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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0023-17T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

MAURICE HOUSTON,

Defendant-Respondent.

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Argued November 13, 2017 – Decided December 12, 2017

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment Nos. 16-06-1965 and 16-06-1966.

Kayla Elizabeth Rowe, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for appellant (Robert D. Laurino, Acting Essex County Prosecutor, attorney; Kayla Elizabeth Rowe, of counsel and on the brief).

Thomas R. Ashley argued the cause for respondent.

PER CURIAM

We granted the State of New Jersey leave to appeal from the Law Division's July 28, 2017 order that granted in part defendant

Maurice Houston's motion to suppress physical evidence seized during a warrantless search of his car. We defer to the factual findings made by the motion judge following an evidentiary hearing because those findings are supported by sufficient credible evidence in the record. State v. Gonzales, 227 N.J. 77, 101 (2016).

New Jersey State Police (NJSP) Detective Joseph Palach and Trooper Frederick Peters were on patrol in Newark when they spotted defendant's car, a Cadillac SUV, make a turn into the parking lot of a housing complex without signaling. As the car turned, Palach observed the windows were tinted. Defendant parked the car in a legal parking spot, and the officers conducted a motor vehicle stop for the observed motor vehicle infraction.

Palach approached the car and observed defendant was not wearing a seat belt. He also detected the smell of burnt marijuana once defendant lowered the window. The officers removed defendant from the car and placed him under arrest after a search of his person produced five prescription Endocet pills, along with a large sum of money. Defendant was placed between the officers' car and his own, and Palach began to search the vehicle's passenger compartment, as other officers, including NJSP Detective Christopher Durning, arrived.

Palach found a "half-smoked marijuana cigarette" in the ashtray and detected the odor of raw marijuana. He opened a backpack that was on the back seat, behind the driver's seat, and found two Tupperware containers of marijuana, a digital scale and a plastic bag containing other smaller plastic bags. Palach also found a bottle in the backpack containing seventy-one Endocet pills similar in nature to those found on defendant.

In addition, two baby bottles were found in the "driver's side front seat pocket sleeve." Defendant admitted these contained promethazine with codeine, a prescription legend drug. Defendant acknowledged that he "paid for" the vehicle, although it was legally owned by his sister.

After noticing the dashboard air vents "did not line up" properly, Palach "popped out [the cover] from the dashboard" and shone his flashlight into the space. He found a .40 caliber handgun. Meanwhile, Durning was in the rear area of the vehicle. He removed plastic paneling above the rear wheel well and found two packages of marijuana in a "void." The officers took defendant from the scene and his car was towed.

The motion judge found Palach's credibility "waned on multiple occasions on cross-examination," and that his testimony was "less credible." She found that Durning was credible, and she

discounted Peters' testimony because he denied seeing the critical elements of the search while he guarded defendant.[1]

The judge concluded the "vehicle stop was lawful" because the officers "observed motor vehicle violations." See, e.g., State v. Scriven, 226 N.J. 20, 33-34 (2016) ("[O]rdinarily, a police officer must have a reasonable and articulable suspicion that the driver of a vehicle . . . is committing a motor-vehicle violation or a criminal or disorderly persons offense to justify a stop."). She then concluded the officers had probable cause to arrest defendant based upon the smell of marijuana. See, e.g., State v. Walker, 213 N.J. 281, 290 (2013) (alteration in original) ("New Jersey courts have recognized that the smell of marijuana itself constitutes probable cause that a criminal offense ha[s] been committed and that additional contraband might be present.") (quoting State v. Nishina, 175 N.J. 502, 515-16 (2003)).

The judge found that Palach's seizure of the burnt marijuana cigarette in the ashtray was "valid pursuant to a search incident to arrest," and because it was in "plain view." However, she reasoned that after defendant was "handcuffed and removed from the car, he did not have the ability to access a weapon, destroy potential evidence or suddenly take flight," therefore, "though

[1] Defendant called Peters as a witness.

the search incident to arrest started out lawfully, it did not end that way." The judge concluded the officers had no right to search the backpack or its contents, "or disassemble the car parts which covered the voids and the air vents of the car."

Although the judge did not specifically address the two baby bottles seized, the order did not suppress this evidence, or the five Endocet pills seized from defendant or the partially burnt marijuana cigarette. The order suppressed the remaining evidence seized by the officers.

Relying on the automobile exception to the warrant requirement as reformulated by the Court in State v. Witt, 223 N.J. 409 (2015), the State argues that because the officers had probable cause to believe defendant's vehicle contained contraband, they were free to search anywhere in the vehicle where "there [was] probable cause to believe that the object of the search might be found," citing State v. Esteves, 93 N.J. 498, 508 (1983). It argues that based upon the officers' training and experience, and the odor of raw marijuana that persisted after the burnt "roach" was removed, they had probable cause to search the backpack, the void above the rear wheel well and the space behind the air vents for other contraband.

Defendant disagrees. He argues that the officers' search of the backpack and the vehicle's "voids" exceeded the permissible scope of a warrantless search under the automobile exception.

In Witt, supra, 223 N.J. at 450, the Court returned to the formulation of the automobile exception it first adopted in State v. Alston, 88 N.J. 211 (1981), namely, "searches [of automobiles] on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible." If the search is justified under these circumstances, police need not secure a warrant beforehand "merely because 'the particular occupants of the vehicle may have been removed from the car, arrested, or otherwise restricted in their freedom of movement.'" Id. at 428 (quoting Alston, supra, 88 N.J. at 234). Therefore, we agree with the State that the judge erred in considering the search as one incident to a lawful arrest.

As we see it, the question is whether the search exceeded the permissible scope pursuant to the automobile exception. We acknowledge that the Witt Court did not specifically address the issue, and the law seems somewhat unsettled.

Clearly, once probable cause is established, police may search the passenger compartment of the vehicle. In Witt, supra, 223 N.J. at 416, after arresting the defendant for driving while intoxicated, police searched for intoxicants and found a gun in

the center console of the car. In Alston, supra, 88 N.J. at 216-17, after seeing shotgun shells in the glove compartment when the defendant opened it to retrieve his credentials, police returned to the car, seized the shells, and three other weapons – a sawed-off shotgun in a bag under the passenger's seat, a revolver in a holster under the front seat, and a revolver secreted in the backseat. The Court concluded that under the circumstances presented, the detectives had "probable cause to search the passenger compartment." Id. at 232.

The law seems relatively settled regarding closed containers found in the passenger compartment. See Kevin G. Byrnes, N.J. Arrest, Search & Seizure § 17:2-3 at 457 (2017-18) ("Seizure of luggage and other sealed containers from an automobile subject to a warrantless search under the automobile exception is normally allowed."). One case the State relies on for support is Esteves. There, police were dispatched to investigate the possible robbery of a store and, after confirming none had occurred, observed a handgun between the front seats of a car parked nearby. 93 N.J. at 501. Attempting to find the owner of the car, police questioned the defendant and his compatriot as they left the store. Ibid. Defendant's compatriot having admitted ownership of the car, the defendant offered to obtain his identification from the vehicle and his compatriot/owner gave one officer the keys. Ibid. Police

opened the door and seized the gun, which was a starter's pistol, and began to search the car for identification. Id. at 502. They found drugs in a film canister in the compatriot's shaving kit, and more drugs in the defendant's knapsack. Ibid.

Applying the automobile exception, id. at 505, the Court concluded police had probable cause to search for weapons "given that they were investigating a weapons offense, and had already discovered what appeared to be a weapon." Id. at 506. Additionally, the Court considered a "second factor," namely "[l]egitimate precaution [that] justifies routine police procedures not designed as pretexts to discover evidence." Ibid. The Court explained:

> We are satisfied that probable cause existed for the officers to search the car and to take reasonable precautions for their own safety. They had been advised of a possible robbery and had seen what appeared to be a pistol in the car. When, in addition, neither [defendant] could produce satisfactory identification, the police had a sufficient basis to search the automobile for weapons or to obtain identification. Nor was the extent of the search unreasonable. The scope of a warrantless search of an automobile is defined by the object of the search and the places where there is probable cause to believe that it may be found. Under these circumstances, the police had probable cause and therefore a right to search as they did. They found no other weapons or satisfactory identification in the front or in the glove compartment. The shaving kit could reasonably have contained either weapons, shells or I.D., and so the

> police had the right to check it. In doing that they came upon the pills in the foil packet in the film container and two other pills in the bottom of the kit.
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> [Id. at 507-08 (citations omitted) (emphasis added).]

Regarding the knapsack, the Court cited United States v. Ross, 456 U.S. 798, 824, 102 S. Ct. 2157, 2172, 72 L. Ed. 2d 572, 593 (1982)), decided after the search in the case, and explained in a footnote "that once probable cause exists to search the interior of a motor vehicle, the police may search every part of the vehicle, including containers, in which there is probable cause to believe that the object of the search may be found." Esteves, supra, 93 N.J. at 508 n.3.

Despite this clear statement, we used a different rationale to justify a warrantless search of the defendant's gym bag in State v. Judge, 275 N.J. Super. 194 (App. Div. 1994). There, we concluded that police had probable cause to search the defendant's automobile based upon the smell of burnt marijuana. Id. at 202. However, Judge, later Justice, Coleman writing for the panel found a different basis upon which to permit the search of the contents of a gym bag found on the rear seat, namely, that it was a search incident to a lawful arrest. Id. at 205.

The State argues that in this case, the extensive search was permissible because the troopers possessed sufficient probable

cause to search behind the wheel well panels and air vents. It relies upon State v. Guerra, 93 N.J. 146 (1983). There, police observed a motor vehicle violation, stopped the car and detected a strong odor of raw marijuana. Id. at 149. After the driver and passenger refused to consent to a search, police took them and the car to the police station. Ibid. Police applied for and obtained a telephonic search warrant, and found nearly two hundred pounds of marijuana in the trunk. Id. at 149-50.

The Court affirmed the search even though the telephonic warrant was deficient. Id. at 152. It concluded that the police had probable cause to search the trunk because the strong smell of marijuana was not emanating from the passenger compartment or a small suitcase in the car's interior. Id. at 150.

Guerra stands in contrast to State v. Patino, 83 N.J. 1 (1980). There, the police officer stopped a car and saw a small amount of marijuana on the floor next to the front seat. Id. at 5. A search of the passenger area revealed no other incriminating evidence. Id. at 6. After ordering the defendant to open the trunk, the officer found cocaine inside a shopping bag. Ibid.

Rejecting the State's argument that the search of the trunk was justified under the automobile exception, the Court said: "A police officer must not only have probable cause to believe that the vehicle is carrying contraband but the search must be

reasonable in scope. It is widely recognized that a search, although validly initiated, may become unreasonable because of its intolerable intensity and scope." Id. at 10-11 (citations omitted) (emphasis added). The Court held:

> The State must produce facts which lead a trooper to conclude that the search of the entire vehicle was based upon probable cause. In this regard, the State failed to satisfy its burden. The presence of a small amount of marijuana, consistent with personal use, does not provide a trooper with probable cause to believe that larger amounts of marijuana or other contraband are being transported.
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> [Id. at 13.]

The Patino Court cited approvingly to our decision in State v. Murray, 151 N.J. Super. 300 (App. Div.), certif. denied, 75 N.J. 541 (1977). Id. at 11. In Murray, police observed a "roach clip" and vials of hashish after stopping the defendants' van. Id. at 303-04. A search of the cab area produced no other evidence, but police removed the driver's seat to access the area under a sink behind the cab. Id. at 305. They found an attaché case under the sink, used a knife to force its lock and found a large amount of hashish. Ibid.

We concluded the officer's search of the passenger portion and the rear of the van was justified. Id. at 306. We held, however, "that when the officer, unsuccessful to that point in uncovering additional contraband, commenced interfering with the

structural integrity of the vehicle itself, the search he was conducting transcended all bounds of reasonableness." Id. at 307 (emphasis added).

The principles we distill from this rather unsettled landscape lead to the following conclusions. Pursuant to the automobile exception, the troopers in this case had authority to conduct a search of the passenger compartment of the vehicle based upon probable cause. Witt, supra, 223 N.J. at 450.[2] Having found the partially smoked marijuana cigarette, as well as the baby bottles filled with suspected CDS in the passenger compartment, they had probable cause to search the contents of the backpack. Esteves, supra, 93 N.J. at 508 n.3.

However, the search could go no further unless specific probable cause supported a reasonable belief that more drugs would be found in the specific places searched. Id. at 508. In Guerra, supra, 93 N.J. at 150, the Court concluded police had specific probable cause to believe that the trunk contained the source of the marijuana odor the trooper continued to smell. In Patino, supra, 83 N.J. at 13 (emphasis added), the Court concluded the

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[2] Because the issue was not raised, we specifically do not address whether the fact that defendant's car was lawfully parked in the lot of a residential complex, and was not stopped on the open roadway, affects application of the automobile exception.

State failed to demonstrate "the search of <u>the entire vehicle</u> was based upon probable cause."

Critical to the State's argument is the conclusion that the smell of raw marijuana, as distinguished from burnt marijuana, coupled with the troopers' training and experience, justified the parking lot search of every nook and cranny where marijuana might be secreted in defendant's car. However, the only witness who testified about the smell of raw marijuana was Palach; Peters only stated that he smelled burnt marijuana on approaching the vehicle. In finding the recovery of the "burnt marijuana 'blunt'" was "valid pursuant to a search incident to arrest," the judge noted Palach "smelled raw marijuana." However, she did not specifically accept that as a fact and expressly found Palach's testimony was "less credible."

In any event, we conclude <u>Witt</u> cannot be read so broadly as to authorize the balance of the search in this case. In <u>Witt</u>, <u>supra</u>, 223 <u>N.J.</u> at 431-32, the Court recognized there was "a limited exigency to the warrant requirement" under the <u>Alston</u> standard, premised on "unforeseeability and spontaneity," the inherent mobility of the vehicle and the unanticipated circumstances that led to probable cause. The Court recognized that the automobile exception applied only to "on-scene warrantless searches," not based upon "fake exigencies," and that

officers who towed and impounded the car needed to secure a warrant before conducting a further search of the vehicle when practicable to do so. Id. at 449.[3]

The State's argument would essentially ignore this cautionary language and adopt the federal standard that "probable cause to search a vehicle 'alone satisfies the automobile exception to the Fourth Amendment's warrant requirement.'" Id. at 422 (quoting Maryland v. Dyson, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014, 144 L. Ed. 2d 442, 445 (1999)). The Witt Court rejected such an approach.

In short, we conclude that the automobile exception did not authorize the troopers to remove the wheel well panels and air vents — to engage upon a search that "transcended all bounds of reasonableness," Murray, supra, 151 N.J. Super. at 307. None of

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[3] We do not specifically conclude that police may not conduct a search of the car on the scene simply because there exist grounds to impound the vehicle. As one commentator noted,

> It is unclear whether the inevitability of vehicle impoundment under the circumstances requires that police forego an on-scene search. If the vehicle will be impounded and there is no immediate need to search the vehicle, should the police expose themselves, the motorist and the general public to the dangers and inconveniences inherent in conducting a search on a roadway?
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> [Byrnes, supra, § 17:2-1 at 449.]

the cases cited by the State authorizes such conduct. We reverse that portion of the order that suppressed the evidence seized from the backpack found on the rear seat of defendant's car; we otherwise affirm the order.

Affirmed in part; reversed in part. The matter is remanded to the Law Division for further proceedings consistent with this opinion.

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

CLERK OF THE APPELLATE DIVISION