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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0072-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MUJTABAA MUHAMMAD,  
a/k/a MUSTAFAA MUHAMMAD,

Defendant-Appellant.

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Submitted March 22, 2017 – Decided April 7, 2017

Before Judges Alvarez and Lisa.

On appeal from Superior Court of New Jersey,  
Law Division, Monmouth County, Indictment No.  
14-02-0331.

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

Christopher J. Gramiccioni, Monmouth County  
Prosecutor, attorney for respondent (Keri-  
Leigh Schaefer, Assistant Prosecutor, of  
counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

After his suppression motion was denied, defendant pled guilty, pursuant to a plea agreement, to three counts in a five-count indictment against him, namely Count Three, second-degree possession of a controlled dangerous substance (CDS) with intent to distribute (N.J.S.A. 2C:35-5(b)(2)), Count Four, third-degree possession of a CDS within one thousand feet of school property with intent to distribute (N.J.S.A. 2C:35-7), and Count Five, second-degree possession of a firearm in the course of committing a drug offense (N.J.S.A. 2C:39-4.1(a)).

Defendant was sentenced on Count Three to four years imprisonment with an eighteen-month period of parole ineligibility, and on Count Four to a similar term of four years imprisonment with an eighteen-month period of parole ineligibility. On Count Five, defendant was sentenced to six years imprisonment with a forty-two-month period of parole ineligibility. Counts Three and Four were ordered to be served concurrent to each other but consecutive to Count Five, thus resulting in an aggregate sentence of ten years imprisonment with a five-year period of parole ineligibility. The court also imposed all mandatory assessments and penalties. Pursuant to the plea agreement, the court granted the State's motion to dismiss Counts One and Two of the indictment, together with all related motor vehicle summonses and a municipal ordinance violation summons.

The sole issue before us in this appeal is whether the trial court erred in denying defendant's motion to suppress evidence seized as a result of a warrantless search, incidental to a motor vehicle stop. More particularly, defendant argues:

POINT I

BECAUSE THERE WAS NO EXCEPTION TO THE WARRANT REQUIREMENT THAT JUSTIFIED THE WARRANTLESS SEARCH OF THE DEFENDANT'S VEHICLE, ANY EVIDENCE SEIZED FROM THE VEHICLE SHOULD HAVE BEEN SUPPRESSED. U.S. CONST. AMENDS. IV, XIV; N.J. CONST. (1947) ART. I, PAR. 7.

- A. THERE WAS NO EXIGENCY TO EXCUSE THE FAILURE OF THE POLICE TO OBTAIN A WARRANT.<sup>1</sup>
- B. THE SEARCH WAS NOT PURSUANT TO A VALIDLY OBTAINED CONSENT.<sup>2</sup>

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<sup>1</sup> When this motor vehicle stop occurred, State v. Pena-Flores, 198 N.J. 6 (2009), was the controlling authority in New Jersey regarding the automobile exception to the warrant requirement. In addition to probable cause, Pena-Flores "added a pure exigent-circumstances requirement to justify an automobile search" without a warrant under this exception. State v. Witt, 223 N.J. 409, 414 (2015). In Witt, the Court overruled Pena-Flores and prospectively returned to the standard previously in effect under State v. Alston, 88 N.J. 211 (1981), which authorized warrantless roadside automobile searches based on probable cause arising from unforeseeable and spontaneous circumstances. Id. at 414-15, 449. The State never invoked the automobile exception in this case. In the trial court and before this court, the State has relied on the consent-to-search exception. Accordingly, we deem defendant's argument under Point I A, arguing an inadequate showing of exigency under the automobile exception, inapplicable, and we will not address it.

<sup>2</sup> In addition to the quoted argument in the brief filed by defendant's attorney, defendant filed a "CERTIFICATION IN LIEU OF FORMAL PRO SE SUPPLEMENTAL BRIEF," which we have reviewed and find lacking sufficient merit to warrant discussion in this opinion. See R. 2:11-3(e)(2).

We reject defendant's arguments and affirm.

At the suppression hearing, the State presented the testimony of Red Bank Police Officer Stanley Balmer. The State also placed in evidence the motor vehicle recorder (MVR) recording that captured the roadside events, together with the accompanying transcript. Defendant did not testify or present any witnesses. The evidence established the following relevant facts.

On Saturday, October 19, 2013, another officer of the Red Bank police department told Officer Balmer that he had received information from a confidential source that a man from South Pearl Street in Red Bank, who has a twin brother, possessed a loaded handgun in a blue Nissan automobile with chrome rims. Balmer was familiar with the twin brothers and knew they parked their cars in front of a residence on South Pearl Street. Defendant is one of those brothers.

The next day, Sunday, October 20, 2013, while Balmer was on patrol, in uniform and driving a marked police car, he observed the blue Nissan. Defendant was driving it on West Bergen Place and was alone in the car. Balmer was proceeding directly behind defendant's car. A truck began to back out of a commercial establishment onto West Bergen Place and partially obstructed defendant's lane of travel. Defendant stopped, and then proceeded to go around the truck, crossing into the oncoming traffic lane

before returning to his proper lane of travel. Defendant did not activate a turn signal during this maneuver. Balmer also observed that during defendant's maneuver, there were other cars proceeding toward defendant in the oncoming lane.

Defendant stopped at a traffic light. Balmer stopped behind him and could hear loud music coming from defendant's car. When the light turned green and defendant began to proceed forward, Balmer activated his overhead lights, and defendant pulled over uneventfully. This occurred at 12:34 p.m.

Balmer was alone in his police car. Although it would have been his normal practice to immediately get out of his car and approach defendant, Balmer did not do so on this occasion. He was concerned for his safety because of the information he had received about the possibility of defendant possessing a loaded gun in the blue Nissan. He therefore remained in his car and called for backup.

While waiting for backup officers to arrive, defendant began to get out of his car. Balmer ordered him to remain in it, and defendant complied. After backup officers arrived, Balmer got out of his car and approached defendant.

When Balmer had activated his emergency lights in order to effectuate the stop, his MVR automatically activated and remained in operation, producing a video and audio recording of all of the

relevant roadside events. The MVR recording was played at the suppression hearing. Therefore, even though defendant did not testify, his recorded discussions with Balmer during the roadside encounter were before the court and could be evaluated together with the demeanor he exhibited throughout the episode.

When Balmer approached defendant, he leaned in through the open driver's side window and spoke to him. Balmer testified that at that time, he immediately detected a very strong odor of raw marijuana coming from inside the vehicle, which he immediately recognized based on his training and experience. He later included this statement in his written police report. However, on the MVR recording, he did not verbalize this observation to defendant or the other officers prior to requesting defendant's consent to search the car.

After the initial discussion, Balmer directed defendant to step out of his car. Defendant refused. After Balmer told defendant he could charge him with obstruction if he continued to refuse, defendant got out of the car, closing the windows and locking the doors behind him.

Defendant's demeanor was agitated and boisterous. He demanded to know why he was being stopped and ordered out of his car. Balmer told him there were two reasons, namely that he had swerved into oncoming traffic to go around the truck that was

backing out and that his sound system was too loud. Defendant responded that the truck driver saw him and waved at him to go by. Defendant also said there was no oncoming traffic.

Defendant spoke to Balmer in a loud and argumentative manner, often using profanity and repeatedly interrupting him. As he spoke, he waived his arms about, often toward Balmer. He demonstrated a lack of cooperation and appeared to be very nervous. The combination of defendant's demeanor and the information Balmer had about the gun induced Balmer to conduct a pat search of defendant for his safety. No weapons were found.

Balmer asked defendant whether there was anything illegal in the car, to which defendant responded in the negative. Balmer asked if he could search the car, and defendant again answered in the negative, telling Balmer he did not have the right to search his car. As the colloquy continued, Balmer asked several more times whether he could search the car, and defendant continued to refuse. Balmer asked whether there were any guns or ammunition in the car. Defendant answered in the negative.

Finally, Balmer told defendant he was going to request a gun-sniffing dog and a drug-sniffing dog. Balmer explained to defendant what would happen next. The dogs would come to the scene and search the vehicle. If either of them detected drugs, firearms or ammunition, the car would be impounded and Balmer

would apply for a search warrant, which would authorize a search of all parts of the car. He estimated that "we'll have the car out of commission for a couple of days."

Defendant asked if he could speed the process up. Balmer informed defendant if he wished to consent the officers would search the car without dogs and, if they did not find anything illegal defendant would probably be free to go in fifteen minutes.

Defendant then said, "I'll let you search the car." Balmer produced a standard consent-to-search form. He read it as defendant followed along, reading the form. Defendant initialed and signed the form in all required locations, acknowledging that he understood he had the right to refuse to allow the search, the right to revoke his consent at any time during the search, and the right to be present during the search. He acknowledged, as stated in the form, that his permission was given voluntarily of his own free will, without coercion, fear or threat.

At this point, the MVR recording, which had begun at 12:34 p.m., was at 1:11 p.m. A total of thirty-seven minutes had elapsed since the initial stop.

The officers then entered the car and discovered a hidden compartment in the driver's side door, which was concealed inside the door frame. In that compartment, they found two scales, which



they recognized as narcotics paraphernalia, cocaine, marijuana, and a gun.

In addition to the criminal charges, Balmer issued motor vehicle summonses to defendant for failure to signal, failure to keep right, failure to keep right within the lane, and possession of CDS in a motor vehicle, as well as a summons for a noise disturbance, in violation of a municipal ordinance.

Defendant moved to suppress the evidence that was seized from his car. He argued that (1) the motor vehicle stop was unlawful, (2) the duration of the investigatory stop constituted a de facto arrest, and (3) his consent to search was coerced. At the conclusion of the hearing, Judge Anthony J. Mellaci, Jr. rendered a comprehensive oral decision in which he rejected all three arguments. He found that the motor vehicle stop was based on Balmer's reasonable suspicion that defendant committed motor vehicle offenses, and was therefore lawful.<sup>3</sup> He found that, under the totality of the circumstances, the duration of the stop was reasonable. Finally, he found that Balmer possessed a reasonable and articulable suspicion that contraband would be found in defendant's car which justified his request for consent to search

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<sup>3</sup> On appeal, defendant does not challenge the trial court's finding that the stop was valid.

the car, and that defendant freely and voluntarily consented. He accordingly denied the suppression motion.

Important to our review of Judge Mellaci's decision is his credibility assessment of Balmer. He found that Balmer was "very candid and very honest in what he said." Based upon that assessment, the judge made a critical factual finding regarding Balmer's testimony about observing a very strong odor of raw marijuana emanating from inside defendant's car when he initially approached the car:

I found [Balmer] to be entirely credible in everything he said. And for that reason, even though it wasn't mentioned on the tape and even though there was an opportunity when another officer came to the car midway through what we saw on the MVR and Balmer asked the officer, did you see anything when you looked in the car, and there was no mention at that time that Balmer had smelled marijuana. I still believe that Balmer when he says he went up to that car and smelled the odor of marijuana, he did. I mean he just doesn't appear to be a liar to me and he didn't come across that way in anything he said or did here. So even though it was not noted in the tape and then reflected in the transcript, it was noted in the report and I believe he did smell marijuana.

The judge also found that defendant was not threatened or coerced into consenting to a search. Balmer merely presented him with the two options before him, and gave him an accurate factual prediction of what would happen under either scenario.

As far as the duration of the stop, the judge observed from his viewing of the MVR recording that much of the time was necessitated because of defendant's uncooperative and inappropriate behavior. He noted that defendant's "actions were really the cause of what dragged out this initial stop to some 13, 14 minutes before anything really substantive occurred." He therefore rejected defendant's argument that the duration of his roadside detention was disproportionately long in relation to the relatively low level of the motor vehicle offenses for which he was stopped, when viewed in the totality of the circumstances, including knowledge of the possible possession of a gun in the car.

The judge was also convinced that, in addition to signing the consent form, defendant's demeanor, as depicted in the MVR recording, showed that he "was not under duress, he was seen laughing and joking with the officers; and . . . no physical, mental or emotional pressure was being . . . exerted against the defendant."

Based upon his factual findings, and applying the correct legal standards, Judge Mellaci found that the State proved that Balmer had a reasonable and articulable suspicion that contraband would be found in defendant's car, see State v. Carty, 170 N.J. 632, 647, modified, 174 N.J. 351 (2002), thus justifying Balmer's

request for consent to search in conjunction with a motor vehicle stop. The judge further found that the State carried its burden of proving that defendant knew he had a choice to agree or refuse to consent, and his consent was given knowingly and voluntarily. See State v. Johnson, 68 N.J. 349, 353-54 (1975).

Our review of a trial court's decision on a suppression motion is circumscribed. We must defer to the trial court's factual findings as long as those findings are supported by sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). A reviewing court should especially "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." Id. at 244 (quoting State v. Johnson, 42 N.J. 16, 161 (1964)). Those findings should only be disregarded when they are clearly mistaken. State v. Hubbard, 222 N.J. 249, 262 (2015) (citing Johnson, supra, 42 N.J. at 146). "A trial court's findings should not be disturbed simply because an appellate court 'might have reached a different conclusion were it the trial tribunal.'" State v. Handy, 206 N.J. 39, 44-45 (2011) (quoting Johnson, supra, 42 N.J. at 162).

Judge Mellaci's credibility assessment of Balmer, the only live witness, was based on his observation of Balmer's manner of

testifying and demeanor. That assessment underpinned the judge's factual finding that Balmer did smell a strong odor of raw marijuana emanating from inside defendant's car when he first approached the car. The judge also based some of his findings pertaining to defendant's conduct on his viewing of the MVR recording. That evidence corroborated Balmer's testimony regarding defendant's uncooperative and inappropriate demeanor, the fact that defendant's behavior was a significant factor in extending the duration of the stop, and that defendant was not under any pressure or duress when he consented to the search. We defer to the judge's factual findings on these dispositive matters.

Article I, paragraph 7 of the New Jersey Constitution requires, as a condition of requesting consent to search a motor vehicle in conjunction with a motor vehicle stop, that the officer possess a reasonable and articulable basis beyond the initial valid motor vehicle stop itself. Carty, supra, 170 N.J. at 647. It is clear to us that Balmer possessed the requisite suspicion when he observed the strong odor of raw marijuana emanating from the interior of defendant's car. See State v. Judge, 275 N.J. Super. 194, 202 (App. Div. 1994). Balmer, therefore, acted appropriately in requesting consent in this case.

The motion record firmly establishes that defendant was fully aware he had the right to refuse consent. Indeed, he refused on

several occasions during the course of the roadside colloquy. Defendant ultimately gave his consent and signed a consent form formally acknowledging that he understood his right to refuse and that he consented freely and voluntarily without force or threat. The absence of coercion or pressure was corroborated by the trial court's assessment of defendant's demeanor on the MVR recording. It is noteworthy that defendant ultimately consented when he was told the police would be requesting a drug-sniffing dog and a gun-sniffing dog. It is very plausible that defendant then realized that the chances of the contraband being found in a concealed compartment were less likely if the police conducted the search without assistance from the dogs. All of these circumstances led to Judge Mellaci's finding that consent was freely and voluntarily given with full knowledge of the options available.

Finally, we reject the argument that Balmer engaged in coercive conduct by informing defendant dogs would be brought to the scene, and if they reacted positively, the car would be impounded and a search warrant would be sought. This was a fair and accurate prediction of the events that would follow if defendant continued to refuse to consent to a search. It was not a hollow threat, but an explanation of the course of events the police would properly take in light of the smell of marijuana emanating from inside defendant's car.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION