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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0665-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID G. SMITH,

Defendant-Appellant.

Submitted March 21, 2017 – Decided April 17, 2017

Before Judges Yannotti and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No. 12-
10-2019.

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

Joseph D. Coronato, Ocean County Prosecutor,
attorney for respondent (Samuel Marzarella,
Chief Appellate Attorney, of counsel; William
Kyle Meighan, Senior Assistant Prosecutor, on
the brief).

PER CURIAM

Following the denial of his motion to suppress physical
evidence, defendant David G. Smith pled guilty to third-degree

distribution of Alprazolam, N.J.S.A. 2C:35-5(a)(1) and -5(b)(13). Defendant also pled guilty to three other separate crimes: fourth-degree violation of community supervision for life, N.J.S.A. 2C:43-6.4(d); third-degree failure to register under Megan's Law, N.J.S.A. 2C:7-2(e); and third-degree theft, N.J.S.A. 2C:20-3.

On the distribution conviction, defendant was sentenced to six years in prison with three years of parole ineligibility. His sentences for the other three convictions were for terms of one to four years in prison and were run concurrent to each other and to his distribution sentence.

Defendant appeals contending that the trial court erred in denying his motion to suppress physical evidence seized without a warrant. We affirm because the motion judge found that the evidence was seized under an established exception to the warrant requirement and that finding was supported by substantial, credible evidence.

I

The relevant facts were established at an evidentiary hearing. Five witnesses testified at the hearing: (1) Detective Brian Flynn of the Lacey Township Police Department; (2) Lieutenant Chris Cornelius, also with the Lacey Township Police Department; (3) defendant; (4) defendant's ex-girlfriend; and (5) the brother of defendant's ex-girlfriend.

Detective Flynn testified that on March 27, 2012, he received information from a concerned citizen that drugs were being sold from defendant's home. The detective had previously received information about narcotics activity at the same address from a confidential informant. Accordingly, the police set up a surveillance of the home. While surveilling the home, Detective Flynn observed two vehicles drive up and park outside the home. The occupants of those vehicles then entered the home. A few minutes later they exited the home and drove away. Flynn testified that such activity was consistent with illegal drug sales.

Shortly thereafter, a third vehicle arrived. That vehicle was driven by a man, who was later identified as Jeffrey Dale. The vehicle also had a female passenger, who was later identified as Lisa Cahill. After he parked his vehicle in front of defendant's home, Dale exited the car and went into the house while Cahill remained in the car. A few minutes later, Flynn saw Dale leave the house, get back into the car, and drive away.

Flynn alerted other officers, including Lieutenant Cornelius, who was parked in a separate car. Cornelius then followed Dale's vehicle until it came to a stop in front of another house. Dale and Cahill both got out of the car and Cornelius approached Dale and began to speak with him.

Shortly thereafter, Flynn arrived. He got out of his car, walked over to Cahill, and began to speak with her. As Flynn was speaking with Cahill, he saw that her purse was open and that it contained a prescription bottle. When he asked Cahill about the bottle, Cahill removed the bottle from her purse, opened it, and showed the contents to the detective. Flynn noted that there were two different types of pills in the bottle. When he asked Cahill about the different pills, she admitted that some of the pills were Alprazolam¹ and that she did not have a prescription for those pills.

Cahill and Dale were then arrested. Cahill was taken to police headquarters, given her Miranda² rights, and she agreed to give a statement. In her statement, she explained that Dale had purchased the Alprazolam pills from defendant.

Thereafter, the police obtained an arrest warrant for defendant, and the following day defendant was arrested at his home. After defendant was arrested, the police obtained consent from his ex-girlfriend to search the home.

Following defendant's arrest, he was indicted under four separate indictments for a number of different crimes. Under

¹ Cahill identified the pills as Xanax, which is the brand name for Alprazolam.

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

Indictment No. 12-10-2019, defendant was indicted for crimes related to the possession, intent to distribute, and distribution of illegal drugs, including Alprazolam.

Defendant filed a motion to suppress the seizure of the illegal drugs and, as already noted, the court held an evidentiary hearing on that motion. After listening to the testimony of the witnesses, the motion court found the testimony of the two police officers to be credible and consistent. The court also found the testimony of defendant, his ex-girlfriend, and his ex-girlfriend's brother to be either incredible or not relevant. The motion judge then found that the police had conducted a lawful field inquiry when they spoke to Dale and Cahill. Alternatively, the motion judge determined that the police had reasonable, articulable suspicion to conduct an investigatory stop of Dale and Cahill.

The court also found that Cahill voluntarily showed Flynn the prescription bottle and the pills inside that bottle. The court then determined that Flynn's questioning of Cahill was non-coercive and reasonable. With regard to the consent to search defendant's home, the motion judge found that the detectives obtained proper consent and that they reasonably believed defendant's ex-girlfriend had the authority to provide that consent.

The motion judge, therefore, denied the motion to suppress and issued a written opinion, dated April 29, 2015, detailing his findings of fact and conclusions of law.

II.

Defendant now appeals the denial of his motion to suppress the physical evidence. Defendant argues that his motion to suppress the Alprazolam should have been granted because the police did not conduct a lawful investigatory stop of Cahill, and even if the initial stop was lawful, they detained her for an unreasonable period during her questioning. Defendant articulates those arguments as follows:

THE TRIAL JUDGE ERRED IN DENYING SMITH'S MOTION TO SUPPRESS THE EVIDENCE BECAUSE THE INVESTIGATIVE STOP OF CODEFENDANT CAHILL WAS NOT BASED ON REASONABLE SUSPICION. ALTERNATIVELY, EVEN IF THE INITIAL STOP WAS JUSTIFIED, IT WAS UNREASONABLE FOR THE DETECTIVES TO CONTINUE CAHILL'S DETENTION IN ORDER TO QUESTION HER ABOUT THE CONTENTS OF HER PURSE

Initially, we clarify what issues are the subject of this appeal. Defendant made a motion to suppress the physical evidence that supported the charges that he had possessed, intended to distribute, and distributed illegal drugs. When that motion was denied, he pled guilty to third-degree distribution of Alprazolam. Defendant had also been charged with a number of separate crimes under three additional indictments. Although defendant filed a

notice of appeal listing all four indictments as the subject of the appeal, he only presents arguments related to the motion to suppress the illegal drugs. Consequently, defendant has not raised any issues that could result in a reversal of his pleas of guilt for third-degree failure to register under Megan's Law, third-degree theft, or fourth-degree violations of community supervision for life.

Moreover, at the motion to suppress, defendant argued that the consent given by his ex-girlfriend to search his home was not valid. On this appeal, however, defendant has not raised that issue. Therefore, defendant has effectively abandoned that argument on this appeal. See El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 155 n. 2 (App. Div. 2005) (citing In re Certificate of Need of Bloomingdale Convalescent Ctr., 233 N.J. Super. 46, 48 n. 1 (App. Div. 1989)). Accordingly, this appeal is focused solely on the motion to suppress as it relates to the stop and questioning of Cahill.

In reviewing a motion to suppress, we defer to the factual and credibility findings of the trial court, "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)). "An appellate court should disregard those findings only when a trial court's findings of fact are clearly mistaken." State v. Hubbard, 222 N.J. 249, 262 (2015). The legal conclusions of the trial court "are reviewed de novo." Id. at 263.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Not all encounters between police and citizens, however, constitute a search or seizure. State v. Rodriguez, 172 N.J. 117, 125 (2002). A police officer may "initiate[] a field inquiry by approaching an individual on the street, or in another public place, and 'by asking him [or her] if he [or she] is willing to answer some questions[.]'" Id. at 126 (fourth alteration in original) (quoting State v. Davis, 104 N.J. 490, 497 (1986)). "[A]n officer would not be deemed to have seized another if his questions were put in a conversational manner, if he did not make demands or issue orders, and if his questions were not overbearing or harassing in nature." Davis, supra, 104 N.J. at 497 n. 6.

In contrast, when an objectively reasonable person would feel that his or her right to move has been restricted, the encounter becomes more than a field inquiry. Id. at 498. Similarly, if the police stop a person in a vehicle, the police must have grounds for such an investigatory stop. State v. Golotta, 178 N.J. 205, 212-13 (2003). Thus, if a police officer makes an investigatory stop or detains a person, the officer must have "specific and articulable facts which, taken together with rationale inferences from those facts," give rise to a reasonable suspicion of criminal activity. State v. Liggett, ___ N.J. ___, ___ (2017) (slip op. at 21) (quoting Rodriguez, supra, 172 N.J. at 126). If a police officer has such reasonable articulable suspicion, then the officer can conduct a lawful investigatory stop and such a stop is a recognized exception to the warrant requirement. State v. Cole, 218 N.J. 322, 342-43 (2014).

The burden is on the State to show by a preponderance of the evidence that it possessed sufficient information to give rise to the required level of suspicion. State v. Pineiro, 181 N.J. 13, 19-20 (2004). That reasonable suspicion standard requires "some minimum level of objective justification for making the stop." State v. Amelio, 197 N.J. 207, 211-12 (2008) (quoting State v. Nishina, 175 N.J. 502, 511 (2003)). "The principal components of a determination of reasonable suspicion . . . [are] the events

which occurred leading up to the stop . . . , and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to a reasonable suspicion" State v. Stovall, 170 N.J. 346, 357 (2002) (alteration in original) (quoting Ornelas v. United States, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661-62, 134 L. Ed. 2d 911, 919 (1996)). In determining whether reasonable suspicion exists, a reviewing court should consider "the totality of the circumstances." State v. Gamble, 218 N.J. 412, 431 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)).

Applying these principles, we discern no basis for disturbing the motion court's determination that Flynn conducted a lawful field inquiry of Cahill. The motion court found that Flynn approached Cahill after she had exited the vehicle and while she was standing in a public location. The detective then asked a limited number of non-accusatory questions and the questions were not overbearing or harassing in nature.

Alternatively, the motion court found that the police had reasonable articulable suspicion to stop and investigate Dale and Cahill. The police had received tips from a concerned citizen and a confidential informant that drugs were being sold at defendant's home. The police then conducted surveillance and observed three

vehicles, including the one driven by Dale, stop at the home and the occupants then quickly entered and exited the home. Based on Flynn's training and experience, he testified that such activity was consistent with illegal drug transactions. Considering the totality of the circumstances, there was sufficient, credible evidence to support the motion court's finding that the officers had reasonable articulable suspicion for making an investigatory stop. See State v. Richards, 351 N.J. Super. 289, 300 (App. Div. 2002) (explaining that information from a confidential informant can "contribute to a reasonable objective and particularized suspicion to serve as the basis for an investigatory stop" (quoting Stovall, supra, 170 N.J. at 361)).

Defendant also contends that the continuous questioning of Cahill constituted an unlawful detention. We disagree. The motion court found that Flynn's questioning of Cahill was reasonable and non-harassing. While questioning Cahill, Flynn observed a prescription bottle in Cahill's open purse. When he asked Cahill about that bottle, Cahill voluntarily removed the prescription bottle and the pills. The motion judge also found that Flynn's follow-up questions were reasonable. There was no evidence to suggest that Cahill felt her rights to move had been restricted in any way. Again, the totality of the circumstances supports the motion court's finding that the questioning of Cahill was

reasonable and did not constitute an unlawful detention. In short, we discern no basis to disturb the findings of fact and conclusions of law made by the motion court.

Affirmed.

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



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