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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1258-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SAUL A. MILLS,

Defendant-Appellant.

Submitted September 25, 2017 – Decided October 3, 2017

Before Judges Sabatino, Whipple and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
13-08-1210.

Joseph E. Krakora, Public Defender, attorney
for appellant (Jay L. Wilensky, Assistant
Deputy Public Defender, of counsel and on the
briefs).

Christopher S. Porrino, Attorney General,
attorney for respondent (Sarah C. Hunt, Deputy
Attorney General, of counsel and on the
briefs).

PER CURIAM

Following the trial court's denial of his motion to suppress
incriminating evidence that police had seized in a warrantless car

search, defendant Saul A. Mills conditionally pled guilty to second-degree robbery, N.J.S.A. 2C:15-1, and second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). Other charges were dismissed and defendant preserved his right to appeal the suppression ruling. The trial court sentenced defendant to concurrent seven-year custodial terms on the two offenses, subject to statutory parole ineligibility periods.

On appeal, defendant contends that the warrantless search of the car in which he had been riding as a passenger was unconstitutional. He submits that the trial court also erred in rejecting his request to draw an adverse inference against the State because one of the two separate video recordings of the motor vehicle stop was not preserved. He further argues that his sentence is excessive, and that the sentencing judge improperly applied aggravating factor twelve (concerning a defendant's knowledge or reason to know a victim was over the age of sixty), N.J.S.A. 2C:44-1(a)(12).

For the reasons that follow, we remand the suppression issues to the trial court for reconsideration, and possible further development of the factual record, in light of the Supreme Court's recent opinion in State v. Robinson, 228 N.J. 529 (2017) (illuminating the requirements for a permissible warrantless "protective sweep" of a motor vehicle). We affirm, however, the

trial court's rejection of the requested adverse inference. We also uphold the sentence imposed, subject to the outcome of the reconsideration motion, which if favorable to defendant could result in him having the option of withdrawing his guilty plea.

I.

Because we are remanding this matter in light of recent case law, and additional facts may be developed and clarified on remand, we need not detail the factual record at length.

At approximately 2:00 in the morning on August 25, 2012, defendant was in the rear passenger seat of a car when it was stopped by several Fairview Township police officers for a broken headlight. One of the Fairview officers spoke with the driver, while another officer spoke to defendant and the front passenger, who was later identified as defendant's boss. The driver provided his identification, although the two passengers had none in their possession.

As the officers began to write summonses for motor vehicle violations, they heard radio dispatch reporting a robbery. The dispatch stated that a robbery had been committed minutes earlier by three men, at a social club in the neighboring town of Cliffside Park.

The Fairview officers responded on the radio that they had just pulled over three men and were waiting for backup. Meanwhile,

a sergeant from Cliffside Park drove from the scene of the robbery to the location of the motor vehicle stop. The sergeant spoke to the men, who he perceived to match the description of the robbers, and ordered them out of the car. Once out of the car, the men stood near its trunk with their hands on the vehicle, under guard of three separate officers. Shortly after the sergeant arrived, several other officers were on the scene providing backup.¹

The men were frisked and a warrantless search of the passenger compartment was conducted. Wallets and a mask were found. Another officer, who came from the nearby town of Ridgefield to provide backup, looked into the trunk with a flashlight through the partially opened, backseat armrest. That officer reported seeing the butt of a gun, and he alerted his fellow officers to the weapon's presence. A full search of the trunk revealed two guns, as well as money, wallets, cell phones, and another mask. The three men were arrested.

The judge who presided over the suppression hearing considered the testimony of four of the police officers who had participated in the motor vehicle stop and warrantless search of the car's interior. The judge found the officers' testimony to

¹ Although it is not precisely clear from the evidence in the record, it appears that there could have been seven or more officers present at the point in time when the protective sweep of the car turned up firearms.

be generally credible, although she expressed some concerns about various uncertainties in the testimony of the officer who had probed into the trunk area. The judge also considered the video recording ("MVR") of the stop filmed from one of the Cliffside Park squad cars.

The suppression judge issued a written opinion upholding the warrantless search of the car interior. Specifically, the judge concluded that the search was justified under both the automobile exception to the warrant requirement and the "protective sweep" doctrine. The judge further ruled that principles of inevitable discovery would independently enable the State's admission of the fruits of the search, even if the other exceptions to the warrant requirement had not been fulfilled.

The suppression judge rejected defendant's claim that the failure of the Ridgefield Police Department to preserve its own squad car's MVR of the scene compelled an adverse inference against the State. The judge agreed with the prosecution's argument that such a second MVR, recorded from a car that was behind a Fairview squad car, was unlikely to have provided more probative evidence of the activities at the scene.

As we have noted, having lost his suppression motion, defendant entered into a negotiated guilty plea with the State, subject to his right to appeal the suppression ruling. See R.

3:5-7(d). Under the plea agreement, the State agreed to recommend a custodial sentence within the second-degree range of five to ten years. The seven-year concurrent sentences imposed by the trial court² were consistent with that agreement.

On appeal, defendant raised the following arguments for our consideration in his merits brief:

POINT I

THE WARRANTLESS SEARCH AND SEIZURE OF THE CAR IN WHICH THE DEFENDANT WAS A PASSENGER VIOLATED THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL PROTECTIONS AGAINST UNLAWFUL SEARCH AND SEIZURE, NECESSITATING SUPPRESSION. U.S. CONST., AMENDS. IV, XIV; N.J. CONST. (1947), ART. 1, PAR. 7.

- A. The Warrantless Search Was Not Justified by the Automobile Exception.
 - 1. The Requisite Probable Cause Did Not Exist.
 - 2. The Requisite Exigent Circumstances Also Did Not Exist.
- B. The Search Exceeded the Bounds of a Permissible Protective Sweep.
- C. This Wholly Unlawful Search Is Not Saved By the Inevitable Discovery Doctrine.
- D. The Court Erred In Refusing to Draw an Adverse Inference From the Loss of a Recording of the Incident.

² A different judge, who is now retired, imposed the sentence.

POINT II

THE COURT IMPOSED AN EXCESSIVE SENTENCE,
NECESSITATING REDUCTION.

In addition, at this court's request, defendant and the State filed supplemental briefs addressing the Supreme Court's recent 2017 opinions in Robinson, supra, regarding protective sweeps, and State v. Bacome, 228 N.J. 94 (2017), regarding the authority of police to order passengers to step out of a vehicle. Both of those opinions were issued by the Court after the parties' merits briefs in this matter had been filed.

Defendant argues that the Court's opinion in Robinson, focusing on fact-sensitive questions relating to the risks of danger and a defendant's access to weapons inside a vehicle, requires reversal of the trial court's ruling.³ The State's supplemental brief counters that the facts that led the Court to invalidate the protective sweep in Robinson are materially distinguishable from those presented here.

II.

A.

We address defendant's arguments in revised sequence, and begin with the protective sweep issue. In considering that subject

³ Defendant concedes that under the standards expressed in Bacome, supra, 228 N.J. at 106-08, that the police in this case had sufficient justification to order all three men out of the car.

and the other search-and-seizure issues, we are mindful that individuals are protected under both the Fourth Amendment of the United States Constitution and under Article I, paragraph seven of the New Jersey Constitution from unreasonable governmental searches and seizures that infringe upon their privacy interests. U.S. Const., amend IV, N.J. Const., art I, para. 7. Our courts have expressed a "preference that police officers secure a warrant before they execute a search." State v. Witt, 223 N.J. 409, 422 (2015) (citing State v. Frankel, 179 N.J. 586, 597-98, cert. denied, 543 U.S. 876, 125 S. Ct. 108, 160 L. Ed. 2d 128 (2004)). Warrantless searches may be permitted if they fall within "one of the 'few specifically established and well-delineated exceptions' to the warrant requirement." Ibid. (quoting Frankel, supra, 179 N.J. at 598).

The protective sweep doctrine is one such recognized exception to the warrant requirement. The exception derives from the United States Supreme Court's holding in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (authorizing the limited intrusion of a police "stop and frisk" of a pedestrian where there is reasonable suspicion that the individual may have engaged in criminal activity).

In Long, the Court applied the protective sweep exception in an automobile setting. Michigan v. Long, 463 U.S. 1032, 1049, 103

S. Ct. 3469, 3481, 77 L. Ed. 2d 1201, 1220 (1983). There, the Court authorized a limited search of a vehicle's passenger area for purposes of officer safety. Ibid. The Court observed in Long that such a "protective sweep" should be restricted to those areas where a weapon could be hidden or placed if an officer "possesses a reasonable belief based on specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant" the officer's belief that the suspect poses a danger and "may gain immediate control of weapons." Ibid. (quoting Terry, supra, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906) (internal quotation marks omitted).

In State v. Lund, 119 N.J. 35, 48-50 (1990), our State Supreme Court adopted the federal test for vehicular protective sweeps that had been articulated in Long. Hence, the coterminous federal and state constitutional standard for a valid protective sweep is whether the State demonstrates "specific and articulable facts that, considered with the rational inferences from those facts, warrant a belief that an individual in the vehicle is dangerous and that he or she 'may gain immediate control of weapons.'" Robinson, supra, 228 N.J. at 547 (quoting Long, supra, 463 U.S. at 1049, 103 S. Ct. at 3481, 77 L. Ed. 2d at 1220). See also State v. Gamble, 218 N.J. 412, 432 (2014). The police may perform a warrantless protective sweep of a vehicle's passenger

compartment where the totality of circumstances support "a reasonable suspicion that a driver or passenger 'is dangerous and may gain immediate access to weapons.'" Robinson, supra, 228 N.J. at 534 (quoting Gamble, supra, 218 N.J. at 432).

Several months before the motion judge's December 2014 suppression ruling in the present case, the New Jersey Supreme Court issued its opinion in Gamble applying these standards. The Court concluded on the factual record in Gamble that a warrantless protective sweep of a car interior was justified. In that case, the police conducted an investigatory stop of a vehicle matching the reported description of a van in which a man had been seen sitting with a gun in his lap. Id. at 418-19. As the two police officers on the scene approached the van, the defendant driver and his passenger were "moving frantically inside the vehicle, as if trying to hide something." Id. at 419 (internal quotation marks omitted). When the lead officer ordered the occupants out of the vehicle, the defendant aborted his exit from the vehicle and tried to return to the driver's seat. Id. at 420. The lead officer pulled the defendant from the van, frisked him for weapons, and placed him under the supervision of the other officer who was also guarding the passenger. Id. The Court held in Gamble that, in light of defendant's defiant conduct and the officers' failure to find a weapon on the person of either occupant, a protective sweep

of the vehicle was justified at that point. Id. at 433. That is so because, as the Court reasoned, the officers had a reasonable basis to believe that the individuals were dangerous and could gain immediate access to weapons. Id. at 434.

In its later May 2017 opinion in Robinson, the Court reached an opposite conclusion, striking down as illegal the warrantless search of a passenger compartment after a valid motor vehicle stop. We shall proceed to discuss the factual setting in Robinson – the Court's newest pronouncement on the protective sweep doctrine in a vehicle context – in extensive detail for comparative purpose.

In Robinson, a single officer in a marked patrol car conducted a valid motor vehicle stop, saw four people in the car, and noticed that none of the occupants wore a seatbelt. Robinson, supra, 228 N.J. at 536. Shortly after making the stop, the officer was advised by his department's dispatcher that the driver of the car had an outstanding warrant for a drug offense. Id. at 537. The dispatcher also told the officer to use caution because the defendant was known to carry weapons. Ibid. The dispatcher further advised the officer that one of the passengers also had an outstanding traffic warrant. Ibid. The officer called for backup and was met by four other uniformed officers, who assisted in directing two of the four occupants out of the car, as well as handcuffing, and arresting them. Id. at 537-38. The officers

detained, but failed to arrest, the other two occupants. Id. at 538.

The officers in Robinson then patted down the two detained individuals, but found no weapons. Ibid. The two men, who remained un-cuffed, were then told to stand on the roadside as the officers monitored them. Ibid. The testifying officer stated that he did not see either of the detained passengers reach for a weapon, attempt to hide anything, or resist the officers' directions. Ibid. The sergeant on the scene then directed one of the officers to conduct a sweep of the car's interior to check for weapons. Ibid. After searching the front driver and passenger areas, the officer lifted a purse found on the front passenger seat. Ibid. The officer testified that he felt the outline of a gun when he felt the bottom of the purse. Id. at 538-39. The gun was retrieved by the officer, all passengers were secured, and the five officers on the scene then decided to seek a search warrant. Id. at 539.

The Court found that the on-the-spot search of the car that produced the handgun was not within the warrant requirement's protective sweep exception. Robinson, supra, 228 N.J. at 549. The Court concluded that, although the circumstances justified a reasonable suspicion that a weapon was in the vehicle, the five officers' "swift and coordinated action eliminated the risk that

any of the four occupants would gain immediate access to the weapon." Id. at 535.

The Court recognized in Robinson that there was "no doubt" that the officers had justifiable support for a reasonable suspicion that at least some of the occupants were armed and that a weapon was present, especially given the late hour of the stop, among other considerations. Id. at 548. The Court also recognized that although no weapons were found on the occupants when they were frisked, the absence of weapons did not remove the need for concern. Ibid.; see Gamble, supra, 218 N.J. at 432-33. Even so, the Court emphasized that this potential danger had been met at the scene with effective and prompt police action. Robinson, supra, 228 N.J. at 549.

Among other things, the Court noted in Robinson that because the original responding officer had "summoned four backup officers, the officers outnumbered the occupants of the vehicle." Ibid. Two of the occupants were handcuffed, while those that remained unsecured "were cooperative" and "carefully monitored." Ibid. The Court concluded that the officers collectively were therefore able to maintain control of the vehicle and the scene generally. Ibid. Because of this prudent police work, none of the car's former occupants realistically had the opportunity to access the car or a weapon. Ibid. The Court remanded the case,

however, for the trial court to address the unresolved issue of inevitable discovery. Id. at 552-54.

In her written opinion in the present case, the suppression judge concluded that "[t]he officers at the scene had gathered more than enough facts to warrant a protective sweep." Among other things, the judge noted that a reported armed robbery had recently occurred in a neighboring town involving three men wearing masks and brandishing handguns, that the three men in the stopped vehicle were likewise wearing dark clothing, that the two passengers lacked identification, that a pat-down of the driver had revealed a wad of cash, and that an initial warrantless foray into the vehicle had turned up a mask covered underneath a sweatshirt.

Perhaps most importantly, the suppression judge concluded that the officers "had reason to believe that they were dealing with armed and dangerous individuals." Moreover, the judge specifically found that the vehicle's trunk area, where the guns and other contraband were ultimately found during the second interior search, was a location as to which the occupants could have gained "immediate access." Citing Gamble and other protective sweep decisions, the court reasoned that "[w]hile no precedent[ial] case addresses the permissibility of a [protective

sweep] search of the trunk through the interior of the vehicle, the same legal foundation for the exception exists."

In their supplemental briefs, defendant and the State differ on whether the facts in the present case are akin to, or materially distinguishable from, those in Robinson. Defendant stresses, among other things, that by the time the protective sweep of the trunk compartment was undertaken here: (1) all three men were outside of the car under the supervision of at least three officers; (2) by the time the gun was found at least seven officers were present; (3) the men had been cooperative; (4) the driver was not intoxicated; and (5) the trunk was closed. The State counters that: (1) at least two of the officers who had been standing guard were holding flashlights; (2) at least one of the officers who could have stood guard was shown on the video being temporarily distracted by other activities away from the car; and (3) that it was feasible for one of the men standing at the rear of the car to suddenly obtain a weapon, presumably either by overtaking an armed officer or somehow gaining access to the trunk.

The present record in this case, including the DVD of the video recording – which was presented to the motion judge and which we have likewise observed as an exhibit – is simply not amenable to resolving these fact-laden matters conclusively. For example, one plausible interpretation of the video may be that the

police had already started to handcuff the three men as the protective search of the trunk compartment was being undertaken.⁴ Other material factual questions, such as the number of officers who were actually present when the protective sweep began, the number of officers who were holding flashlights, whether the trunk feasibly could have been opened by one of the occupants with or without a key while under police guard, and so on, have not been clearly resolved.

We recognize that the Supreme Court has instructed that it is generally not a reviewing court's function to second-guess factual findings made by trial judges on suppression motions based on independent appellate review of video evidence. See State v. S.S., 229 N.J. 360, 364-65 (2017). We are equally cognizant that the motion judge in this case lacked the benefit of the Supreme Court's analytic guidance concerning protective sweeps in Robinson, an opinion which was issued over two years after the trial court's ruling.⁵ As counsel have now helpfully spotlighted through their supplemental briefs, there are numerous material

⁴ In this regard, we suggest the trial court review the videotape at approximately time stamp 2:06:50.

⁵ Notably, the State has not argued that Robinson, which was decided while the present case was in the appellate pipeline, does not apply to the present facts. Nor does the Court's opinion in Robinson state that its holding applies only prospectively.

factual aspects of this matter affecting this case which are either disputed, unclear, or which were not the subject of express findings in the motion judge's pre-Robinson decision.

For these many reasons, we conclude that the appropriate course of action is to remand this matter to the trial court to reconsider its original suppression ruling in light of Robinson. As part of the remand, the record should be developed with more precision on the critical factual matters relating to the actual scope of danger posed when the two protective sweeps were undertaken, including but not limited to, the important question of whether the men were already being handcuffed when the trunk search was being conducted.

To the extent the trial court deems it appropriate, one or more of the arresting police officers may be re-called on remand to clarify or amplify their testimony. In addition, the trial court is invited to review again the video recording, this time with the guidance of Robinson. We do not intimate any advisory opinion on the outcome of the remand. Instead, we leave it to the trial court in the first instance to make another careful assessment of the course of events and the legality of the search, with specific associated factual findings.

B.

We turn briefly to defendant's remaining arguments. First, we conclude that the question of whether the search of the vehicle's interior is justified under the "automobile exception" to the warrant requirement is likewise dependent on the trial court's renewed factual assessments on remand. Because the search here predates State v. Witt, supra, 223 N.J. at 449 (noting that Witt is a "new rule of law" to be applied "purely prospectively"), the analysis under the automobile exception is guided by the former multi-factor test set forth in State v. Peña-Flores, 198 N.J. 6, 28 (2009).

We agree with the trial court that the State sufficiently established probable cause indicating a "fair probability that contraband or evidence of a crime" would be found within the car, given that the police had a very recent report of the local robbery and their observations of the three car occupants' characteristics. See State v. Moore, 181 N.J. 40, 46 (2004). However, the question of whether "exigent circumstances" were present at the scene to justify the immediate search of the car's interior substantially overlaps with the issues of danger and realistic access to weapons that need to be re-analyzed under the protective sweep doctrine. Consequently, we defer to the trial court in reconsidering this exigency issue on remand, including,

among other things, consideration of the actual ratio of officers to passengers at the scene when the car was twice searched without a warrant. See State v. Dunlap, 185 N.J. 543, 545-46 (2006) (focusing on the ratio); see also Peña-Flores, supra, 198 N.J. at 29-30.

C.

Next, we likewise defer to the trial court in reconsidering the applicability of the doctrine of inevitable discovery. To obtain the benefit of that doctrine, the State must establish, by clear and convincing proof, that: "(1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means." State v. Sugar, 100 N.J. 214, 238 (1985) (citations omitted); see also State v. Holland, 176 N.J. 344, 361-62 (2003) (reaffirming these requirements).

Here, the suppression judge concluded that the State met the requirements of inevitable discovery because the officers had sufficient proof to arrest defendant and his two cohorts, and to

impound the vehicle, which would then be subject to an inventory search. However, that analysis may have been affected in part by an assumption that the ski mask uncovered in the first warrantless entry into the car had been lawfully seized. Depending on how the trial court rules on remand concerning the protective sweep and exigent circumstances issues, that evidential aspect of probable cause to arrest defendant may be inapplicable.⁶

In addition, the protective sweep analysis may be affected by the State's following statement it recently advanced within its supplemental brief:

As defendants were not under arrest until probable cause was definitely established by the discovery of the guns, and it had already been determined that [the driver] had a valid driver's license and was not under the influence, there was no reason he would not have been permitted back into the car to drive himself and the other two defendants away. In fact, before learning of the armed robbery, Officers Napolitano and Schmitt had every intention of letting defendants go after issuing the summonses, as evidenced by the fact they had already allowed [the driver] back in the vehicle after determining he was not under the influence.

[Ssb7 (emphasis added)].

⁶ We distinguish in this regard between the level of probable cause needed to support a search under the automobile exception, and the probable cause required to support an arrest of a vehicle's former occupants.

This statement arguably suggests that the State now concedes that the occupants would have been allowed by the police to reenter the car and drive it away, but for the fact that guns were discovered in the trunk during the second protective sweep. If this apparent concession is accepted at face value, it may undermine the analytic support for a finding of inevitable discovery. Rather than resolve the legal significance of the State's above-quoted assertion here, we refer this subject to the trial court's consideration.

D.

Defendant's final non-sentencing argument is that the trial court should have applied an adverse inference against the State pursuant to State v. Hollander, 201 N.J. Super. 453, 479 (App. Div.), certif. denied, 101 N.J. 335 (1985), because the Ridgefield Police Department did not preserve the MVR of the squad car that responded to the motor vehicle stop after the Fairview officers had already arrived. This argument lacks sufficient merit to be discussed in detail. R. 2:11-3(e)(2).

It will suffice for us to note that we concur with the trial court's assessment that the failure to preserve the Ridgefield recording – which had not been requested – was not intentionally done to prejudice defendant's rights, but instead the recording had been erased in the "normal course" of the municipality's data

maintenance procedures. Moreover, it is exceedingly unlikely that an MVR recording from the Ridgefield squad car, which was parked behind the Fairview squad car two cars behind defendant's vehicle, would have presented non-cumulative information of any consequence. The MVR recording from the Cliffside Park squad car was ample video evidence under the circumstances.

E.


Lastly, we reject defendant's challenge to his sentence. We acknowledge that the sentencing judge lacked a sufficient evidential basis to find, under aggravating factor twelve, that defendant knew or had reason to know that one of the robbery victims was over the age of sixty just because an elderly man's identification was found in the vehicle. Nonetheless, the court's finding on this discrete point manifestly could not have undermined the overall fairness and propriety of the sentence. Apart from this incidental finding, the aggravating and mitigating factors otherwise identified by the sentencing judge clearly justified the seven-year custodial term imposed. See State v. Case, 220 N.J. 49, 65 (2014); see also State v. Fuentes, 217 N.J. 57, 73 (2014).

We further observe that the sentence was below the midpoint of the five-to-ten-year range set forth in the negotiated plea agreement.⁷

Affirmed in part, and remanded in part. Pending the outcome of the remand, defendant's conviction and sentence remain in force.

We do not retain jurisdiction.

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


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⁷ On remand, we direct the trial court to amend the judgment of conviction to omit aggravating factor twelve.