SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0136-16T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

RANDOLPH MCLEOD,

Defendant-Respondent.

Argued March 16, 2017 – Decided June 8, 2017

Before Judges Alvarez and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 13-07-0984 and 13-07-0991.

David M. Liston, Assistant Prosecutor, argued the cause for appellant (Andrew C. Carey, Middlesex County Prosecutor, attorney; Mr. Liston, of counsel and on the brief).

Stefan Van Jura, Deputy Public Defender II, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Mr. Van Jura, of counsel and on the brief).

PER CURIAM

By leave granted, the State appeals a March 23, 2016 order suppressing evidence after a hearing on defendant Randolph

McLeod's motion, as well as the judge's subsequent denial of reconsideration. We now reverse.

Defendant was indicted for fourth-degree being an unlicensed bounty hunter, N.J.S.A. 45:19-30 (count one); three counts of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (counts two, four, and six); four counts of second-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(a) (counts three, five, seven, and nine); fourth-degree unlawful possession of hollow point bullets, N.J.S.A. 2C:39-3(f) (count ten); fourth-degree unlawful possession of a stun gun, N.J.S.A. 2C:39-3(h) (count eleven); four counts of fourth-degree unlawful possession of a large capacity ammunition magazine, N.J.S.A. 2C:39-3(j) (counts twelve, thirteen, fourteen, fifteen); two counts of fourth-degree possession of a prohibited weapon, an expandable baton, N.J.S.A. 2C:39-3(e) (counts sixteen and seventeen); two counts of fourth-degree possession of imitation firearms, N.J.S.A. 2C:39-4(e) (counts eighteen and nineteen); fourth-degree violation of regulatory provision, N.J.S.A. 2C:58-3 and/or 2C:58-4, N.J.S.A. 2C:39-10 (count twenty); and fourth-degree hindering, N.J.S.A. 2C:29-3(b)(4) (county twenty-one).

Woodbridge Police Department Patrol Officer Thomas Ganci, Jr., testified that on March 27, 2013, he passed a blue Crown Victoria with tinted side windows, lights in the grill, and

spotlights on the sides. His attention was drawn to the vehicle because it was headed west "a little fast" while he was headed east in a marked vehicle. Ganci promptly made a u-turn and followed. The Crown Victoria, which to that point had been traveling in the center lane, suddenly made a sharp left across the far left lane of travel towards the exit ramp. After the vehicle halted at a stop sign, the driver rolled down his car window, and gave Ganci a "thumbs-up" signal, proceeding to make another sharp left into a parking lot.

Ganci followed the car into the lot, learned that the owner had a suspended license, and turned on his overhead lights, which activated the patrol car's video camera. The driver got out of the Crown Victoria and immediately walked over to him. Ganci testified that the driver said, "something to the effect of, 'we just came from your department. We just came from you guys. I have a warrant here for this person.'" The driver seemed nervous and talked very fast. He wore battle dress uniform (BDU) pants, a bullet-proof vest which had the words, "Sergeant Johnson" embroidered on the left side, and a nylon duty holster around his belt and one on his thigh, with an empty gun holster.

The paper the driver handed Ganci only had a person's name written on it, and no other information. Ganci had difficulty understanding the driver, but thought he said something about a

warrant and that the driver intended to apprehend the person. When asked about the registered owner of the vehicle, the driver said it was his partner, whose father was a lieutenant in the Newark Police Department.

The driver handed Ganci an unfamiliar form of identification, indicating the driver was a bounty hunter. When Ganci asked him to identify the department with which he was affiliated, he said "[n]o, we're bounty hunters." He was unable to produce a driver's license, although he looked in the back seat of his car, opened the trunk, briefly looked in a duffle bag, and said something to the effect of "[y]ou know, I might have left it on the counter[.]"

The driver gave his name as Edward Johnson IV, and when asked if he used a middle initial, he first said no and then said the letter "B."[1] Johnson provided Ganci with a correct date of birth. By that juncture, defendant, who was the passenger, had stepped out of the vehicle and handed Ganci his cell phone, stating the registered owner was on the line. Ganci spoke to someone who said the occupants had permission to drive his car.

When Ganci tried to pin Johnson down as to his precise title, he initially declared he and defendant "[w]e're bail bondsmen[.]" Defendant interrupted him and said "[w]e're fugitive recovery."

[1] Johnson is named in the indictment for virtually the same offenses; he is defendant's co-defendant.

As a result, Ganci became concerned since the men "gave me three separate titles as to who they were and . . . they didn't even know what -- who they worked for, what their job was."

Defendant was dressed in the same manner as Johnson, including an empty gun holster. Johnson had a criminal warrant out of the Town of Orange and a traffic warrant from the Newark Municipal Court. Defendant also had an active arrest warrant either out of Long Branch or West Long Branch municipal court.

After backup arrived, Sergeant Richard Velez and Ganci spoke about the possibility of searching the vehicle. Velez decided to call a detective to the scene, Detective Richard Yanak, to obtain a consent to search the car.

Once Yanak arrived, he and Ganci can be heard discussing the possibility of a search on the video tape from the stop played during the hearing. When Yanak asked Ganci if defendant had any weapons, Ganci responded that he had not seen any. Yanak then said:

> I know [bail bondsmen] carry bullet proof vests and stuff like that; they're allowed to. Unless they have a (indiscernible), holsters and stuff like that, they can have. But if there's a gun in it, they better have the information on them 'cause of them, 99 percent of them, don't -- aren't allowed to carry.

Johnson consented to the search after being read the form. Towards the end of the search, a man claiming to be the owner of the

vehicle appeared with a licensed driver. By then, the officers had located firearms, hollow point bullets, and a stun gun, among other items.

The trial judge found that the consent to search was obtained voluntarily, a point not in dispute. His concern was whether there was sufficient reasonable and articulable suspicion as required under State v. Carty, 170 N.J. 632, 647, modified on other grounds, 174 N.J. 351 (2002), to request consent in the first place. In his opinion, looking at the totality of the circumstances, there was insufficient reasonable and articulable suspicion "to suggest that the driver or passenger had engaged in, or were about to engage in, criminal activity." He found that the initial testimony established that the officers intended to arrest Johnson and defendant on the outstanding warrants, and secure the vehicle for retrieval by the owner.

In the judge's opinion, when Yanak arrived at the scene, however, that plan changed because he had a "hunch" that bail bond employees often illegally carry firearms. The judge further opined that the empty holsters were not indicative of criminal activity, nor were the men's clothing. That the driver was nervous did not alter the equation. The judge considered Yanak's "presentiment" not equivalent to reasonable and articulable suspicion. He therefore suppressed the evidence.

On appeal, the State contends that the trial judge erred because he mischaracterized the facts, namely, that the decision to search was based on Yanak's expression of a hunch. The State also argues that the judge misunderstood the type of scenario the Carty reasonable and articulable suspicion standard was intended to address, and that in any event the circumstances presented ample reasonable and articulable suspicion.

We review a motion judge's factual findings in a suppression hearing with great deference. State v. Gonzales, 227 N.J. 77, 101 (2016). They are upheld "so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). The deference with which we review those factual findings is "substantially influenced by [the motion judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Johnson, 42 N.J. 146, 161 (1964). We owe no deference, however, to the trial court's legal conclusions or interpretation of the legal consequences that flow from established facts. As always, our review in that regard is de novo. State v. Watts, 223 N.J. 503, 516 (2015); State v. Vargas, 213 N.J. 301, 327 (2013).

Under the Fourth Amendment of the United States Constitution and Article I, Paragraph 7, of the New Jersey Constitution, a

warrantless search is presumed invalid. The burden is on the State to prove it "falls within one of the few well delineated exceptions to the warrant requirement." State v. Pineiro, 181 N.J. 13, 19 (2004) (quoting State v. Maryland, 167 N.J. 471, 482 (2001)). Consent is a well-recognized exception to the Fourth Amendment's search warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44, 36 L. Ed. 2d 854, 858 (1973). The voluntary or knowing nature of the consent is not challenged here. See State v. Sugar, 100 N.J. 214, 234 (1985).

Once the validity of a consent to search has been established, the burden then shifts to the defendant to establish some illegality in the manner of execution. State v. Robinson, 200 N.J. 1, 7-8 (2009) (citing State v. Valencia, 93 N.J. 126, 133 (1983)).

Although the Law Division judge made no specific finding, it is clear that he considered Ganci a credible witness. Ganci's testimony was corroborated by a second officer who testified regarding unrelated issues, as well as by the video of the entire incident, which the judge watched. His conclusion, not supported by Ganci's testimony, appeared to be that until Yanak arrived, and articulated his "hunch," the officers were not considering searching the Crown Victoria. That is not the testimony.

Ganci said that he and Velez discussed obtaining a consent to search because of their concerns, and Velez called Yanak to the scene for that very reason. Furthermore, Yanak did not say that there was a possibility weapons would be found in the car based on a guess. He said, captured on the video:

> I know they carry bullet proof vests and stuff like that; they're allowed to. Unless they have a (indiscernible), holsters and stuff like that, they can have. But if there's a gun in it, they better have the information on them 'cause of them, 99 percent of them, don't --- aren't allowed to carry.

The basis for his certainty that most "bounty hunters" do not have permits to carry weapons is unknown——but his expression was of a certainty, based on some knowledge, not a guess. Moreover, the comment followed a discussion with Ganci regarding Ganci's suspicions based on his encounter with the driver and defendant.

The stop of this automobile was lawful. The car was proceeding at a rate of speed that caught Ganci's attention, attempted to evade the patrol car by turning unexpectedly onto a side street when the officer was observed to have made a u-turn, attempted to engage Ganci in a friendly exchange by a thumbs-up gesture, and immediately pulled into a parking lot. Once Ganci pulled in behind the vehicle and stopped, Johnson promptly got out of his car and approached him. The tinted windows, themselves a violation of New Jersey's motor vehicle code, N.J.S.A. 39:3-74,

warranted the stop without consideration of the other circumstances.

During the stop, the conduct of the driver and the passenger was suspicious. The officer could not elicit a definite answer from the two men as to the nature of their employment, the name of the person that they were seeking to apprehend, and by whom they were employed. They were dressed in highly unusual military or police garb, which would, when added to the driver's nervousness, establish the reasonable and articulable suspicion that the empty holsters meant that weapons would likely be found in the car.

Before a consent to search can be requested, reasonable and articulable suspicion must be demonstrated. See Carty, supra, 170 N.J. at 635. This doctrine was developed specifically to address "unreasonable intrusions when it comes to suspicionless consent searches following valid motor vehicle stops." Id. at 646. It was intended to deter "the widespread abuse of our existing law that allows law enforcement officers to obtain consent searches of every motor vehicle stopped for even the most minor traffic violation." Ibid. An "objective standard [was] imposed to restore some semblance of reasonableness" to requests for consent to search during routine motorist/police encounters. Ibid. The State demonstrated in this case, however, that the officers had an

objective reasonable and articulable suspicion to obtain consent to search, a far cry from the fishing expeditions barred by Carty.

Preliminarily, reasonable suspicion may be based on an officer's prior experiences. See State v. Stovall, 170 N.J. 346, 361 (2002). Yanak's seeming knowledge regarding the habits of bail bondsmen was not speculation, but based on some prior experience or training. It is inconsequential that he did not identify the source of his knowledge given the fact he was standing with other officers and two suspects in a public parking lot in the midst of a stop. That he expressed himself as having "knowledge" is consequential. It was not a "hunch."

In any event, where the driver and his passenger could not give a good report of their destination, had outstanding warrants, were not driving their own vehicle, appeared nervous, and initially attempted to misrepresent themselves as law enforcement, reasonable and articulable suspicion that justified the request for a consent to search was well demonstrated. See Carty, supra, 170 N.J. at 635; State v. Thomas, 392 N.J. Super. 169, 188 (App. Div.), certif. denied, 192 N.J. 597 (2007). The standard is far lower than probable cause and is determined objectively. See State v. Elders, 192 N.J. 224, 250 (2007); Stovall, supra, 170 N.J. at 356.

The interests of justice demand intervention and correction because, first, the trial court misheard testimony. Additionally, even were we not to conclude the court mistakenly interpreted the record, we disagree with the court's legal determination. The circumstances did give rise to a reasonable and articulable suspicion that a search would produce evidence of criminal wrongdoing.

Reversed and remanded to the Law Division for further proceedings consistent with this opinion.