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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2975-11T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JERMAINE WRIGHT, a/k/a
ARAMIS WRIGHT,

Defendant-Appellant.

Argued May 21, 2014 – Decided August 26, 2014

Before Judges Sapp-Peterson and Hoffman.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 10-01-49.

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

Jane C. Schuster, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Sarah Lichter, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Following the denial of his suppression motion, defendant entered into a negotiated plea agreement, pleading guilty to narcotics-related offenses in connection with three indictments.

In denying the suppression motion, the motion judge rejected defendant's contention that the officers' actions constituted a de facto arrest, unaccompanied by probable cause. The judge found police conducted an investigative stop, of limited duration and, which involved limited intrusion upon defendant's liberty. The judge additionally found that some of the contraband seized was in plain view and the remaining contraband seized was justified based upon probable cause and exigent circumstances.

The evidence from which the motion judge reached his decision was provided by three witnesses, who testified during the evidentiary hearing held in response to defendant's suppression motion. Detective John Torrey from the Division of Criminal Justice, Detective Thomas Tumillo of the Trenton Police Department, and a Verizon Wireless employee were presented by the State. Defendant presented one witness, a resident from the neighborhood where the stop occurred ("neighborhood resident").

Detective Torrey was performing surveillance operations in Ewing Township on an unrelated matter during the evening of June 16, 2008, when he received a tip from a reliable confidential informant that an individual known to the informant as "Jazz," and later identified as defendant, was in the Wilbur section of Trenton delivering drugs from a gray or silver Hyundai bearing a

specific license plate number. Detective Torrey and his partner, Sergeant Keith Stopko, left their surveillance operation and traveled to the Wilbur section to follow up on the information received from the confidential informant.

Once in the area, Detective Torrey saw the vehicle described by the confidential informant travelling on East State Street, in the opposite direction. The detective made a U-turn and proceeded to follow the vehicle, which then turned onto Chambers Street. The vehicle then turned right onto Locust Avenue, where it pulled over and stopped. Not wanting to be detected, Detective Torrey traveled around the block. Upon his return, however, the vehicle had moved. He then contacted the Trenton Police Department, where he spoke to Detective Tumillo, who was assigned to the Tactical Anti-Crime (TAC) Unit. Detective Torrey asked Detective Tumillo to conduct "an investigative detention" of the vehicle if he found it. He provided Detective Tumillo with a description of the vehicle.

When Detective Tumillo and his partner, Detective Derek Simpson, arrived in the area, they spotted the vehicle described by Detective Torrey parked with its headlights on. He parked the vehicle nose-to-nose in front of the gray Hyundai, approximately ten feet away. The two detectives exited their vehicle and started to approach the vehicle, with Detective

Tumillo approaching on the driver's side and Detective Simpson approaching the vehicle on the passenger side. Detective Torrey recalled observing the Trenton police officers approaching the subject vehicle with guns drawn, a fact which Detective Tumillo denied.

The neighborhood resident also testified that the two officers had their guns drawn. In addition, he stated police ordered the occupants out of the car. The motion judge, in his findings of fact, found that the officers' guns were drawn, but did not make any factual finding as to whether police ordered the occupants out of the vehicle.

As the officers approached the vehicle they used their flashlights to illuminate the vehicle and saw the two occupants seated in the vehicle looking towards the vehicle's console. Defendant, who was seated in the passenger seat, opened the door and attempted to exit the vehicle. Detective Simpson stopped him from doing so, but not before Detective Tumillo was able to see "a black and silver[-]colored scale sitting on the center console with a nice quantity of suspected CDS cocaine sitting on it." Detective Tumillo explained he knew that he had observed a scale because "it was lit up in blue digital. . . . [l]ike a little LED screen"

Based upon these observations, Detective Tumillo directed Detective Simpson to place defendant under arrest and then he ordered the driver to exit the vehicle to be placed under arrest. As the driver did so, she "threw" her purse on the front seat. Detective Tumillo observed a large amount of money in her purse, which was open. He also saw a black bag on the passenger seat that was partially open, displaying a large quantity of cocaine. He placed the driver under arrest.

The motion judge framed the issues before the court as whether "Trenton Police [had] a reasonable and articulable suspicion that defendant Wright was engaged in the distribution of CDS to justify stopping his vehicle? Second, upon conducting that motor vehicle stop, did the police have probable cause to seize both drugs and currency without a warrant?" The judge answered both questions in the affirmative, and denied the motion. In doing so, the judge found that the officers had conducted an investigative stop, which was "adequately supported by a reasonable and articulable suspicion of criminal activity." The judge determined that the police conducted a stop but not an arrest, explaining "the TAC vehicle was parked in such a way as to block defendants' exit. The officers quickly exited, to prevent defendants from departing the scene on foot. They also approached with their guns drawn, conveying a clear and

unmistakable message to defendants that they were not free to leave."

Notwithstanding his resolution of the dispute as to whether the police approached the vehicle with guns drawn in favor of the testimony of the neighborhood resident, who stated police had their guns drawn, the judge rejected defendants' contention that because the officers had their guns drawn, they converted the stop to an arrest, which required probable cause:

[T]he court does not find that defendants were under arrest as the officers approached the vehicle with guns drawn. Defendants were not then held for an extended period of time. Upon the officers' approach of Wright, whom they believed to possess cocaine in distributable amounts, the drawing of guns was a reasonable protective measure. In short, the officers' actions were not unnecessarily intrusive or intimidating. Thus, the defendants were not arrested until cocaine was located in the vehicle and Tumillo ordered their arrest.

With regard to the evidence seized from the console, the judge determined it was discovered in plain view. With respect to the remaining evidence seized, the judge concluded its seizure was justified on the basis of probable cause and exigent circumstances.

On appeal, defendant raises one point, together with four sub-points for our consideration:

POINT I

THE PHYSICAL EVIDENCE MUST BE SUPPRESSED BECAUSE THE POLICE HAD NO CONSTITUTIONALLY VALID REASON TO STOP AND DETAIN THE CAR OR SEIZE ANYTHING FOUND INSIDE IT.

- A. Because the questionable informant's vague tip was not accurate, and police could merely corroborate the car's general location rather than any evidence of criminal activity, they had no reasonable suspicion to stop the car and detain its occupants.
- B. Because it was undisputed that the searching officer "did not perceive exigent circumstances" and "had the scene under control," the judge's finding of exigency must be reversed, and all items seized pursuant to the warrantless search must be suppressed.
- C. The judge properly found that the black plastic bag and the purse, and their contents, were not in plain view and were in fact seized pursuant to a warrantless search of the Sonata.
- D. The judge based his finding that 28 grams of cocaine and a scale were in plain view, "by a bare preponderance of the evidence" wholly on his own baseless belief that weighing 28 grams of loose cocaine on a car's console, with windows down and headlights on, while parked on a busy residential street is "consistent with preparations for sale."

We first comment upon the judge's conclusion that police did not arrest defendant. The judge clearly found that neither defendant nor his co-defendant were free to leave under the factual circumstances presented. He concluded the actions of

the police officers were indicative of a stop rather than an arrest because the "the officers' actions were not unnecessarily intrusive or intimidating." It is apparent the judge focused upon the brevity of the police officers' actions. While the brevity of a police officer's intrusion into the liberty of an individual is a factor to be considered, it is only one factor, among other considerations, which must be considered in determining whether police conduct passes constitutional muster. See State v. Dickey, 152 N.J. 468, 475 (1998) (stating the temporary detention of individuals during an automobile stop by police, "'even if only for a brief period and for a limited purpose,'" constitutes a seizure) (quoting Whren v. U.S., 517 U.S. 806, 809-10, 116 S. Ct. 1769, 1772, 153 L. Ed. 2d 89, 95 (1996)). Having concluded defendant was not free to leave, the judge characterized the actions of the officers as a stop rather than an arrest and, in doing so, measured the officers' conduct based upon reasonable and articulable suspicion of criminal activity, rather than by probable cause, as to the existence of criminal activity on the part of the seized individual, the standard necessary to effectuate a warrantless arrest. State v. Gibson, __ N.J. __, __ (2014) (slip op. at 26)

The Fourth Amendment to the Constitution of the United States and Article I, paragraph 7 of the New Jersey Constitution

protect citizens of this State from unreasonable searches and seizures. State v. Pena-Flores, 198 N.J. 6, 18 (2009). "A warrantless [seizure] is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." State v. Cooke, 163 N.J. 657, 664 (2000). "'Because our constitutional jurisprudence evinces a strong preference for judicially issued warrants, the State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure falls within one of the few well-delineated exceptions to the warrant requirement.'" State v. Mann, 203 N.J. 328, 337-38 (2010) (quoting State v. Elders, 192 N.J. 224, 246 (2007)).

Police encounters with individuals generally occur at three distinct levels: a field inquiry; an investigatory stop; and/or an arrest. State v. Nishina, 175 N.J. 502, 510-11 (2003). There are constitutional considerations at all levels of encounters. Ibid. It is the investigatory stop which the trial court here found as a basis for upholding the officers' actions.

An investigatory stop or the so-called "Terry"¹ stop does not require probable cause to believe a person has committed or is about to commit an offense. Id. at 510. Rather, "[a] police

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

officer may conduct an investigatory stop if, based on the totality of the circumstances, the officer ha[s] a reasonable and particularized suspicion to believe that an individual has just engaged in, or was about to engage in, criminal activity." State v. Stoval, 170 N.J. 346, 356 (2002) (citing Terry, supra, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). Nonetheless, "an investigative stop may become a de facto arrest" when the conduct of police officers escalates into action that is more intrusive than what is necessary to accomplish the investigation, measured of course, under the totality of the then existing circumstances. State v. Bernokeys, 423 N.J. Super. 365, 372 (App. Div. 2011). When determining whether police have utilized the least intrusive measures to accomplish the investigative stop, courts should consider the "temporal duration of the stop." Id. at 372 (citing Dickey, supra, 152 N.J. at 478-79). Additionally, consideration should be given to the degree of fear or humiliation engendered by police officers' conduct in conducting the investigative stop. Id. at 374. The presence of a gun is also a factor which should be considered. Hedges v. Musco, 204 F.3d 109, 120 (3d Cir. 2000). Ultimately, "[i]n any given case, the reasonableness of the investigatory detention is a function of the degree and kind of intrusion upon the individual's

privacy balanced against the need to promote governmental interests. Bernokeits, supra, 423 N.J. Super. at 372 (citing State v. Davis, 104 N.J. 490, 504 (1986)).

Here, Detective Torrey received information from a reliable confidential informant that defendant, known as "Jazz," was making drug deliveries from a silver or gray Sonata in the Wilbur section of Trenton, a "high-narcotics distribution area." Based upon this information, the detective proceeded to that area in an unmarked vehicle, where he observed a vehicle meeting the description given by the informant. The vehicle traveled down East State Street, and the detective started to follow it. He saw the vehicle stop once, but no other activity. He briefly lost visual sight of the vehicle. He contacted Trenton police and requested that they stop the vehicle for an investigative detention.

We agree, as the motion judge found, the stop here was not an arrest, meaning that defendant had not been brought into the formal custodial status of a defacto arrestee because the intrusion was minimal. See Dickey, supra, 152 N.J. at 477. Nonetheless, "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of this provision," thereby requiring

reasonable and articulable suspicion to justify the detention. Id. at 475 (citations and internal quotation marks omitted).

Here, there were no particularized facts justifying the seizure. Beyond the identification and location of the vehicle and the fact that defendant was delivering drugs from the vehicle in the Wilbur section of Trenton, based upon personal knowledge, the informant provided no further information. Indeed, the motion judge noted that the tip did not inform police that there were two occupants in the motor vehicle, which the judge stated tended to "undermine as opposed to corroborate the informant's tip." The motion judge concluded, however, that Detective Torrey provided "significant" details, which corroborated the informant's tip. Such a finding however, is not reflected in the record.

Detective Torrey observed no activity consistent with drug activities from the time he first observed the vehicle and commenced to follow it before it pulled over onto Locust Avenue. He never testified to making any other observations as to the vehicle or the conduct of its occupants. He made the decision to conduct an investigative stop based solely upon the information provided by the confidential informant and his apparent corroboration that the vehicle meeting the confidential informant's description was in the Wilbur section.

The record does reflect that the vehicle was observed briefly stopping on Locust Avenue, leaving that location a short time later, and then being observed parked on North Olden Avenue, the location where the TAC Unit approached the vehicle and seized the vehicle and its occupants. This moving from one location to another is inferentially consistent with making deliveries. Detective Torrey, however, never testified that this conduct was part of the particularized facts that formed his reasonable and articulable suspicion that criminal activity was afoot. Our standard of review requires that we determine whether there was reasonable and articulable suspicion based upon the officer's assessment of the totality of circumstances with which he was confronted at the time the decision to seize a suspect is made, Davis, supra, 104 N.J. at 504, not from what we may later glean from the record.

Defendant's presence in a high crime area in a vehicle described by the confidential informant, irrespective of the informant's demonstrated reliability, without more cannot support an "investigative stop." State in the Interest of D.S., 125 N.J. Super. 278, 286 (App. Div.) (Botter, J.A.D. dissenting), rev'd, 63 N.J. 541 (1973). We do not suggest that purely innocent actions, such as here, where a vehicle is observed travelling around in a high narcotics drug-distribution

area means an officer cannot base a finding of reasonable and articulable suspicion upon such perceived innocent actions ascribed to a suspect. State v. Pineiro, 181 N.J. 13, 25 (2004). Rather, what is required is "some objective manifestation that the person [to be detained] is, or is about to be engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 628 (1981). In other words, the essential question to be answered is, "would the facts available to the officer at the moment of the seizure . . . warrant a man of reasonable caution in the belief that the action taken was appropriate?" State v. Arthur, 149 N.J. 1, 7-8 (1997).

The information upon which Detective Torrey based the decision to have the vehicle stopped lacked the particularized specificity contemplated. See State v. Birkenmeier, 185 N.J. 552 (2006). In Birkenmeier, the confidential informant provided specific details as to what the defendant was about to do. As the confidential informant reported would occur, the police observed the defendant leaving his home at 4:30 p.m. carrying a laundry tote bag and driving away in the car identified by the confidential informant. Id. at 560. "Once corroborated, the confidential informant's information gave rise to reasonable and articulable suspicion justifying an investigatory stop of

defendant." Id. at 561. No such corroboration occurred here. Consequently, the seizure of defendant was not justified by reasonable and articulable suspicion. Davis, supra, 104 N.J. at 504.

Likewise, Detective Tumillo did not approach the parked vehicle because Detective Torrey had corroborated the informant's tip that defendant was making drug deliveries in the Wilbur section. Under cross-examination, Detective Tumillo acknowledged that he intended to detain defendant based solely upon the request of Detective Torrey.

An investigatory stop is valid only if the officer has a "particularized suspicion" based upon an objective observation that the person stopped has been [engaged] or is about to engage in criminal wrongdoing. The "articulable reasons" or "particularized suspicion" of criminal activity must be based upon the law enforcement officer's assessment of the totality of circumstances with which he is faced. Such observations are those that, in view of [the] officer's experience and knowledge, taken together with rational inferences drawn from those facts, warrant the limited intrusion upon the individual's freedom.

[Davis, supra, 104 N.J. at 504.]

In the absence of any observations by the police officers, other than defendants' presence in the Hyundai and the Hyundai's presence in the Wilbur section, the purported criminal activity which justified the stop was completely supplied by the

confidential informant, who only reported that he saw defendant in the Wilbur section, not that he saw defendant engaging in any narcotics activities. Defendant's mere presence in a known narcotics-distribution neighborhood, without more, will not sustain a warrantless seizure. That the motion judge found the confidential informant reliable, based upon past information he supplied to law enforcement, which led to two convictions, cannot compensate for the absence of any corroborative evidence here, which reflects some objective manifestation of criminal activity on the part of the person detained. Cortez, supra, 449 U.S. at 417-18, 101 S. Ct. at 695, 66 L. Ed. 2d at 628.

Because the seizure of defendant was not based on reasonable and articulable suspicion and, therefore, unlawful, the next issue is whether the discovery of drugs in the vehicle was the result of the unlawful investigatory stop, and, if so, whether that evidence must be suppressed. State v. Smith, 155 N.J. 83, 100, cert. denied, 525 U.S. 1033, 119 S. Ct. 576, 142 L. Ed. 2d 480 (1998). "Evidence obtained as the fruit of an unlawful search or seizure must be suppressed." Smith, supra, 155 N.J. at 100.

Three factors determine whether subsequently obtained evidence is tainted by a prior illegality: (1) the presence of intervening circumstances between the original illegality and the challenged evidence; (2) the temporal proximity between the original

illegality and the challenged evidence; and (3) the flagrancy and purpose of the police misconduct.

[Ibid.]

The judge found the plain view and exigent circumstances exceptions to the warrant requirement justified the seizure of the suspected narcotics and paraphernalia. The plain view exception to the warrant requirement has three requirements. Mann, supra, 203 N.J. at 340-41. First, the police officer must be lawfully in the viewing area. State v. Bruzzese, 94 N.J. 210, 236 (1983) (citing Coolidge v. New Hampshire, 403 U.S. 443, 465-68, 91 S. Ct. 2022, 2037-39, 29 L. Ed. 2d 564, 582-84 (1971)).

An example of the applicability of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character. Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. Thus the police may inadvertently come across evidence while in "hot pursuit" of a fleeing suspect. And an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant. Finally, the "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object.

[Coolidge, supra, 403 U.S. at 465-66, 91 S. Ct. at 2037-38, 29 L. Ed. 2d at 582-83 (citations omitted).]

In the context of a warrantless seizure, police must be lawfully in the viewing area as well. "The question whether property in plain view of the police may be seized . . . must turn on the legality of the intrusion that enables them to perceive and physically seize the property in question." State v. Johnson, 171 N.J. 192, 208 (2002) (quoting Texas v. Brown, 460 U.S. 730, 737, 103 S. Ct. 1535, 1541, 75 L. Ed. 2d 502, 510 (1983)).

Second, the officer has to discover the evidence "inadvertently," meaning that he did not know in advance where evidence was located nor intend beforehand to seize it.² Bruzzese, supra, 94 N.J. at 236 (citing Coolidge, supra, 403 U.S. at 470, 91 S. Ct. at 2040, 29 L. Ed. 2d at 585; (finding "a plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated,

² The United States Supreme Court has indicated that the inadvertence element may no longer be required. See Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); see also State v. Johnson, 171 N.J. 192, 213 (2002).

where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different.")) Third, it has to be "immediately apparent" to the police that the items in plain view were evidence of a crime, contraband, or otherwise subject to seizure. Bruzzese, supra, 94 N.J. at 236 (citing Coolidge, supra, 403 U.S. at 466, 91 S. Ct. at 2038, 29 L. Ed. 2d at 583).

Here, there were no intervening circumstances between the unlawful seizure and the discovery of the drugs. The officers were not lawfully in the viewing area. The officers were in the viewing area as a direct result of an illegal investigatory detention. The vehicle was otherwise "lawfully" parked on the street. Furthermore, the discovery was anticipated. The police officers detained the vehicle based solely upon the request of Detective Torrey, who based his decision to conduct an "investigative detention" on the limited information provided by the confidential informant that the vehicle was being used to distribute illicit drugs.

Likewise, the seizure of the drugs from the purse and its contents based upon probable cause and exigent circumstances was not an intervening circumstance sufficiently attenuated from the illegal stop. State v. Walker, 213 N.J. 281, 295 (2013) (noting that although the information provided by the reliable

confidential informant was insufficient to establish probable cause "subsequent events, created by defendant's own actions, established probable cause and exigent circumstances which justified an entry into [the] defendant's apartment"). In Walker, even without probable cause, police had the right to conduct an investigation of the tip and did so by going to the defendant's apartment and knocking on the door. Id. at 286. There was nothing unlawful about that conduct. Ibid. There was no seizure, merely a knock on the door, which the defendant had a choice to answer or to ignore. Ibid. The defendant chose to open the door, holding a marijuana cigarette. Ibid.

Here, on the other hand, without any objective manifestation of criminal activity, police stopped defendant, relying solely upon the limited and uncorroborated information from the confidential informant that defendant was distributing drugs. Under these circumstances, the exigency was police created and not sustainable on this record. State v. Hutchins, 116 N.J. 457, 460 (1989).

Consequently, there is no separate basis upon which to sustain the seizure of that evidence based upon plain view or exigent circumstances. The illegal stop of defendant ultimately led to the drugs. Therefore, suppression of the

drugs is required as the "fruit" of an unlawful seizure. Smith,
supra, 155 N.J. at 100.

Reversed.

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



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