SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1131-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL A. TUCKER,
a/k/a MICHAEL A. JONES,
a/k/a MICHAEL TUCKER, and
a/k/a MICHAEL ANTHONY JONES,

Defendant-Appellant.

Submitted January 31, 2017 – Decided April 11, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 14-06-1445.

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

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Lucille M. Rosano, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Michael Jones, also known as Michael Tucker, pled guilty to third-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5(a)(1), (b)(3), and fourth-degree possession with intent to distribute marijuana, N.J.S.A. 2C:35(a)(1), (b)(12). He was sentenced to concurrent three-year terms. On appeal he challenges the denial of his motion to suppress evidence which resulted from a warrantless search. Defendant also challenges his three-year sentence on the fourth-degree marijuana possession count. We vacate the sentence on that count and remand for resentencing, but otherwise affirm his September 24, 2015 judgment of conviction.

I.

We derive the following facts from testimony of Essex County Sheriff's Officers Christian Megaro and Giuseppe Forgione and the trial court's factual findings at defendant's suppression motion hearing.

At approximately 10:30 p.m. on March 24, 2014, Officers Megaro and Forgione pulled over a Ford Explorer in Newark after observing the vehicle's driver-side brake light was out. Defendant was the sole occupant of the vehicle.

When Officer Megaro approached the driver's side of the vehicle, he observed defendant making "some slight movements" as if he were "maybe, possibly, reaching into his pocket." Officer

Forgione then positioned himself at the passenger side window. Megaro explained to defendant why he was pulled over and told him to produce his driving credentials. Defendant told the officers that the vehicle registration and insurance card were in the glove box, but that he did not have his driver's license on him.

During the stop, defendant's windows were rolled down, and both officers smelled the odor of "raw" or "fresh" marijuana coming from inside the vehicle. As defendant reached for the glove box, Officer Forgione noticed part of "a clear, plastic bagg[ie]" sticking out of the right pocket of defendant's jacket "like it wasn't tucked in all the way." Forgione, who could not see the contents of the baggie, asked defendant what was in his right jacket pocket. Defendant did not respond, and Forgione told Officer Megaro "he's got weed in that bag." Forgione ordered defendant to remove the baggie from his pocket and turn it over to him, which he did.

Both officers observed a "green vegetative substance" in the baggie which, based on their training and experience as police officers, they believed was marijuana. Officer Megaro also noticed in the baggie a packaged material, like "magazine or newspaper paper" "commonly used to store heroin." The officers placed defendant under arrest. It was later determined the plastic baggie contained two bags of marijuana and ninety-eight bags of heroin.

Defendant was charged with: third-degree possession of heroin, N.J.S.A. 2C:35-10(a) (Count 1); third-degree possession with the intent to distribute less than one-half ounce of heroin, N.J.S.A. 2C:35-5(a)(1), (b)(3) (Count 2); second-degree possession with the intent to distribute heroin within 500 feet of a public facility, N.J.S.A. 2C:35-7.1(a) (Count 3); fourth-degree possession with the intent to distribute less than one ounce of marijuana, N.J.S.A. 2C:35-5(a)(1), (b)(12) (Count 4); and third-degree possession with the intent to distribute less than one ounce of marijuana within 500 feet of a public facility, N.J.S.A. 2C:35-7.1(a) (Count 5).

Defendant filed a motion to suppress the evidence from the search of the baggie. At the suppression hearing, the trial court credited the officers' testimony. The court found the officers had a reasonable and articulable suspicion and lawfully stopped defendant because of his broken taillight. The court found the officers' request for defendant to turn over the plastic baggie was justified: because of the late hour and the odor of raw marijuana coming from the car; also under the plain view doctrine, and additionally under the inevitable discovery doctrine. Accordingly, the court denied defendant's suppression motion.

Defendant then entered a conditional guilty plea to third-degree possession with intent to distribute heroin (Count 2) and

fourth-degree possession with intent to distribute marijuana (Count 4). He was sentenced to concurrent terms of three years in prison with eighteen months to be served without parole.

Defendant appeals, raising the following arguments:

> POINT I – THE TRIAL COURT ERRED IN SANCTIONING THE WARRANTLESS SEARCH.
>
> THE PLAIN-VIEW EXCEPTION DOES NOT APPLY.
>
> THIS WAS NOT A PROTECTIVE FRISK.
>
> POINT II – THE THREE-YEAR SENTENCE IMPOSED ON THE FOURTH-DEGREE CONVICTION IS ILLEGAL.

II.

We first address the orders denying suppression. We must hew to our "deferential standard of review." State v. Rockford, 213 N.J. 424, 440 (2013). "'[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record.'" Ibid. (citation omitted). "Those findings warrant particular deference when they are 'substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Ibid. (citation omitted). "Thus, appellate courts should reverse only when the trial court's determination is 'so clearly mistaken "that the interests of

justice demand intervention and correction."'" State v. Gamble, 218 N.J. 412, 425 (2014) (citations omitted).

Like its federal counterpart, Article I, Paragraph 7 of the New Jersey Constitution protects against "unreasonable searches and seizures" and generally requires a warrant issued on "probable cause." N.J. Const. art. I, ¶ 7; see U.S. Const. amend. IV. "[A] warrantless search is presumptively invalid" unless the State establishes the search falls into "one of the 'few specifically established and well-delineated exceptions to the warrant requirement.'" State v. Gonzales, 227 N.J. 77, 90 (2016) (citation omitted).

"New Jersey courts have [repeatedly] recognized that the smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Myers, 442 N.J. Super. 287, 295 (App. Div. 2015) (quoting State v. Walker, 213 N.J. 281, 290 (2013)), certif. denied, 224 N.J. 123 (2016). The "smell of [raw] marijuana emanating from the automobile gave the officer probable cause to believe that it contained contraband." Id. at 296 (quoting State v. Pena-Flores, 198 N.J. 6, 30 (2009)); see State v. Guerra, 93 N.J. 146, 150 (1983). "[T]he odor of marijuana gives 'rise to probable cause "to conduct a warrantless search of the persons in the immediate area from where the smell has

emanated."'" Myers, supra, 442 N.J. Super. at 297 (citation omitted).[1]

Here, defendant was the sole occupant of the vehicle emitting the smell of raw marijuana. Based on their training and experience, the two officers recognized that odor of marijuana giving them probable cause to search defendant.

Furthermore, Officer Forgione saw a clear plastic baggie sticking out of defendant's jacket pocket that he suspected could contain marijuana and that defendant could conceal or discard. The officers "had no practical opportunity to secure a warrant once faced with an immediate and well-grounded suspicion that defendant illegally possessed marijuana in [their] presence." State v. Nishina, 175 N.J. 502, 517 (2003). "Once the car was stopped lawfully and the odor of marijuana detected by the police, probable cause and exigent circumstances existed[.]" State v. Birkenmeier, 185 N.J. 552, 565 (2006). "Exigent circumstances clearly were present in this case to justify a warrantless search" of defendant because he was "in the immediate area from where the

[1] Pena-Flores and Guerra involved "raw" or "unburnt" marijuana, while Walker and Myers involved "burnt" marijuana, but the distinction has no impact on our analysis. "[A]n odor of unburned marijuana creates an inference that marijuana is physically present in the vehicle. An odor of burnt marijuana creates an inference that marijuana is not only physically present in the vehicle, but that some of it has been smoked recently." State v. Judge, 275 N.J. Super. 194, 201 (App. Div. 1994).

smell has emanated." State v. Vanderveer, 285 N.J. Super. 475, 481 (App. Div. 1995). Accordingly, the officers could search defendant directly, or ask him to remove the baggie and show it to them.

Indeed, the odor of marijuana gave the officers probable cause to arrest defendant without a warrant for "committing an apparent marijuana offense in [their] presence." Myers, supra, 442 N.J. Super. at 297 & n.5. "The 'in presence' requirement . . . is satisfied by [an officer's] use of his sense of smell in much the same manner as if he had used his sight or hearing or touch[.]" Id. at 297 & n.6. If the officers arrested defendant, the marijuana in the clear plastic baggie "would inevitably have been discovered pursuant to a search incident to [his] lawful arrest." State v. Casimono, 250 N.J. Super. 173, 187-88 (App. Div. 1991).[2]

Defendant argues the officers gave no indication they planned to arrest him. We need not rely on inevitable discovery, because the officers had the right to search defendant as set forth above.

[2] "Under the search incident to arrest exception, the legal seizure of the arrestee automatically justifies the warrantless search of his person and the area within his immediate grasp." Pena-Flores, supra, 198 N.J. at 19. Upon a custodial arrest, the officers' "authority to conduct an essentially unlimited search of the arrestee's person follows as a matter of course," even for a disorderly-person offense. State v. Daniels, 393 N.J. Super. 476, 487, 490-91 (App. Div. 2007).

Furthermore, the trial court properly found the officers could seize the clear plastic baggie under the plain view doctrine.

> A police officer may seize evidence in plain view without a warrant if the officer is "lawfully . . . in the viewing area" when he discovers the evidence, and it is immediately apparent the object viewed is "evidence of a crime, contraband, or otherwise subject to seizure." "The officer must discover the evidence 'inadvertently, meaning that he did not know in advance where evidence was located nor intend beforehand to seize it.'"
>
> [State v. Keaton, 222 N.J. 438, 448 (2015) (quoting State v. Johnson, 171 N.J. 192, 206-07 (2002)).]

There is no dispute that the officers were lawfully in the viewing area because they were conducting a lawful traffic stop.

Defendant argues the discovery of the marijuana was not inadvertent because the officers ordered him to remove the baggie believing it contained marijuana. He misapprehends "[t]he purpose of the inadvertence requirement," which was "to prevent the police from engaging in planned warrantless searches where they know in advance the location of certain evidence and intend to seize it, relying on the 'plain view' exception as a pretext." State v. Padilla, 321 N.J. Super. 96, 109 & n.7 (App. Div. 1999), aff'd o.b., 163 N.J. 3 (2000).

Here, because the officers had no idea prior to the traffic stop defendant was involved in drugs, they "had no practical opportunity to secure a warrant once faced with an immediate and

well-grounded suspicion that defendant illegally possessed marijuana in the officer[s'] presence," and "once [they] had observed the [clear] plastic bag." Nishina, supra, 175 N.J. at 517-18. In any event, discovery of the drugs was inadvertent because they did not know the drugs' precise location. Gonzales, supra, 227 N.J. at 103. "[W]hatever remains of the 'inadvertence' requirement of plain view since [the United States Supreme Court abandoned it in Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990),] was satisfied in this case because the police officers did not know in advance that evidence would be found" in that precise location. Johnson, supra, 171 N.J. at 213.[3]

Defendant also disputes it was immediately apparent the clear plastic baggie was evidence of a crime or contraband. "[E]vidence of a crime is 'immediately apparent' under the plain-view doctrine when the officer possesses 'probable cause to associate the property with criminal activity.'" Gonzales, supra, 227 N.J. at 93 (quoting Texas v. Brown, 460 U.S. 730, 741-42, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d 502, 513 (1983)).

[3] Indeed, our Supreme Court in 2016 agreed with Horton "that an inadvertent discovery of contraband or evidence of a crime is no longer a predicate for a plain-view seizure." Gonzales, supra, 227 N.J. at 81-82. However, our Court determined its "holding is a new rule of law and therefore must be applied prospectively." Id. at 82.

Our Supreme Court has held that officers who see a clear plastic bag may seize it under the plain view doctrine, even if they cannot see its contents, if the surrounding circumstances give them probable cause to believe it contains illegal drugs. In Johnson, supra, an officer saw a man put a "light-colored object" into a hole. 171 N.J. at 199-200. The officer shined a flashlight into the hole and saw the object was "a clear plastic-like bag," but could not see its contents. Id. at 201, 204, 214, 218.

Our Supreme Court found probable cause to seize the clear plastic bag because "[t]he totality of the circumstances here 'warrant a man of reasonable caution in the belief that [the content of the plastic bag] may be contraband.'" Id. at 219 (alterations in original) (quoting Brown, supra, 460 U.S. at 742, 103 S. Ct. at 1543, 75 L. Ed. 2d at 514). The Court cited that the officer had other information indicating the man might be in possession of crack cocaine; the man made an "attempt to conceal the object"; and the officer "testified that, in his experience, zip-lock baggies are often used as containers for crack cocaine." Id. at 215-18. Under these circumstances, seeing "the clear plastic bag gave the officer a degree of certainty that was functionally equivalent to the plain view of crack-cocaine itself." Id. at 219.

Here, the odor of marijuana gave the officers probable cause to believe defendant was carrying marijuana. Defendant made movements around his pocket, and the baggie was not tucked in his pocket all the way, suggesting defendant attempted to conceal it as the officers approached.

Moreover, as the trial court found, plastic bags are "commonly used to store marihuana." New Jersey v. T.L.O., 469 U.S. 325, 347, 105 S. Ct. 733, 746, 83 L. Ed. 2d 720, 738 (1985). "Plastic baggies . . . are well-known tools for the packaging and sale of drugs." United States v. Carrasco, 257 F.3d 1045, 1048 (9th Cir.), cert. denied, 534 U.S. 1061, 122 S. Ct. 658, 151 L. Ed. 2d 574 (2001); accord United States v. Triana, 477 F.3d 1189, 1195 (10th Cir.), cert. denied, 551 U.S. 1110, 127 S. Ct. 2928, 168 L. Ed. 2d 257 (2007); United States v. Mays, 466 F.3d 335, 341 (5th Cir. 2006), cert. denied, 549 U.S. 1234, 127 S. Ct. 1313, 167 L. Ed. 2d 124 (2007); United States v. Parcels of Real Prop., 913 F.2d 1, 3 n.2 (1st Cir. 1990). "[E]ven though a clear plastic bag may be used for a multitude of noncriminal purposes, it is common knowledge that such a bag is frequently used to stash illegal narcotics." Moya v. United States, 761 F.2d 322, 333 (7th Cir. 1984); see United States v. Cowgill, 68 M.J. 388, 396 (C.A.A.F. 2010) ("It is common knowledge that marijuana is kept and distributed in sandwich baggies").

Defendant cites State v. Pineiro, 181 N.J. 13 (2004), but it involved an opaque cigarette pack. "[T]here was no proof of 'regularized police experience that objects such as [cigarette packs] are the probable containers of drugs.'" Id. at 28 (quoting State v. Demeter, 124 N.J. 374, 385-86 (1991) (involving film canisters)). By contrast, as set forth above, many courts have found regularized police experience that plastic baggies are probable containers of drugs. That widespread experience distinguishes Piniero and Demeter, where the sole "evidence was the experience of only one officer." Demeter, supra, 124 N.J. at 386.

Moreover, the circumstances here gave probable cause "[t]he clear plastic bag" contained drugs, unlike Demeter "where there were no surrounding circumstances to support probable cause that the cannister contained drugs." Johnson, supra, 171 N.J. at 218. Based on those circumstances, Officer Forgione expressly believed the clear plastic baggie contained "weed." See Nishina, supra, 175 N.J. at 508-09 (finding an officer under the circumstances could seize a clear plastic bag where he "believed that the plastic bag contained marijuana, although he acknowledged that he could not see the bag's contents"). Accordingly, he also could seize the baggie under the plain view doctrine. Thus, the trial court

properly found multiple reasons to deny defendant's motion to suppress.

III.

Defendant contends, and the State concedes, that defendant's three-year sentence on the fourth-degree marijuana count exceeded the statutory maximum. Pursuant to our Criminal Code, the sentence for a crime of the fourth degree, "shall not exceed 18 months." N.J.S.A. 2C:43-6(a)(4). Therefore, it is an illegal sentence. State v. Acevedo, 205 N.J. 40, 45 (2011). "We choose not to exercise our power to modify the sentence under N.J.S.A. 2C:44-7, and elect instead to remand the matter to the sentencing judge who presided over the trial and who is presumably more sensitive to the nuances of the case than we." State v. Abrams, 256 N.J. Super. 390, 403-04 (App. Div. 1992); see R. 2:10-3.

Accordingly, we affirm, except that we must vacate defendant's three-year term on the fourth-degree count and remand to the Law Division for resentencing. We do not retain jurisdiction.

Affirmed in part, vacated and remanded in part.