SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1678-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD PHITTS, a/k/a EDDIE PHITTS, a/k/a EDUARDO PHITTS,

Defendant-Appellant.

Submitted February 28, 2017 – Decided March 21, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 14-05-0277.

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

Michael H. Robertson, Somerset County Prosecutor, attorney for respondent (James L. McConnell, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following the denial of defendant's motion to suppress evidence, he pled guilty to the single charge contained in the indictment, third degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1), and was sentenced to five years of special probation in drug court as an alternative to a five-year custodial term. He appeals claiming the court erred by denying his motion to suppress evidence. We disagree and affirm.

I.

The evidence at the suppression hearing showed that at 9:00 p.m. on March 6, 2014, defendant was the driver of a minivan in Franklin Township. Police officers Michael Opaleski and Patrick Clyne were in a patrol vehicle and observed the minivan stopped in a no-parking zone and defendant speaking on a cell phone. The officers activated their emergency lights, defendant drove the vehicle a short distance, and the officers effectuated a stop of defendant's vehicle.[1]

The officers approached the vehicle on foot and began speaking to defendant. As Opaleski stood outside the passenger side of the vehicle, he observed what he characterized as the "corner of a wax fold with a lettering or a stamp on it" in a cup in the vehicle's

[1] Defendant did not challenge the legality of the motor vehicle stop before the trial court and does not make any claims here related to the stop.

center console. Opaleski also observed defendant was breathing heavily, his pupils were constricted, his hand movements were slow, and he failed to make eye contact with the officer. Based on his observations, Opaleski believed defendant was impaired.

Defendant told the officers he did not have his driver's license or any other form of identification, and his driving privileges were suspended. The officers directed defendant to exit the vehicle and he complied. Opaleski directed Clyne to conduct a pat-down search of defendant to determine if he had any weapons. Clyne did not discover any weapons during the pat-down.

During the initial ninety seconds following defendant's exit from the vehicle, and during Clyne's pat-down of defendant, Opaleski advised defendant why he was stopped. Opaleski asked if defendant was in possession of any weapons and if he knew about a car-jacking that occurred the previous evening. During the pat-down defendant "rolled his head backwards, or picked his head up," enabling Opaleski to see a whitish-yellow powder under defendant's right nostril.

Based on Opaleski's training and experience, he suspected the powder to be a controlled dangerous substance, concluded defendant used a controlled dangerous substance "very recently," and suspected defendant was still in possession of a controlled dangerous substance.

Opaleski decided to place defendant under arrest for driving while suspended, N.J.S.A. 39:3-40, and possession of drug paraphernalia, N.J.S.A. 2C:36-1 and -2, based on the "totality of circumstances," and what his "training and experience taught [him] over the years." However, prior to formally placing defendant under arrest, Opaleski searched defendant and seized nine packets of heroin from his jacket pocket.

Following Opaleski's decision to arrest defendant and as he conducted the search, he continued asking defendant questions.[2] He asked if defendant had a drug habit. Defendant stated that "every once in a while" he snorted "dope," which Opaleski understood to be a reference to heroin. Defendant also admitted snorting dope a short while before the motor vehicle stop but denied having any dope in his possession because he had used it all.

Defendant was subsequently asked if he needed anything retrieved from the vehicle. Defendant told the officers he wanted his reading glasses. Opaleski entered the vehicle to retrieve the glasses and the wax fold in the console, observed a second cup containing wax folds, and seized all of the wax folds.

[2] Opaleski testified he searched defendant during the period from 21:20:01 p.m. to 21:21:03 p.m., as reflected on the officer's motor vehicle recording (MVR) that was admitted into evidence. This is the period during which he asked defendant questions concerning his drug use and possession of a controlled dangerous substance.

Following the suppression hearing, the judge issued a written decision denying defendant's motion. The judge found Opaleski, the only witness who testified at the hearing, to be credible. She also found there was probable cause for defendant's arrest supporting Opaleski's search of defendant incident to the arrest. The judge further found the wax folds in the vehicle were properly seized because they were in plain view.

On appeal, defendant makes the following arguments:

> POINT I
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> ALL EVIDENCE SEIZED IN THIS MATTER SHOULD HAVE BEEN SUPPRESSED BECAUSE THE OFFICER'S SIGHTING OF A "WAX FOLD" IN THE MINIVAN WAS NOT SHOWN TO HAVE BEEN ASSOCIATED WITH CRIME AND, THEREFORE, WAS NOT A PLAIN VIEW OBSERVATION; THE PAT-DOWN OF [DEFENDANT] VIOLATED HIS FOURTH AMENDMENT RIGHTS; AND [DEFENDANT'S] ADMISSION THAT HE USED DRUGS WAS ACQUIRED BY WAY OF INTERROGATION THAT VIOLATED HIS FIFTH AMENDMENT RIGHTS.
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> A. Introduction[.]
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> B. The sighting of the corner of a "wax fold" was not shown to have been a "plain view" observation[.]
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> C. The pat-down performed in this matter lacked justification, and any evidence acquired as a result of that pat-down should have been suppressed.
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> D. The admission of recent use of drugs was made during an unconstitutional interrogation, and any evidence found as a result of that interrogation should have been suppressed.

> [E.] The seizure of the "wax folds" from the minivan was the result of a pretextual search, the fruits of which should have been suppressed.

II.

Our review of the denial of a suppression motion is limited. See State v. Handy, 206 N.J. 39, 44 (2011). "We must uphold a trial court's factual findings at a motion-to-suppress hearing when they are supported by sufficient credible evidence in the record," State v. Hathaway, 222 N.J. 453, 467 (2015), and will "not disturb the trial court's findings merely because '[we] might have reached a different conclusion' . . . or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case," State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). It is only where we are "thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction [that we will] appraise the record as if [we] were deciding the matter at inception and make [our] own findings and conclusions." Johnson, supra, 42 N.J. at 162.

We do not owe deference to a trial court's "interpretation of the law," and such issues are reviewed de novo. Hathaway, supra, 222 N.J. at 467. "A trial court's interpretation of the law . . .

and the consequences that flow from established facts are not entitled to any special deference." State v. Lamb, 218 N.J. 300, 313 (2014).

Here, we consider the court's determination that the warrantless searches of defendant and his vehicle were lawful. The United States and New Jersey Constitutions guarantee the right "of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures[.]" U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. The Fourth Amendment and Article 1, paragraph 7 of the New Jersey Constitution both "require[] the approval of an impartial judicial officer based on probable cause before most searches may be undertaken." State v. Patino, 83 N.J. 1, 7 (1980).

Warrantless searches are presumed invalid. State v. Gamble, 218 N.J. 412, 425 (2014). "Any warrantless search is prima facie invalid, and the invalidity may be overcome only if the search falls within one of the specific exceptions created by the United States Supreme Court." State v. Hill, 115 N.J. 169, 173 (1989). The State has the burden of proving the existence of an exception by a preponderance of the evidence. State v. Amelio, 197 N.J. 207, 211 (2008), cert. denied, 556 U.S. 1237, 129 S. Ct. 2402, 173 L. Ed. 2d 1297 (2009).

Defendant first challenges the search of his person, arguing

Opaleski's initial observation of the wax fold in the console was insufficient to permit its seizure under the plain view exception to the warrant requirement. Under the plain view exception, an officer may seize evidence without a warrant "if the officer is 'lawfully . . . in the viewing area' when he [or she] discovers the evidence, and it is immediately apparent the object viewed is 'evidence of a crime, contraband, or otherwise subject to seizure.'" State v. Keaton, 222 N.J. 438, 448 (2015) (quoting State v. Johnson, 171 N.J. 192, 206-07 (2003)). "The officer must discover the evidence 'inadvertently,' 'meaning that [the officer] did not know in advance where evidence was located nor intend beforehand to seize it.'"[3] Johnson, supra, 171 N.J. at 206 (quoting State v. Bruzzese, 94 N.J. 210, 236 (1983), certif. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984)).

Defendant argues Opaleski's observation was insufficient to support a plain view seizure of the wax fold because there was nothing about the wax fold making it immediately apparent that it constituted evidence of a crime. Defendant also reasons that Opaleski could not properly rely on his observation of the wax

[3] In State v. Gonzales, 227 N.J. 77, 101 (2016), the Court announced a "new rule of law" eliminating the requirement that the State prove evidence was discovered inadvertently to support a warrantless search under the plain view exception to the warrant requirement. The Court's decision applies prospectively and therefore the new standard is not applicable here. Ibid.

fold to support his arrest and search of defendant because it was unlawful for Opaleski to seize the wax fold under the plain view exception.

We reject defendant's argument because even assuming Opaleski's observation of the wax fold in the console was insufficient to permit a seizure under the plain view exception, there was no seizure of the wax fold prior to Opaleski's search of defendant. Thus, the search was not based on an illegal seizure of any evidence and there was no basis to suppress the heroin found in his pocket as the fruit of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 415-16, 9 L. Ed. 2d 441, 453-54 (1963).

Moreover, it was immediately apparent the wax fold evidenced the commission of an offense. Opaleski was an experienced police officer who received training concerning controlled dangerous substances and participated in over two hundred cases involving the use and sale of heroin. He explained that heroin is commonly packaged in bundles, consisting of ten "deck[s]," "bag[s]," or "fold[s]," which are "individually packaged items . . . of heroin." Thus, his observation of the wax fold in the center of defendant's console made it readily apparent that it was evidence of a crime.

Defendant argues Opaleski lacked probable cause to conclude the wax fold was evidence of an offense because it "appear[ed]

intrinsically innocent." State v. Demeter, 124 N.J. 374, 383 (1991). Defendant asserts that Opaleski's "subjective beliefs" that the wax fold was drug paraphernalia were "not dispostive." Id. at 384.

The circumstances here are unlike those presented in Demeter where the Court determined that an officer's observation of a thirty-five-millimeter film canister in a vehicle, which he suspected contained a controlled dangerous substance, did not support a finding of probable cause. Ibid. The Court found the canister "was intrinsically innocent" and there were no other "objective factors that would lead any officer with similar training and experience reasonably to conclude that drugs were in the canister." Id. at 383.

In Texas v. Brown, 460 U.S. 730, 739, 103 S. Ct. 1535, 1542, 75 L. Ed. 2d 502, 512 (1983), the Supreme Court sustained the seizure of a balloon from a motor vehicle under the plain view doctrine. The Court found it was immediately apparent to the officer that the balloon constituted evidence of crime because he knew from his training and experience "that narcotics frequently were packaged in [similar] balloons" and because there were other circumstances supporting the officer's conclusion. Id. at 734, 103 S. Ct. at 1539, 75 L. Ed. 2d at 508; see also Johnson, supra, 171 N.J. at 219 (holding that criminal nature of container is

immediately apparent where "outward appearance of the clear plastic bag gave the officer a degree of certainty that was functionally equivalent to the plain view of crack-cocaine itself").

Opaleski had training and experience in heroin investigations, and explained that folds are commonly used to package small quantities of heroin. There was no evidence the wax fold Opaleski first observed had a use for any purpose other than the packaging of a controlled dangerous substance. Moreover, unlike in Demeter, "where there were no surrounding circumstances to support probable cause that the canister contained drugs," Johnson, supra, 171 N.J. at 218 (distinguishing Demeter, supra, 124 N.J. at 383), Opaleski was trained in the symptomology of drug usage, and concluded defendant was impaired based on his observations of defendant's eyes and physical movements. His observations and conclusion supported his determination that the wax fold, which was in the center console next to the driver's seat of the vehicle, was drug paraphernalia. Based on his experience and "the facts that were known to" Opaleski, the "[t]otality of the circumstances" provided "probable cause to associate the [wax fold] with criminal activity," Brown, supra, 460 U.S. at 741-42, 103 S. Ct. at 1543, 75 L. Ed. 2d 513 (quoting

Payton v. New York, 445 U.S. 573, 587, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639, 651 (1980)).

Defendant was arrested and searched in part because Opaleski believed defendant committed the offense of possession of drug paraphernalia. A person commits the offense when they "use, or [] possess with intent to use, drug paraphernalia to . . . pack . . . store, contain, [or] conceal . . . a controlled dangerous substance." N.J.S.A. 2C:36-2. Drug paraphernalia includes materials "used or intended for use in packaging . . . controlled dangerous substances," including "envelopes and other containers." N.J.S.A. 2C:36-1(i). We are satisfied Opaleski's observations of the wax fold, defendant's eyes and physical movements, and the location of the wax fold next to an apparently impaired defendant, provided probable cause to believe that defendant committed an offense under N.J.S.A. 2C:36-2.

Opaleski did not immediately seize the wax fold. Opaleski ordered defendant out of the car, subsequently searched him, and found heroin in his jacket pocket. The State asserts, and the court found, that the search of defendant was incidental to his lawful arrest. We agree.

An officer may properly search an individual who has been lawfully placed under arrest. Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685, 694 (1969); State

v. Minitee, 210 N.J. 307, 318 (2012); State v. Eckel, 185 N.J. 523, 528 (2006); State v. Pierce, 136 N.J. 184, 213-14 (1994). Probable cause for an arrest "exists where the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." State v. O'Neal, 190 N.J. 601, 612 (2007) (alterations in original) (quoting State v. Moore, 181 N.J. 40, 45-46 (2004)). We consider the "totality of the circumstances" in determining if an officer had probable cause to make an arrest. Ibid.

We are convinced the evidence amply supports the court's determination there was probable cause to arrest defendant for driving while suspended,[4] N.J.S.A. 39:3-40, and possession of drug paraphernalia, N.J.S.A. 2C:36-2, prior to Opaleski's search of defendant. Defendant admitted his license was suspended and, as noted, Opaleski's observations of the defendant and the wax fold

[4] A search incident to a lawful arrest generally cannot be based on a charge of driving without a license because "driving without a license, without more, would not constitute sufficient grounds for a custodial arrest." State v. Lark, 163 N.J. 294, 296 (2000). Here, we need not consider whether defendant's arrest for driving while suspended alone would provide a sufficient basis for an arrest permitting a search incident to the arrest because Opaleski had probable cause to arrest defendant for the commission of an offense under N.J.S.A. 2C:36-2.

provided probable cause for defendant's arrest for possession of drug paraphernalia.

It is of no moment that the search occurred prior to defendant's formal arrest. "As long as the right to arrest pre-existed the search, . . . the search will not be invalidated 'simply because in precise point of time the arrest does not precede the search.'" O'Neal, supra, 190 N.J. at 614-15 (quoting State v. Doyle, 42 N.J. 334, 343 (1964)). The record shows Opaleski had the right to arrest defendant for possession of drug paraphernalia before defendant exited the vehicle. The fact that Opaleski did not immediately arrest defendant, or obtained additional information prior to the arrest, did not affect the validity of the search. It is the "right to arrest," rather than the actual arrest that "must pre-exist the search." Ibid. (quoting Doyle, supra, 42 N.J. at 342). Opaleski had probable cause to arrest defendant for possession of drug paraphernalia prior to the search and, as a result, his search of defendant was incident to a lawful arrest. See State v. Dangerfield, 171 N.J. 446, 460 (2002) (finding the police have authority to arrest for disorderly persons offenses committed in their presence).

Defendant contends Opaleski's observation of the powder under defendant's nose was the result of an improper pat-down. See, e.g., State v. Casimono, 250 N.J. Super. 173, 178-80 (App. Div.

1991) (finding a pat-down search was not justified where defendant was charged with motor vehicle offenses and there was no reasonable suspicion he was armed), certif. denied, 127 N.J. 558 (1992). Defendant claims Opaleski relied on the observation in deciding to arrest defendant, and his reliance on the observation rendered the arrest and subsequent search unlawful. We are not persuaded by defendant's claim because even assuming Opaleski saw the powder as a result of an unlawful pat-down and relied upon it in part to arrest and search defendant, there was independent evidence prior to the pat-down sufficient to arrest defendant for possession of a drug paraphernalia. See O'Neal, supra, 190 N.J. at 618 (finding harmless error in court's denial of motion to suppress statements made in violation of Miranda rights because there was probable cause for a search independent of the statements).

We also reject defendant's argument that the arrest and search were unlawful because they were based on defendant's statements, which were made in the absence of any Miranda[5] warnings and in response to Opaleski's questions. The evidence shows Opaleski could not have considered any statements made by defendant in his decision to make an arrest and conduct the search. Opaleski began

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

the search before asking defendant any questions about drug use and prior to any of defendant's admissions concerning his drug use that evening.[6] In addition, even if Opaleski had considered any statements made by defendant in the absence of required Miranda warnings, there was probable cause for the arrest and search before defendant left the vehicle. Thus, the validity of defendant's arrest and search were not dependent upon any statements he made about drug use in response to Opaleski's questions.[7] Ibid.

Defendant last argues the court erred in denying the motion to suppress the wax folds Opaleski seized from the vehicle following defendant's arrest. Defendant claims there was no reason to impound the vehicle and therefore Opaleski's entry into the vehicle to retrieve defendant's glasses was improper. We find no merit in defendant's contention.

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[6] Opaleski testified he began to search defendant at 21:20:01 p.m., as shown on the MVR. Prior to that time, Opaleski had not asked defendant any questions about drug use. Opaleski asked the first question about drug use at 21:20:01 p.m., after he decided to arrest defendant and as he commenced the search.

[7] There is no support in the record for the court's finding that "it was not until after [d]efendant admitting to having 'dope' in his possession, that the officers searched his person for the controlled dangerous substance." There was no discussion of drugs with defendant until the search began and defendant did not acknowledge he possessed any drugs until after the search revealed the nine folds of heroin found in his pocket.

Although Opaleski entered the vehicle in part to obtain defendant's glasses at defendant's request, he did so in order to seize the wax fold he had observed in plain view. He was entitled to enter the vehicle for that purpose. See Brown, supra, 460 U.S. at 739, 103 S. Ct. at 1542, 75 L. Ed. 2d at 512 (finding that an officer is entitled to immediately seize evidence of an offense in plain view); State v. Mann, 203 N.J. 328, 341 (2010) (holding seizure of a controlled dangerous substance from an automobile was proper where plain view exception to the warrant requirement applied). While Opaleski was lawfully in the vehicle to seize the wax fold he first observed, he saw for the first time additional folds, which he recognized as drug paraphernalia. The evidence therefore supports the court's conclusion that all of the folds were properly seized under the plain view exception to the warrant requirement.

Affirmed.