NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4453-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ORNETTE M. TERRY a/k/a
KEITH TERRY, KEITH M. TERRY,
ORHETTE TERRY, and RASHEIA TERRY,

Defendant-Appellant.

Argued May 25, 2016 – Decided June 13, 2016

Before Judges Ostrer, Haas and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 11-04-0466.

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Lerer, of counsel and on the brief).

Kimberly L. Donnelly, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Grace H. Park, Acting Union County Prosecutor, attorney; Amanda K. Dalton, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Keith Terry[1] appeals his conviction for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); and fourth-degree possession of hollow-nose bullets, N.J.S.A. 2C:39-3(f). Defendant contests the Law Division judge's decision to deny a motion to suppress evidence based on an illegal search of the motor vehicle he was driving. Defendant also contests his conviction based upon purported trial errors. As we conclude the search resulting in the discovery of the handgun and bullets was conducted without a warrant and exceeded the bounds of a permissible motor vehicle search, we reverse the judge's decision to deny the motion to suppress and vacate defendant's conviction.

We derive the relevant facts from the testimony elicited at the motion to suppress. On December 31, 2010, Union Township Police Officer Joseph Devlin was traveling east on Morris Avenue at approximately 6:50 p.m. during his patrol shift. Devlin observed a white GMC truck run a stop sign at Ingersoll Terrace and turn right onto Morris Avenue. He drove behind the truck and activated his lights and siren to effect a motor vehicle

[1] Defendant's legal name is Keith Terry. He was tried as Keith Terry in a second trial after the first trial resulted in a mistrial when the State introduced evidence that defendant misrepresented his name as being "Ornette" Terry. The State's witnesses were barred from referring to defendant as Ornette Terry in the second trial.

stop. The vehicle did not stop, switched lanes multiples times without signaling, and continued to travel for approximately one-half of a mile before stopping at a BP gas station.

Devlin notified dispatch of the situation and provided the license plate number and model of the truck. Dispatch informed Devlin that the truck was a rental from Hertz at Newark Airport. There was no report that the truck was stolen.

Devlin and another Union police officer who responded to the gas station blocked defendant's truck, drew their weapons, and approached the vehicle. Devlin ordered defendant to show his hands multiple times but defendant did not comply. Devlin then opened the door and ordered defendant out of the truck. Defendant stepped out of the truck and leaned against the truck placing his hands in his pockets. On multiple occasions Devlin instructed defendant to take his hands out of his pockets. Devlin proceeded to pat defendant down, checking defendant's pants and jacket pockets. No weapons or contraband were found.

Defendant produced his driver's license upon request by Devlin. Devlin confirmed that defendant had no warrants and the information on the driver's license was accurate. Devlin testified that defendant was not under arrest at that point and he did not require the vehicle's registration to issue defendant a traffic ticket. Devlin was also aware that the truck was not

registered to defendant. Nonetheless, Devlin asked defendant for the vehicle registration and insurance card so he could write a ticket for failure to stop and for unsafe lane change. Defendant did not respond. When Devlin requested the ownership credentials a second time, defendant shrugged his shoulders. Devlin then inquired of defendant whether he owned the truck or had any paperwork for it. Defendant did not respond. Devlin testified that defendant was not free to enter the truck to get any information, nor did he inquire what defendant meant when he shrugged his shoulders.

After the exchange, Devlin proceeded to the passenger's side of the truck to search the glove compartment for the registration and insurance for the stated purpose of issuing a motor vehicle summons. Devlin did not locate any credentials in the glove box. As he was exiting the vehicle, Devlin saw a reflection on the floor of the truck through use of his flashlight. The reflection was from a handgun located on the floorboard protruding from under the seat. Devlin testified he saw the gun in his line of sight on the floorboard because the glove box dropped downwards. He did not immediately retrieve the handgun. Instead, defendant was placed under arrest and the truck was impounded at the Union police station until a search warrant to retrieve the gun was obtained days later. A search

of defendant's jacket incident to arrest uncovered the rental agreement and registration.

Defendant was indicted by a Union County Grand Jury for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count one); and fourth-degree possession of hollow-nose bullets, N.J.S.A. 2C:39-3(f) (count two). Thereafter, defendant filed a motion to suppress the handgun loaded with hollow-nose bullets uncovered during a motor vehicle search. The judge denied the motion in an oral opinion following a hearing on February 15, 2013. Defendant subsequently moved for reconsideration, which the judge denied in an oral opinion on March 18, 2013.

The first trial commenced on August 13, 2013. Upon motion by defendant, the trial judge granted a mistrial based on the State's failure to produce any evidence that defendant had misrepresented himself as "Ornette" Terry. After declaring a mistrial, the judge denied defendant's motion to bar retrial. A second trial commenced on August 21, 2013, and concluded on August 28, 2013. The jury convicted defendant on both counts. On November 22, 2013, defendant was sentenced on count one to five years in state prison, subject to an eighty-five percent parole disqualifier, and a concurrent one-year sentence on count two. This appeal followed.

Defendant raises the following arguments on appeal:

POINT I

BECAUSE THE OFFICER HAD NO JUSTIFICATION TO CONDUCT A WARRANTLESS SEARCH FOR THE CAR'S REGISTRATION AND INSURANCE INFORMATION, THE GUN FOUND IN THE CAR MUST BE SUPPRESSED.

POINT II

BECAUSE THE ADMISSION OF EXTENSIVE HEARSAY TESTIMONY VIOLATED BOTH THE CONFRONTATION CLAUSE AND THE RULES OF EVIDENCE AND EVISCERATED . . . DEFENDANT'S MOST COMPELLING DEFENSE, HIS CONVICTIONS MUST BE REVERSED. [NOT RAISED BELOW]

. . . .

POINT III

THE PROSECUTION'S SUMMATION BOTH IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENSE AND INAPPROPRIATELY URGED THE JURY TO FIND THAT . . . DEFENDANT FLED THE POLICE DUE TO HIS GUILT WITHOUT A SUFFICIENT EVIDENTIARY BASIS. THE RESULTANT PREJUDICE REQUIRES REVERSAL OF . . . DEFENDANT'S CONVICTIONS. [PARTIALLY RAISED BELOW]

. . . .

POINT IV

THE TRIAL COURT'S ERRONEOUS INSTRUCTION THAT THE STATE DID NOT HAVE TO PROVE THAT . . . DEFENDANT KNEW THE AMMUNITION WAS [HOLLOW-NOSED] IN ORDER TO BE FOUND GUILTY . . . REMOVED THE STATE'S BURDEN TO PROVE . . . DEFENDANT'S MENS REA AND THEREFORE VIOLATED HIS CONSTITUTIONAL RIGHTS TO HAVE ALL ELEMENTS FOUND BY A JURY BEYOND A REASONABLE DOUBT. [NOT RAISED BELOW]

We limit our discussion to the first argument raised by defendant.

The Supreme Court has recited the standard of review applicable to an appellate court's consideration of a trial judge's fact-finding on a motion to suppress:

> [A]n appellate court reviewing a motion to suppress 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, 386 N.J. Super. 208, 228 (App. Div. 2006)] (citing State v. Locurto, 157 N.J. 463, 474 (1999)); see also State v. Slockbower, 79 N.J. 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the . . . investigatory search [was] not based on probable cause"); State v. Alvarez, 238 N.J. Super. 560, 562-64 (App. Div. 1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present in the record" (citing State v. Johnson, 42 N.J. 146, 164 (1964))).
>
> An appellate court "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." Johnson, supra, 42 N.J. at 161. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. Id. at 162. A trial court's findings

> should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." Ibid. In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." Ibid.
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> [State v. Elders, 192 N.J. 224, 243-44 (2007).]

An appellate court need not give deference to a trial judge's interpretation of the law. State v. Vargas, 213 N.J. 301, 327 (2013); State v. Gandhi, 201 N.J. 161, 176 (2010); State v. Handy, 412 N.J. Super. 492, 498 (App. Div. 2010) (stating that our review of the judge's legal conclusions is plenary), aff'd, 206 N.J. 39 (2011). Legal issues are reviewed de novo. Ibid. "A trial court's interpretation of the law . . . and the consequences that flow from established facts are not entitled to any special deference." State v. Lamb, 218 N.J. 300, 313 (2014).

In his oral opinion denying the motion to suppress, the judge held that defendant was required to present the registration upon demand, and his failure to do so permitted Devlin to perform a search of the vehicle to uncover the documents. In the opinion, the judge did not cite to controlling decisional law. The judge did reference that it was "possible" that defendant's failure to comply with Devlin's

request was because "he was so scared that he just did not do anything." On the motion for reconsideration, the judge held that State v. Lark, 319 N.J. Super. 618 (App. Div. 1999), aff'd o.b., 163 N.J. 294 (2000), was inapplicable. The judge distinguished Lark by reasoning that it "did not involve a search of a vehicle for registration[,]" and therefore was "not controlling at all."

The Fourth Amendment to the United States Constitution and Article 1, paragraph 7 of the New Jersey Constitution guarantee the right "of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures[.]" U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. The Fourth Amendment and Article 1, paragraph 7 of the New Jersey Constitution both "require[] the approval of an impartial judicial officer based on probable cause before most searches may be undertaken." State v. Patino, 83 N.J. 1, 7 (1980).

Warrantless searches are presumed invalid. State v. Gamble, 218 N.J. 412, 425 (2014); State v. Cooke, 163 N.J. 657, 664 (2000). "Any warrantless search is prima facie invalid, and the invalidity may be overcome only if the search falls within one of the specific exceptions created by the United States Supreme Court." State v. Hill, 115 N.J. 169, 173 (1989) (citing Patino, supra, 83 N.J. at 7). The State carries the burden of

proving the existence of an exception by a preponderance of the evidence. State v. Amelio, 197 N.J. 207, 211 (2008), cert. denied, 556 U.S. 1237, 129 S. Ct. 2402, 173 L. Ed. 2d 1297 (2009).

One exception is the automobile exception, under which our Supreme Court has permitted the warrantless search of a vehicle where unforeseeable and spontaneous circumstances give rise to probable cause and there is some degree of exigency. State v. Pena-Flores, 198 N.J. 6, 28 (2009) (requiring an unexpected stop, probable cause for a search, and that "exigent circumstances exist under which it is impracticable to obtain a warrant"); see State v. Witt, 223 N.J. 409, 423-25, 427, 450 (2015) (prospectively overruling the requirement in Pena-Flores, and requiring no exigency beyond "the inherent mobility" of the vehicle).

"[S]eparate and apart from the automobile exception," our Supreme Court has repeatedly recognized another exception permitting a limited warrantless search of a vehicle to uncover proof of ownership or insurance. Pena-Flores, supra, 198 N.J. at 31. Under this "driving documents" exception, "[i]f the vehicle's operator is unable to produce proof of registration, the officer may search the car for evidence of ownership." State v. Keaton, 222 N.J. 438, 448 (2015) (citing State v.

Boykins, 50 N.J. 73, 77 (1967)); accord Pena-Flores, supra, 198 N.J. at 31; Patino, supra, 83 N.J. at 12; State v. Gammons, 113 N.J. Super. 434, 437 (App. Div.), aff'd o.b., 59 N.J. 451 (1971).

In Keaton, supra, 222 N.J. at 448 (citing Boykins, supra, 50 N.J. at 77), the Court explained that "a traffic violation may justify a search for things relating to that stop[,]" and if the driver is "unable to produce proof of registration, the officer may search the car for evidence of ownership."[2] "Such a search must be reasonable in scope and tailored to the degree of the violation." Id. at 448-49 (quoting Patino, supra, 83 N.J. at 12). "[A] search to find the registration would be permissible if confined to the glove compartment or other area where registration might normally be kept in a vehicle." Id. at 449 (quoting Patino, supra, 83 N.J. at 12); accord Pena-Flores, supra, 198 N.J. at 31 (upholding such a search).

Prior to conducting a "limited search," the police are "required to provide [the] defendant with the opportunity to

[2] Keaton was decided in 2015 while defendant's direct appeal was pending, but was based on "settled law" announced in Slockbower, State v. Bruzzese, 94 N.J. 210, 236 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984), and State v. Jones, 195 N.J. Super. 119, 122 (App. Div. 1984). Keaton, supra, 222 N.J. at 449-50. Therefore, no retroactivity analysis is required because the decision is "not a clear break with the past, but a simple extension of the principle of prior cases . . . ." State v. Bey, 112 N.J. 123, 213 (1988).

present his credentials before entering the vehicle. If such an opportunity is presented, and the defendant is unable or unwilling to produce his registration or insurance information, only then may an officer conduct a search for those credentials." Keaton, supra, 222 N.J. at 442-43.

Although defendant was required both to have the documents in his possession and to produce them when requested pursuant to N.J.S.A. 39:3-29 (see also State v. Baum, 393 N.J. Super. 275, 286 (App. Div. 2007), aff'd as modified, 199 N.J. 407, 424 (2009); State v. Perlstein, 206 N.J. Super. 246, 253 (App. Div. 1985)), there are several factors present in the instant factual scenario that militate against the reasonableness of the search. Preceding the search of the glove box, there was no question relating to the ownership of the vehicle as Devlin knew that the truck was owned by Hertz and was not reported stolen. Also, defendant produced his driver's license and Devlin verified the validity of the license. Devlin also testified that the registration and insurance were not required for the issuance of a summons for failure to stop and unsafe lane change – which was the reason provided by Devlin for his requesting the documents and entering the vehicle.[3]

[3] The State argues that the search was appropriate because "defendant's failure to provide a valid registration alone gave (continued)

In regard to defendant's ability to retrieve the documents Devlin sought, he testified on cross-examination that defendant was not permitted to re-enter the vehicle to retrieve the credentials:

> Counsel: And [defendant is] not allowed back in the car yet?
>
> Devlin: No.
>
> . . . .
>
> Counsel: And after you got [the driver's license] from him he still wasn't free to go back in the car, right?
>
> Devlin: (No verbal response).
>
> Counsel: You weren't letting him back to sit in the car, correct?
>
> Devlin: Not at that point, no.
>
> Counsel: But he wasn't under arrest yet?
>
> Devlin: No.
>
> . . . .
>
> Counsel: And he didn't give you permission to go in the car, correct?

(continued)
rise to at least a reasonable suspicion that the car was stolen[.]" The State's argument is belied by the record. Devlin did not testify that he required the credentials for such a purpose; only for the purpose of issuing a traffic ticket. If Devlin did suspect the car was stolen and sought the credentials as part of an investigation, he would have needed probable cause — more than a "reasonable suspicion" — to conduct the search. Pena-Flores, supra, 198 N.J. at 28; Witt, supra, 223 N.J. at 422, 450.

Devlin: He made no effort to say verbally or physically that he was going to go into the car to get it or where it was.

Counsel: Did you tell him he could go into the car to get the registration out?

Devlin: No.

Devlin testified that he interpreted defendant's non-responsive shrug to indicate that defendant "had no idea" where the credentials were.

In context, defendant was detained by police officers with their weapons drawn. The entire incident took place in a matter of minutes. Hence, it is entirely likely — as the judge acknowledged in his initial decision — that defendant's non-verbal response to Devlin's requests may have been the product of fear. Even if Devlin's interpretation of defendant's shrug was accurate as to his state of mind, we conclude that "unknowing" is not synonymous with "unwilling" in relation to the exception cited in Keaton to permit entry into the vehicle. We also conclude that since defendant's "inability" to re-enter the vehicle was premised upon the police officers' disallowance, his "inability" to produce the credentials also does not qualify as an exception under Keaton. Here, as in Keaton, defendant was

not "provided the opportunity to produce his credentials." Keaton, supra, 222 N.J. at 450.

We next address the applicability of Lark, where this court held that a search of a vehicle for proof of the driver's identity was unreasonable "absent probable cause to believe that a further offense has been committed[.]" Lark, supra, 319 N.J. Super. at 627. We also held that because defendant's identity was unnecessary to prove the motor vehicle offense, the search was not justified. Id. at 627. Further, we held that "[w]here a driver has failed to produce his license and an investigating officer is merely trying to determine the driver's identity so he can issue a citation, no search of the passenger compartment can be justified." Id. at 630. Thus, Lark expressly forbade a search for failure to produce a driver's license where it was only needed to issue a citation; and instead required probable cause for such a search where there was suspicion of a further offense.

In reaching our determination, we have not applied Lark since we view Keaton as the controlling law on the issue regarding warrantless automobile searches, absent probable cause, for the limited purpose of obtaining motor vehicle credentials. We conclude that Lark has effectively been

superseded in light of the Court's decisions in Keaton and Pena-Flores.

Reversed.