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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1506-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARIAL PIERCE,
KRISTINA VANGELI,
and NICOLE MARKOWITZ,

Defendants-Appellants.

Submitted February 8, 2017 – Decided March 3, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Municipal Appeal No. 15-034.

Rudnick, Addonizio, Pappa & Casazza, P.C., attorneys for appellants (Michael J. Pappa, of counsel and on the brief).

Arbus, Maybruch & Goode, LLC, attorneys for respondent (Martin J. Arbus and Matthew R. Goode, on the brief).

PER CURIAM

On November 1, 2014, defendants Marial Pierce,[1] Kristina Vangeli, and Nicole Markowitz were charged with the disorderly persons offense of providing alcoholic beverages to minors, N.J.S.A. 2C:33-17. Pierce and Markowitz were also charged with underage consumption of alcohol, in violation of Ocean Township Ordinance 3-12.3. Following the denial of their joint motion to suppress evidence seized from a warrantless search of the home they occupied as tenants, Pierce and Markowitz entered a negotiated plea of guilty to Ordinance 3-12.3, while Vangeli pled guilty to creating excessive noise in violation of Ocean Township Ordinance 3:3-1. Defendants were each fined $256 plus court costs, and Pierce and Markowitz were ordered to serve ten days of community service. Defendants now appeal from the denial of their suppression motion. For the reasons that follow, we affirm.

No witnesses testified at the suppression hearing in the Ocean Township Municipal Court. Rather, the parties stipulated to the facts set forth in a police report prepared by Ocean Township Patrolman Mark Powoski. At 1:44 a.m. on November 1, 2014, Powoski and three other officers responded to an Emergency Medical Services (EMS) call involving a "fall victim" in front of the home defendants rented on Crosby Avenue in Ocean Township.

[1] Pierce's first name alternately appears as Mariel in certain portions of the record.

While being treated for his injuries, including a large laceration on his head, the victim admitted he had consumed alcohol and was only nineteen years old. The Oakhurst First Aid Squad subsequently transported him to Monmouth Medical Center for further treatment.

In his report, Powoski described the ensuing events as follows:

> As [the fall victim] was being attended to by the Oakhurst First Aid Squad we observed a large gathering of people standing on the front property of [] Crosby Avenue. We asked for everyone to go back inside the home. Sgt. Martin and I knocked on the front door of [] Crosby Avenue and asked to speak with a tenant. We made contact with three tenants (Kristina Vangeli, Nicole Markowitz, Marial Pierce, all Monmouth University students) who live at [] Crosby Avenue and spoke with them inside the front room of the home. As we were speaking with the three tenants we observed a large group of nervous looking subjects standing around dressed in miscellaneous Halloween costumes. With the assistance of the three tenants of the home they escorted us to each room of the house to ensure that we did not have any other injured subjects inside the home. While walking with the tenants we observed used Solo cups laying on the floor and tables, empty beer cans of Bud[L]ight, Coors, miscellaneous bottles of wine, and finished kegs in the basement. We also located a highly intoxicated subject who was observed laying on a couch and who was unresponsive to officers at the scene. This subject was breathing but we could not wake him. This subject was identified as [N.K.].[2] We dispatched a first aid response for [N.K.]

[2] We use initials to preserve the confidentiality of the individual who required medical attention.

> at that location. The Monoc Paramedics responded and . . . [treated [N.K.] at the scene]. The Monoc Paramedics transported [N.K.] to Monmouth Medical Center for further treatment.

Following oral argument, the municipal court judge denied defendants' motion. The judge concluded that Powowski reasonably determined "that there may be injury to other people" inside defendants' residence, and that the police lawfully entered the home as part of their community caretaking function. The judge also noted that the State did not seek to validate the search based on defendants' consent to allow the police to enter and search the home. The judge added, "[b]ut I'm not precluding the State from arguing that on appeal if that would become an issue or if they want to [expand] the record by testimony."

Defendants appealed the denial of their suppression motion to the Law Division. Following oral argument based on the municipal court record, the Law Division judge again denied the motion in a comprehensive written opinion. Relying on <u>State v. Frankel</u>, 179 <u>N.J.</u> 586, 598 (2004), and <u>State v. Edmonds</u>, 211 <u>N.J.</u> 117, 131-32 (2012), the judge concluded that the warrantless search of the home was justified by the emergency aid doctrine. As an alternative basis for validating the search, the judge found that "[d]efendants impliedly consented to Patrolman Powoski's entry into their residence when he knocked on the front door, 'asked to

speak' with the 'tenants,' and was permitted entry." "Further, Patrolman Powoski also consensually conducted a welfare check of the residence '[w]ith the assistance' of defendants, who willingly and cooperatively 'escorted' the officers to and from each room."

Defendants appeal, raising a single issue for our consideration:

> THE WARRANTLESS SEARCH OF THE RESIDENCE WAS WITHOUT LEGAL JUSTIFICATION IN VIOLATION OF THE FOURTH AMENDMENT.

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. "There is a constitutional preference for" law enforcement officers to obtain a warrant from a neutral magistrate before conducting a search or seizure. State v. Pineiro, 181 N.J. 13, 19 (2004); State v. Ravotto, 169 N.J. 227, 236 (2001). Our Supreme Court has recently reiterated that:

> The State's burden is particularly heavy when the search is conducted after warrantless entry into a home. We have generally applied a more stringent standard of the Fourth Amendment to searches of a residential dwelling. The home bears a special status because unlawful, warrantless searches and seizures within the home are the chief evil against which the wording of the Fourth Amendment is directed.
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> [State v. Legette, ___ N.J. ___, ___ (2017) (slip op. at 14) (citations omitted).]

A search without a warrant is presumptively invalid unless it "falls within one of the few well-delineated exceptions to the warrant requirement." Elders, supra, 192 N.J. at 246 (citations omitted). Here, the motion judge found the police search of the home was valid under the emergency aid doctrine, which is a "species of exigent circumstances." State v. Hathaway, 222 N.J. 453, 469 (2015) (quoting United States v. Martins, 413 F.3d 139, 147 (1st Cir. 2005)). "The emergency aid doctrine is derived from

the commonsense understanding that exigent circumstances may require public safety officials, such as the police, firefighters, or paramedics, to enter a dwelling without a warrant for the purpose of protecting or preserving life, or preventing serious injury." Ibid. (quoting Frankel, supra, 179 N.J. at 598).

> To justify a warrantless search under the emergency[]aid doctrine, the State must satisfy a two-prong test. The State has the burden to show that (1) the officer had an objectively reasonable basis to believe that an emergency require[d] that he provide immediate assistance to protect or preserve life, or to prevent serious injury and (2) there was a reasonable nexus between the emergency and the area or places to be searched. The emergency aid doctrine only requires that public safety officials possess an objectively reasonable basis to believe - not certitude - that there is a danger and need for prompt action. The reasonableness of a decision to act in response to a perceived danger in real time does not depend on whether it is later determined that the danger actually existed.
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> The scope of the search under the emergency aid exception is limited to the reasons and objectives that prompted the search in the first place. Therefore, police officers looking for an injured person may not extend their search to small compartments such as drawers, cupboards, or wastepaper baskets. If, however, contraband is observed in plain view by a public safety official who is lawfully on the premises and is not exceeding the scope of the search, that evidence will be admissible.
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> [Id. at 470 (citations omitted).]

The applicability of the emergency aid doctrine in this case thus turns on whether Patrolman Powoski had an objectively reasonable basis to believe there were any other injured subjects inside the home that required medical attention, and whether a reasonable nexus existed to conduct a search of the home for such individuals. The Law Division judge found that the two-part test for the emergency aid exception was satisfied, reasoning:

> With regard to the first prong, before the paramedics arrived, a large group of partygoers were standing around in front of [d]efendants' residence and not providing aid, despite the fact that the fallen, intoxicated minor was lying in the nearby street with a large head laceration. Patrolman Powoski became concerned that there were similar circumstances occurring in the house that the intoxicated minor had departed from prior to falling. In addition, Patrolman Powoski also feared that there was additional underage drinking occurring inside the home. As such, based on the totality of the circumstances and Patrolman Powoski's training, experience, and expertise, he developed an objectively reasonable basis to believe that additional intoxicated minors could have been injured and untended to inside [d]efendants' home.

The judge found that prong two was satisfied because "there was a reasonable nexus between getting medical attention for incapacitated minors and the main floors of [] [d]efendants' home that were searched." The judge added that "Patrolman Powoski's welfare check was limited to places where an incapacitated person in need of immediate medical assistance could be found."

Here, due to the absence of any live testimony at the suppression hearing, we need not accord any special deference to the judge's factual findings based on his opportunity to hear and see the witnesses and to have the "feel" of the case. Reece, supra, 222 N.J. at 166. Nonetheless, we find the judge's factual findings fully supported by Powoski's report, to which the parties stipulated. We further conclude that the emergency aid doctrine justified the warrantless entry into the home and the limited search that followed, substantially for the reasons expressed in the Law Division judge's written opinion. See State v. Castro, 238 N.J. Super. 482, 489 (App. Div. 1990) (holding that "[t]he exigency test may also be met by a prudent and reasonably based belief that there is a potential medical emergency of unknown dimension."). Accordingly, we affirm the Law Division's decision based on the emergency aid doctrine.

We do, however, part company with the judge's alternative conclusion that the search was valid under the consent exception to the warrant requirement. To justify a warrantless search under this exception, the State must prove that "the consent was voluntary and that the consenting party understood his or her right to refuse consent." State v. Maristany, 133 N.J. 299, 305 (1993). The State must prove voluntariness by "'clear and positive testimony.'" State v. Chapman, 332 N.J. Super. 452, 466 (App.

Div. 2000) (quoting State v. King, 44 N.J. 346, 352 (1965)). Furthermore, the State must show that the individual giving consent "knew that he or she 'had a choice in the matter.'" State v. Carty, 170 N.J. 632, 639 (quoting State v. Johnson, 68 N.J. 349, 354 (1975)), modified by 174 N.J. 351 (2002).

Here, although there is no indication that defendants objected to Powoski's request to enter and search the home, the limited record developed at the suppression hearing does not demonstrate that defendants, young college students, "had knowledge of the right to refuse consent." Johnson, supra, 68 N.J. at 354. Therefore, on this record, we do not find that the search was consensual. See Legette, supra, ___ N.J. at ___ (slip op. at 18).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION