SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0137-16T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LAMONT TILLER and
RASHEEM DAVIS,

Defendant-Respondent.

Submitted March 6, 2017 – Decided April 27, 2017

Before Judges Nugent and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 15-07-1005.

Esther Suarez, Hudson County Prosecutor, attorney for appellant (Stephen J. Natoli, Assistant Prosecutor, on the brief).

Janet Costello, attorney for respondent Lamont Tiller.

Respondent Rasheem Davis has not filed a brief.

PER CURIAM

Defendants Lamont Tiller (Tiller) and Rasheem Davis (Davis) (collectively defendants), were charged and indicted with eight

counts related to the possession of heroin with the intent to distribute. The State appeals from the June 28, 2016 order that granted defendants' motion to suppress evidence of heroin obtained from a minivan. After a review of the contentions in light of the applicable principles of law, we affirm.

We derive the following facts from the suppression motion record. In the week prior to these events, Police Officer Greg Wojtowicz of the Jersey City Police Department (JCPD) received a tip from a confidential informant (CI) referring to an illegal narcotics distribution network and a stash[1] vehicle. The CI stated that a black male, known by the street name of "L" (who was known to the JCPD as Lamont Tiller) was dropping off bricks of heroin and using a tan minivan as a "stash location." The CI gave the make, model and license plate number of the van as well as the street location where it was parked.

Wojtowicz, along with several other JCPD officers, located the minivan and set up surveillance. The officers saw defendants approach and enter the vehicle; Davis got into the front passenger seat and Tiller sat behind him in the rear. Wojtowicz then

[1] Wojtowicz explained that a "[s]tash is essentially . . . where [people involved in narcotics distribution] keep their drugs away from the area so when they need to replenish their supply . . . they retrieve the drugs and bring it back to where it's being distributed."

observed Tiller bend down, begin to manipulate an object and hand it to Davis.

Believing that he had witnessed a drug transaction, Wojtowicz advised the "perimeter units to move in to further investigate." At that moment, a police siren was accidentally activated by another officer and defendants both exited the minivan. As he got out of the van, Davis placed an object consistent with the size and shape of a brick of heroin into his boot and began to walk up the street. After he was stopped by two officers, Davis stated that he had heroin in his right boot; the officers retrieved thirty glassine bags of heroin from the boot.

After hearing the police siren, Tiller also began to walk away from the minivan. As he did so, he threw a key over a fence; the key was eventually recovered and determined to be the key to the minivan. Tiller was stopped by several officers and placed under arrest.

Under the instruction of Wojtowicz, Officer Carlos Lugo approached the minivan and observed through a tinted side window a light blue tinted saran wrap[2] and several bricks of suspected heroin on the floor of the van. Lugo entered the minivan and discovered ten bricks of heroin wrapped in a green saran wrap.

[2] Lugo testified that tinted saran wrap is commonly used for the packaging of bulk heroin.

Approximately five hundred glassine bags of heroin were recovered from the minivan.

Defendants moved to suppress the evidence seized from both the minivan and Davis's boot. On June 28, 2016, the Honorable Sheila A. Venable granted defendants' motion to suppress the evidence obtained from the van, and denied suppression of the evidence obtained from Davis's boot. In a comprehensive written decision, Judge Venable rejected the State's assertion that the plain view exception to the warrant requirement was applicable because the officers "knew in advance where evidence was located based on the CI tip and it is reasonable to infer that police intend[ed] beforehand to seize the van or evidence in the van prior to viewing the contraband in plain view." The judge noted that the "police relied on the plain view doctrine only in pretense." As such, the "discovery of evidence in plain view cannot be inadvertent." We granted the State leave to appeal from the order.

On appeal, the State argues that the trial court erred in finding the inadvertence prong of the plain view exception was applicable to the case at bar because Lugo did not conduct a search by looking in the car. Alternatively, the State asserts that if the inadvertence prong applies, the record supports a finding that

the police officer discovered the contraband in the van inadvertently.

In reviewing a motion to suppress, "we accord deference to the factual findings of the trial court." State v. Scriven, 226 N.J. 20, 32 (2016). 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)). "Nevertheless, we are not required to accept findings that are 'clearly mistaken' based on our independent review of the record." State v. Watts, 223 N.J. 503, 516 (2015). Applying this standard, we discern no reason to disturb the trial judge's ruling.

"A warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." State v. Gamble, 218 N.J. 412, 425 (2014) (quoting State v. Cooke, 163 N.J. 657, 664 (2000)). The State bears the burden, by a preponderance of the evidence, to establish that the warrantless search or seizure of an individual was justified in light of the totality of the circumstances. State v. Mann, 203 N.J. 328, 337-38 (2010).

The State argues that the plain view exception was satisfied to permit the warrantless search of the minivan. Under the plain view exception, three elements must be met:

> First, the police officer must be lawfully in the viewing area. 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. 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.
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> [State v. Bruzzese, 94 N.J. 210, 236 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984) (citations omitted).]

There is no dispute here as to the first and last elements of the plain view exception, rather, the State contests the judge's ruling that the inadvertence prong was applicable in these circumstances, and that it was satisfied.[3] We disagree.

As Judge Venable properly noted, Lugo did not "unlawfully search simply by viewing into a vehicle parked on a public street . . . . Mere visual observation without physical intrusion generally does not constitute a 'search' within the meaning of the

[3] State v. Gonzales, 227 N.J. 77 (2016) held prospectively "that an inadvertent discovery of contraband or evidence of a crime is no longer a predicate for a plain view seizure." Id. at 82. This suppression motion pre-dated Gonzales and therefore the element must be satisfied in this case.

Fourth Amendment." In State v. Pineiro, 369 N.J. Super. 65, 73-74 (App. Div. 2004), we explained that

> [a] police officer may seize an item revealed by a plain view observation only if the officer has probable cause to believe that the item is contraband or evidence and the seizure can be made without intruding into any constitutionally protected area or the intrusion can be made in conformity with the Fourth Amendment.

The plain view observation made here could likely furnish probable cause for a warrant to issue for a seizure. However, it does not justify a warrantless intrusion to seize the viewed evidence. The officers' entry into the van was an intrusion into a constitutionally protected area, and therefore required the inadvertence prong of the exception to be satisfied.

We disagree with the State's contention that the inadvertence prong was met. The officers knew in advance that contraband existed in the van. As the judge stated:

> [T]he police knew in advance where evidence was located based on the CI tip and it is reasonable to infer that police intended . . . to seize the van or evidence in the van prior to viewing the contraband . . . . Thus, if [the] police knew that Tiller was using the van as a stash site for CDS heroin, PO Lugo's discovery of evidence in plain view cannot be inadvertent.

The police officers knew based on information received from the CI that the minivan was being used as a stash location for heroin.

The tip was corroborated after Wojtowicz viewed what he believed to be a heroin transaction while he was surveilling defendants. Subsequently, other officers retrieved heroin from Davis's boot. The inadvertence prong is only satisfied if the police did not "know in advance the location of the evidence and intend to seize it," essentially relying on the plain-view doctrine only as a pretense. State v. Johnson, 171 N.J. 192, 211 (2002). The inadvertence requirement was not satisfied because the officers were expecting to find heroin in the minivan. Accordingly, the warrantless search was not justified under the plain view doctrine.

Affirmed.