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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0061-14T3
A-3993-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KOREY REEVES a/k/a
KOREY A. REEVES,

Defendant-Appellant.

Submitted November 2, 2016 – Decided March 1, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 12-05-0864, 12-07-1020 and 13-06-0837.

Joseph E. Krakora, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (David M. Liston, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In these consolidated matters, defendant Korey Reeves appeals from his conviction following a conditional plea of guilty to a

narcotics-related offense. On appeal, defendant challenges the denial of his motion to suppress. In denying the suppression motion, the court held that the search was justified based upon probable cause and exigent circumstances or, alternatively, based upon the independent source doctrine. Defendant also appeals the sentences imposed following his guilty pleas to three violation of probation charges. Having considered defendant's contentions in light of the record and applicable law, we reverse.

A Middlesex County grand jury returned Indictment 12-05-0864, charging defendant with fourth-degree possession with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 35-5(b)(12) (count one); third-degree conspiracy, N.J.S.A. 2C:5-2 (count two); and third-degree possession with intent to distribute within 500 feet of certain public property, N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7.1 (count three). The charges arose from events that occurred on January 27, 2012.

Thereafter, a Middlesex County grand jury returned Indictment 12-07-1020, charging defendant with third-degree conspiracy, N.J.S.A. 2C:5-2 (count one); third-degree burglary, N.J.S.A. 2C:18-2(a)(1) (count two); third-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a) (count three); and third-degree fraudulent use of a credit card, N.J.S.A. 2C:21-6(h) (count four). The charges arose from events that occurred on February 22, 2012.

Eleven months later, a Middlesex County grand jury returned Indictment 13-06-0837, charging defendant with third-degree possession with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count one); third-degree distribution of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count two); and third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1) (count three). The charges arose from events that occurred on April 30, 2013.

Defendant pled guilty to count four of Indictment 12-07-1020 and count two of Indictment 12-05-0864 on March 8, 2013. Consistent with the plea agreement, defendant was sentenced to an aggregate term of probation for 5 years and 180-days in the county jail. The court imposed applicable fines, fees, and restitution. The remaining counts were dismissed.

Defendant filed a motion to suppress evidence on Indictment 13-06-0837. Testimonial hearings were conducted. The judge entered an order with an accompanying statement of reasons denying the motion to suppress.

Subsequent to the denial of the motion, on May 14, 2014, defendant pled guilty to count one of Indictment 13-06-0837. Upon the determination that defendant was not eligible for a mandatory extended term, a new plea agreement was executed on July 2, 2014. Defendant was sentenced that same day to a five-year term of

probation, consistent with the State's recommendations in the new plea. The court imposed applicable fines and fees. The remaining counts were dismissed. Thereafter, defendant filed a notice of appeal on August 27, 2014.

On January 14, 2015, defendant was charged with violations of probation. He pled guilty to the charges on February 9, 2015. That same day, the judge imposed an eighteen-month prison term on Indictment 12-05-0864; a five-year prison term on Indictment 12-07-1020; and a five-year prison term on Indictment 13-06-0837 consecutive to Indictment 12-05-0864 after the judge's consideration of the Yarbough[1] factors. Probation was terminated with all fines and fees being transferred to parole for collection.

On May 7, 2015, defendant filed a second notice of appeal, together with a motion to file notice as within time regarding all three indictments. We granted the motion and, by additional order, consolidated the appeals.

We discern the following facts taken from the suppression hearing as essential to our determination of defendant's first argument. On April 30, 2013, Sergeant Michael Mintchwarner of the Edison Township Police Department was on routine patrol in a marked police vehicle. After receiving reliable, confidential

[1] State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

information regarding defendant, Mintchwarner proceeded to the Lexington Inn Hotel where he observed a green Lincoln parked in the hotel lot. After running the license plate, Mintchwarner learned the registered owner of the vehicle was Roland Reeves. Reeves resided at an address associated with defendant, an individual whom Mintchwarner had information from "a couple of sources" as being involved in heroin distribution in Edison and Woodbridge. Mintchwarner then moved his vehicle from the hotel parking lot to an adjacent driveway to surveil activity at the hotel.

At approximately 2:15 a.m., Mintchwarner observed a white "unkempt" male riding a bicycle toward the hotel. The individual entered the hotel, emerged approximately five minutes later, and rode away. Mintchwarner notified officers in the area to stop the cyclist. After an attempt at flight, the cyclist, later identified as Herbert Straub, was stopped by police. When Mintchwarner arrived at the scene, the apprehending officers reported they observed Straub discard items later identified as bundles of heroin wrapped in magazine paper.

After his arrest, Straub was provided with Miranda[2] warnings. In a recorded statement, Straub related that he went to Room 253

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

of the Lexington Inn Hotel to purchase a brick of heroin from defendant. Straub further stated that when he made the purchase, defendant's brother Kyle was present.

Following Straub's statement, Mintchwarner sent Officer Christian Pedana to the Lexington Inn Hotel. Pedana approached the hotel clerk to ascertain the identity of the individuals in Room 253. Defendant was identified by the clerk from a photograph as the occupant of the room. The clerk noted that a second occupant bore a resemblance to defendant, and then showed the officers a room with a similar layout.[3] Pedana remained with the clerk to prevent him from advising defendant of police presence while Mintchwarner devised a plan of action.

In accord with their plan, Mintchwarner, accompanied by Pedana, Officer Christopher Teleposky, and Officer Timothy Farrell, proceeded to defendant's room with a key, a pry bar, and a shield. Mintchwarner gave two successive knocks on the door of the room and announced his presence as a police officer. The officers then heard a "click" from the door lock. Pedana looked at Mintchwarner and mouthed, "They locked it." Mintchwarner instructed the officers to "Put the key in, we have to go in. We've been compromised."

[3] The second occupant was later identified as defendant's brother, Kyle Reeves.

Upon entering defendant's hotel room, officers found defendant and his brother lying on the bed. The officers announced that the two men were under arrest and performed a "protective sweep" in the immediate area of defendant and his brother. The "protective sweep" included a search of defendant's wallet which revealed "thousands of dollars in small bills." The officers also observed a trashcan containing magazine paper resembling the paper used to wrap the heroin discarded by Straub. Mintchwarner instructed the officers to secure the scene until a search warrant was obtained.

Mintchwarner's affidavit in support of the search warrant recited: his investigation of defendant; his observation that the car in the parking lot could likely have been driven by defendant; the statement and evidence emanating from Straub's arrest and subsequent statement; the corroboration of defendant's presence in the room by the hotel clerk; and observations of the cash and magazine wrapping material after entry into defendant's room. Pursuant to the affidavit, a search warrant was issued for defendant, Kyle, and the hotel room. The ensuing search revealed six cellular phones, approximately $2200 in cash, and 890 bundles of heroin.

Defendant raises the following points on appeal challenging both the search and his sentence:

POINT I

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM THE HOTEL ROOM SHOULD HAVE BEEN GRANTED.

POINT II

THE MAXIMUM SENTENCES OF TWO CONSECUTIVE [FIVE]-YEAR TERMS AND ONE CONSECUTIVE [EIGHTEEN]-MONTH TERM, FOR A TOTAL OF [ELEVEN-AND-A-HALF] YEARS ON TWO THIRD-DEGREE CONVICTIONS AND ONE FOURTH-DEGREE CONVICTION WAS EXCESSIVE.

In reviewing a motion to suppress, a reviewing court defers to the trial court's factual and credibility findings "so long as those findings are supported by sufficient credible evidence in the record." State v. Handy, 206 N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). Deference is afforded "because the 'findings of the trial judge . . . are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Reece, 222 N.J. 154, 166 (2015) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). Those findings should only be disregarded when the trial court's findings of fact are clearly mistaken. State v. Hubbard, 222 N.J. 249, 262 (2015) (citing State v. Johnson, 42 N.J. 146, 162 (1964)). The legal conclusions of a trial court are reviewed de novo. Id. at 263 (citing State v. Gandhi, 201 N.J. 161, 176 (2010)).

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 presumptively invalid. State v. Gamble, 218 N.J. 412, 425 (2014); State v. Lamb, 218 N.J. 300, 315 (2014). "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. Lamb, supra, 218 N.J. at 315; Gamble, supra, 218 N.J. at 425; State v. Brown, 216 N.J. 508, 527 (2014); State v. Edmonds, 211 N.J. 117, 130 (2012); State v. Bogan, 200 N.J. 61, 73 (2009).

One recognized exception to the warrant requirement is the exigent-circumstances doctrine, State v. Cassidy, 179 N.J. 150, 160 (2004). This exception applies to hotel and motel rooms.

State v. Hathaway, 222 N.J. 453, 468 (2015); State v. Hinton, 216 N.J. 211, 232 n.6 (2013) (noting that a hotel guest may have a reasonable expectation of privacy in a rental room until his or her guest status has been terminated); State v. Rose, 357 N.J. Super. 100, 103 (App. Div.), certif. denied, 176 N.J. 429 (2003) (occupant of a hotel enjoys a "constitutionally protected expectation of privacy"); see also Hoffa v. United States, 385 U.S. 293, 301, 87 S. Ct. 408, 413, 17 L. Ed. 2d 374, 381 (1966).

Proof of both exigent circumstances and probable cause "may excuse police from compliance with the warrant requirement." State v. Walker, 213 N.J. 281, 289 (2013) (quoting State v. Bolte, 115 N.J. 579, 585-86, cert. denied, 493 U.S. 936, 110 S. Ct. 330, 107 L. Ed. 2d 320 (1989)). The focus of the exigent circumstance inquiry is whether the police conduct was objectively reasonable under the totality of the circumstances. State v. Deluca, 168 N.J. 626, 634 (2001). In determining whether the circumstances in a particular case warrant exigency, courts consider several factors:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant;
>
> (2) reasonable belief that the contraband is about to be removed;

> (3) the possibility of danger to police officers guarding the site of contraband while a search warrant is sought;
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> (4) information indicating the possessors of the contraband are aware that the police are on their trail;
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> (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in narcotics traffic;
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> (6) the gravity of the offense involved;
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> (7) the possibility that the suspect is armed;
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> (8) the strength or weakness of the facts establishing probable cause;
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> (9) the time of the entry;
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> (10) where removal of evidence is offered as an exigent circumstance, whether the physical character of the premises is conducive to effective surveillance while a warrant is procured; and
>
> (11) whether the exigent circumstance is "police-created" and arose as a result of reasonable investigative conduct intended to generate evidence of criminal activity or was specifically designed to spur suspects into activity that would then justify a warrantless entry and search.
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> [State v. DeLuca, 325 N.J. Super. 376, 391 (App. Div. 1999), aff'd as modified, 168 N.J. 626 (2001); State v. Alvarez, 238 N.J. Super. 560, 568 (1990)).]

In denying defendant's motion to suppress evidence, the judge held, and we agree, that the facts "unequivocally establish[] that

probable cause existed to believe criminal activity was taking place in the [hotel] room occupied by the [defendant]." Among other observations by the police, the court specifically pointed to Straub entering and exiting the hotel within five minutes, Straub's discarded items that were later determined to be heroin, Straub's voluntary recorded statement, and the hotel clerk's identification of defendant as the person occupying the room. These events, known to the officers prior to entering the hotel room, clearly established probable cause that defendant was engaged in illegal drug distribution from that location.

Having determined that probable cause existed prior to the entry to the hotel room, we next address whether exigent circumstances were present to satisfy the exception to the warrant requirement. The judge noted in reaching his decision that the primary issue when assessing the existence of exigent circumstances is the "probability that the suspect or object of the search will disappear, or both." State v. Smith 129 N.J. Super. 430, 435 (App. Div.), certif. denied, 66 N.J. 327 (1974). The judge held that the totality of the circumstances facing the police met the standard for an exception to the warrant requirement. Specifically, the judge pointed to the "raised specter of the destruction" of the drugs, the raised possibility of the police being discovered by defendant, and the reasonable

conclusion that it would take "some time" to obtain a telephonic warrant.

In Alvarez, supra, 238 N.J. Super. at 563, an informant told police officers that narcotic distribution was occurring at an Atlantic City hotel on a specific floor. Officers went to the hotel and, after speaking with the clerk, determined that only one room on the specific floor was occupied, discovered the room was registered to defendant and learned that there was significant "foot traffic" to and from the room. Ibid. The police were also aware of defendant's connection to drug trafficking from a prior investigation. Ibid. Four officers proceeded to the room. Ibid. While standing in the hallway, the officers heard a male voice comment that "if we sell one more ounce, we'll have enough to re-up." Ibid. This led officers to conclude there was an ongoing drug operation in the room and that the individuals would need to restock their supply. Ibid. One of the officers then knocked on the door and identified himself as a maid using a falsetto voice. Alvarez, supra, 238 N.J. Super. at 563. The occupants opened the door and the officers entered, seized drugs and paraphernalia, and arrested all of the occupants. Ibid.

We held that exigent circumstances existed at the time of the investigation, specifically noting that: (1) the police were involved in an "immediate, ongoing investigation" instead of a

"planned" search or arrest; (2) the police reasonably believed the contraband was about to be removed; (3) drugs are easily destroyed; (4) the hotel hallway was not conducive to maintaining surveillance while a warrant was sought; and (5) the exigency was not police-created. Id. at 569-72. Subsequent to our holding in Alvarez, this court reiterated that exigent circumstances resulting from police conduct cannot justify warrantless entries. State v. De La Paz, 337 N.J. Super. 181, 196, certif. denied, 168 N.J. 295 (2001).

Here, there is nothing in the record to support a finding that defendant was aware of the police presence prior to the knock and announce. This is so notwithstanding that before knocking on the door, the police investigated defendant's car, arrested and obtained information from Straub, and spoke to the hotel clerk. To be sure, under the circumstances presented, when the police announced their presence outside the hotel room, they created the exigency by enhancing the probability of destruction of evidence and flight by the room's occupants. In light of the officers' conduct, we hold that the warrantless intrusion into the hotel room and the evidence viewed upon that entry was in violation of the search warrant requirement as unexcused by exigent circumstances.

Despite our holding, our inquiry as to the validity of the evidence seized does not end here. Ordinarily, evidence seized in violation of the warrant requirement is suppressed at trial. State v. Holland, 176 N.J. 344, 353 (2003) (citing Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed 2d 1081 (1961)). The rationale for exclusion is "to compel respect for the constitutional guarantee in the only effective way-by removing the incentive to disregard it." Ibid. (quoting United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 620, 38 L. Ed. 2d 561, 571 (1974)).

The Holland Court noted a recognized exception to the warrant requirement that, if satisfied, allows for the admission of evidence discovered independent of any constitutional violation. Id. at 353-355. In order for admission of otherwise impermissibly obtained evidence by the "independent-source doctrine," the State must satisfy a three-prong test. The test requires that: (1) the State must demonstrate that probable cause existed to conduct the challenged search without the unlawfully obtained information; (2) the State must demonstrate by clear and convincing evidence that the police would have sought a warrant without the tainted knowledge or evidence that they previously had acquired or viewed; and (3) the State must demonstrate by clear and convincing evidence

that the initial impermissible search was not the product of flagrant police misconduct. Id. at 360-61.

At the outset of our analysis, we note that the judge concluded, without attribution to the specific facts in the record upon which he relied, that the independent source exception was satisfied by clear and convincing evidence. Notwithstanding this summary determination, we do not require additional fact-finding, and can resolve the suppression issue on the record before us.

In the context of the first prong and in consonance with our holding on the exigent circumstances exception, the Mintchwarner affidavit articulated information obtained prior to the entry that established probable cause that criminal activity was taking place in the hotel room prior to the entry. As such, the State satisfied the first prong.

We next address the second prong of the test. This test involves whether the police would have sought a warrant without the evidence acquired after entering defendant's hotel room. In Holland, supra, 176 N.J. at 363, the Court concluded it must suppress the evidence obtained from the warrantless entry into defendant's home. In reaching its determination, the Court focused its analysis "on the most doubtful element of the State's argument, namely, that the officers would have sought the search warrant regardless of their improper search." Ibid.

The Court disagreed with the State's argument that the officers' conduct prior to their entry both evinced commitment to the criminal investigation and that the police would have applied for a warrant. Id. at 364. Critical to the Court's finding was that the subsequent warrant application included "few facts that the officers observed prior to their illegal entry" and the application was "saturated with references to the knowledge and items acquired or observed by the first set of officers once inside defendant's home." Ibid. The Court also cited to the process that the officers had to engage in to obtain permission for a search warrant application as negatively impacting satisfaction of this prong. Having determined that the second prong of the analysis was not satisfied, the Court did not address the first or third prongs. Id. at 365.

In State v. Chaney, 318 N.J. Super. 217, 220 (App. Div. 1999), this court's decision referenced in Holland, police officers entered a motel room to execute an arrest warrant. Chaney was staying in the room with another individual named Brandon Johnson, who was arrested while attempting to sell stolen jewelry. Id. at 219-20. Johnson told police that Chaney was at the motel. Id. at 220. The police ran a record search using Chaney's name and discovered an arrest warrant for a "Walter Chaney," an individual later discovered to be a different person but having the same name

as the defendant. Ibid. Acting on the arrest warrant, police entered the motel room and noticed several articles that matched items reported stolen in nearby burglaries. Ibid. The police then obtained a warrant to search the room for other property taken in the burglaries. Ibid. Upholding the validity of the search, this court noted that the police decided to take whatever steps necessary to search the motel room once they discovered Johnson attempted to sell stolen jewelry. Chaney, supra, 318 N.J. Super. at 226. We concluded that even if the police had not seen some of the stolen items in plain view when they entered defendant's motel room with the arrest warrant, they still would have applied for a search warrant. Ibid. On the facts presented here, we cannot reach the same conclusion.

Although here, unlike in Holland, the affidavit was not "saturated with references to the knowledge acquired or observed" after the illegal entry, the officers' pre-entry conduct belied that they would have applied for a search warrant. Pointedly, the detailed investigation conducted by the police into the activities of defendant and their plan for entry, including a crow bar and a shield for potential use, were devoid of consideration as to the need for or the ability to obtain a search warrant. Stated simply, as we have held, the officers had probable cause to believe that illegal activity was occurring in the hotel room prior to their

entry. Yet, they made the decision not to seek a warrant; a plain and unmistakable indicator of their state of mind. Given the above and in consideration of the clear and convincing burden of persuasion, we conclude the State did not meet its burden under the second prong of the independent-source rule.

The third prong requires the State to demonstrate by clear and convincing evidence that the initial impermissible search was not the product of flagrant police misconduct. In addition to our finding that the police conduct in knocking and announcing their presence created the exigency leading to the unlawful entry, we also find that their conduct was consistent with a flagrant disregard of privacy rights. As we noted, the record is devoid of any contemplation by the police officers to seek a warrant. To the contrary, by their plan, they evinced the intent to gain entry without a warrant despite what appeared to be the opportunity to obtain one. Under these circumstances, unlike our holding in Chaney, we conclude the police entry into the hotel room "constituted such flagrant police misconduct that the evidence subsequently obtained pursuant to the warrant should be suppressed to deter similar violations of constitutional rights." Id. at 227 (citation and footnote omitted).

In sum, the State failed to meet its burden under both the second and the third prongs. As such, the evidence obtained from

the impermissible entry and search of the hotel room and the evidence obtained subsequent thereto by the execution of the search warrant requires suppression.

The final issue before us is defendant's argument that the court's sentence was excessive. Since the sentence under review was premised in part upon defendant's conviction on charges for which we have suppressed evidence, we remand to the Law Division for re-sentence on the violations of probation.

Reversed and remanded. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION