lawfully in the viewing area of the CDS, and the first prong of the plain view exception to a warrantless search was not met. See Bruzzese, supra, 94 N.J. at 236; Johnson, supra, 171 N.J. at 206. In turn, the seizure of heroin on the floor is invalid, as is the custodial search uncovering CDS on defendant incident to his arrest.

Lastly, while the motion judge's reliance on Cleveland has some appeal, ultimately we disagree with his analysis. Cleveland and the situation here both involve the execution of a warrant in a hotel room leading to a plain view observation of CDS. Cleveland, supra, 371 N.J. Super. at 302. Yet, the determinative factor in concluding the search and seizure constitutional in Cleveland was our reasoning that there was no expectation of privacy in a hotel room with an opened door. Ibid. We concluded that the risk of an unwarranted intrusion on any privacy interest that the defendant might have possessed was insufficient to require the police to obtain a search warrant

given the arrest warrant authorizing defendant's seizure. Ibid. Here, the motion judge equated the opened door in Cleveland with the voluntary opening of the door by Cherry. However, this analysis fails based upon the aforementioned reasons that the police here did not have consent to enter the room occupied by defendant. Since the police did not have the legal authority to enter the room, the plain view doctrine does not uphold the warrantless search.

Accordingly, we conclude that that the police officers were using the arrest warrant as a "surrogate for a search warrant," which is impermissible conduct under Miller, supra, 342 N.J. Super. at 500.

Reversed and remanded. We do not retain jurisdiction.