SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1725-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD O'DAY,[1]

Defendant-Appellant.

Submitted April 4, 2017 – Decided September 7, 2017

Before Judges Reisner and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 14-09-2469.

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

Christopher S. Porrino, Attorney General, attorney for respondent (Frank Muroski, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

---

[1] We use the spelling of defendant's name as used in the indictment and the trial court's order in dispute. However, his name is spelled "Oday" in the Notice of Appeal and the parties' briefs.

Following the denial of his motion to suppress, defendant Edward O'Day pled guilty to two counts of third-degree burglary, N.J.S.A. 2C:18-2, and third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1). In accordance with the plea agreement, defendant was sentenced to five years of special Drug Court probation. Defendant appeals from the order denying his motion to suppress. For the reasons that follow, we affirm.

I.

The issue at the suppression hearing was whether the Berkeley Township (township) police had the right to conduct a warrantless search and seizure at a boarded up property (the house) located on Route 9. The State presented three witnesses to support its position that the search and seizure was valid.

James Sperber, the township's supervisor of the parks department, testified he was familiar with the house due to his responsibility in monitoring all of the township's parks and structures that have code enforcement problems. After receiving reports from his employees of a home burglary near one of his offices and a suspicious looking man in the vicinity, Sperber stated that during next three days he observed a man matching his employees' description in the same area. The first two days, he

telephoned the Ocean County Prosecutor's Office about the man. On the third day, he spoke to William Cullen, a township police detective, about the man, and advised that a board had been removed from a boarded-up window. According to Sperber, the house was uninhabited, vacant and boarded up for a long time.

Cullen testified he investigated the initial burglary report and township employees told him they saw a man near the burglarized home. Cullen was also familiar with the house and attested that it was dilapidated and had wood covering up its windows.

Following Sperber's telephone call, Cullen and fellow detective Joseph Santoro met at the house to investigate. No one responded to their knocks at the door and calls asking if anyone was inside. At the back of the house, they saw a "For Sale" sign, and unsuccessfully tried to contact someone at the telephone number written on the sign. After they were unable to obtain an emergency telephone number for the house from the police dispatcher, they reached out to the prosecutor's office and were advised that a search warrant was not needed to enter the house. They gained entry through the open window, where the plywood cover had been removed and a cement block had been placed below the windowsill that allowed them to climb into the window. Santoro stated that he and Cullen entered the house to ensure that nobody was inside before the township would re-secure the boarded-up window. Cullen

similarly stated they entered the house to make sure that it was safe from children who lived next door.

In a second floor bedroom, the detectives found a makeshift bed, two cell phones, a cell phone charger, and a medical document with defendant's name. Cullen immediately believed the phones and charger matched the description of items stolen in the home burglary that he investigated three days earlier. He confirmed his suspicion when the burglary victims later identified them as items stolen from their home.

After the police located defendant and advised him of his Miranda[2] rights, he gave a statement admitting to burglarizing a township home and putting the stolen items in the house, which he entered without permission.

Defendant did not present any witnesses. Following argument, the motion judge entered an order and rendered an oral decision denying defendant's suppression motion. She found the State's witnesses provided credible testimony, which established that the boarded-up house was uninhabited, abandoned and entered by a trespasser. She reasoned:

---

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

> Both [detectives] testified that they entered the home after seeing that it was boarded up and had seen it boarded up like that for more than 10 years, never seeing anyone on the property. They did so only after having done a perimeter search, phone calls to a number on a sign, to dispatch and the prosecutor's office, after knocking and announcing police, and with a reasonable belief that they did not need a warrant, having safety concerns that they needed to clear the house by determining that there was no children or other individuals hiding or injured inside the house. Which was in a deplorable condition.

Citing State v. Brown, 216 N.J. 508 (2014) and United States v. Harrison, 689 F. 3d 301 (3d Cir. 2012), cert. denied, 568 U.S. 1242, 133 S. Ct. 1616, 185 L.Ed. 2d 602 (2013), the judge found that defendant he had no right to be in the house and no expectation of privacy in the house, and that the detectives acted reasonably in entering the house.

The judge also found that the search was valid under the community caretaking doctrine. She determined that the police had the right to enter the abandoned house, which had been entered by a trespasser and left open for entry by a board removed from a boarded-up window, in order to protect the public from serious injury. This appeal ensued.

II.

Before us, defendant raises the following argument:

> THE ARTICLES REMOVED FROM THE HOUSE AT 562 ROUTE 9 AND FROM MR. ODAY'S PERSON SHOULD HAVE

BEEN SUPPRESSED BECAUSE THE STATE DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE WARRANTLESS SEARCH OF [THE HOUSE] WAS JUSTIFIED BY THE ABANDONED PROPERTY EXCEPTION OR BY THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT.

A. THE PROSECUTION DID NOT SHOW THAT THE HOUSE WAS ABANDONED.

B. THE PROSECUTION FAILED TO SHOW THAT THE DETECTIVES WERE ENGAGED IN COMMUNITY CARETAKING WHEN THEY ENTERED THE HOUSE.

C. SUMMARY

In our consideration of a trial court's ruling on a motion to suppress evidence, "[w]e conduct [our] review with substantial deference to the trial court's factual findings, which we 'must uphold . . . so long as those findings are supported by sufficient credible evidence in the record.'" State v. Hinton, 216 N.J. 211, 228 (2013) (quoting State v. Handy, 206 N.J. 39, 44 (2011)). "When . . . we consider a ruling that applies legal principles to the factual findings of the trial court, we defer to those findings but review de novo the application of those principles to the factual findings." Ibid. (citing State v. Harris, 181 N.J. 391, 416 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005)). However, despite our deferential standard, "if the trial court's findings are so clearly mistaken 'that the interests of justice demand intervention and correction,' then the appellate court should review 'the record as if it were deciding

the matter at inception and make its own findings and conclusions.'" State v. Mann, 203 N.J. 328, 337 (2010) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

Both the United States and New Jersey Constitutions protect individuals against unreasonable searches and seizures "in their persons, houses, papers, and effects [.]" U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Under the exclusionary rule, evidence obtained in violation of an individual's constitutional rights will be excluded as "fruit of the poisonous tree." State v. Faucette, 439 N.J. Super. 241, 266 (App. Div.), certif. denied, 221 N.J. 492 (2015). Because the search at issue was executed without a warrant, it is presumed to be facially invalid; to overcome this presumption, the State must show that the search falls within one of the well-recognized exceptions to the warrant requirement and there exists probable cause. State v. Moore, 181 N.J. 40, 44 (2004); State v. Valencia, 93 N.J. 126, 133 (1983).

We first turn our attention to the trial judge's determination that defendant had no standing to challenge the search and seizure because it occurred in an abandoned house where he had no expectation of privacy. It is well-established that "a person can have a legally sufficient interest in a place other than his own home[, such] that the Fourth Amendment protects him from government intrusion into that place." State v. Stott, 171 N.J. 343, 357

(2002) (quoting Rakas v. Illinois, 439 U.S. 128, 142, 99 S. Ct. 421, 430, 58 L. Ed. 2d 387, 401 (1978)); see also State v. Rose, 357 N.J. Super. 100, 103 (App. Div.), certif. denied, 176 N.J. 429 (2003); State v. Alvarez, 238 N.J. Super. 560, 571 (App. Div. 1990).

Our Supreme Court has recognized:

> In New Jersey, "a criminal defendant [has standing] to bring a motion to suppress evidence obtained in an unlawful search and seizure if he has a proprietary, possessory or participatory interest in either the place searched or the property seized." [State v. Alston, 88 N.J. 211, 228 (1981)]; accord [Brown, supra, 216 N.J. at 548-49]. "[S]tanding to seek suppression of evidence" is a "separate issue" from "the existence of a reasonable expectation of privacy," which pertains to the merits of the police action. [Hinton, supra, 216 N.J. at 235]. Defendant's automatic standing to contest the constitutional validity of the seizure "does not equate to a finding that he . . . has a substantive right of privacy in the place searched that mandates the grant of that motion." Ibid. "[A]lthough we do not use a reasonable expectation of privacy analysis for standing purposes in criminal cases, we do apply that analysis to determine whether a person has a substantive right of privacy in a place searched or an item seized." [Id. at 234] (quoting [State v. Johnson, 193 N.J. 528, 547 (2008)]). "[T]he objective reasonableness of the defendant's expectation of privacy in that property, for purposes of Article I, Paragraph 7, turns in large part on his or her legal right to occupy the property at issue." [Id. at 236].

> [State v. Randolph, 441 N.J. Super. 533, 548-49 (App. Div. 2015) (first, fourth, sixth, and ninth alterations in original), certif. granted, 224 N.J. 529 (2016).]

However, a defendant does not have standing to challenge a search and seizure where "the State can show that the property was abandoned or the accused was a trespasser." State v. Randolph, 228 N.J. 566, 571-72 (2017). The State has the burden of proof to establish a reasonable expectation of privacy. Brown, supra, 216 N.J. at 527-28.

In Brown, based upon a totality of circumstances standard, the Court rejected the State's contention that a row house subjected to a warrantless search and seizure was abandoned. Id. at 542. State troopers conducted several hours of surveillance of the house over the course of two non-consecutive days where they observed the defendants, who used a key to unlock the house's padlocked front door in order to enter and retrieve stashed drugs. Id. at 538. Although the house was in a deplorable condition - padlocked front and back doors to keep intruders out, broken windows, trash-littered, and a missing electric meter - there was no reliable or first-hand testimony regarding the long-term condition of the house, nor any reasonable attempt by law enforcement to contact the owner. Id. 540-42.

Guided by these standards, we discern no reason to disturb the denial of defendant's suppression motion. There was credible evidence to support the trial judge's finding that based on the totality of the circumstances the house was abandoned. Unlike in Brown, here, the detectives did not conduct a surveillance of the house and did not see anyone enter the house by using a key to open a locked door. They were responding to reports that a suspicious looking man was around the house, which they knew had been boarded up. After making an unsuccessful effort to contact someone responsible for the house, the detectives noticed that someone had apparently trespassed into the house by removing a board from the boarded-up front window and stepping on a concrete block to enter through the window. Since the house was abandoned, defendant did not have standing to challenge the warrantless search and seizure, which uncovered the burglary victim's property. Furthermore, without permission to be in the house, defendant had no expectation of privacy regarding his entry under our federal and state constitutions.

Considering we affirm the denial of defendant's suppression motion due to his lack of standing to challenge the State's warrantless search and seizure, we need not address the judge's ruling that there was a valid search and seizure under the community caretaking doctrine. However, for sake of completeness,

we find it necessary to briefly express our disagreement with the determination that the doctrine applies here.

The community caretaking doctrine is an exception to the warrant requirement. State v. Harris, 211 N.J. 566, 581 (2012). Our Supreme Court has recognized that "police officers acting in a community-caretaking capacity 'provide "a wide range of social services" outside of their traditional law enforcement and criminal investigatory roles.'" State v. Vargas, 213 N.J. 301, 323 (2013) (quoting State v. Edmonds, 211 N.J. 117, 141 (2012)). In the context of home searches, our Supreme Court has developed and applied "a two-prong test" that considers "the totality of the circumstances" in determining if the emergency-aid doctrine justifies a warrantless search of a home. State v. Hathaway, 222 N.J. 453, 470, 474 (2015). 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.
>
> [Id. at 470 (quoting Edmonds, supra, 211 N.J. at 132)].

Based upon these standards, we conclude that the community caretaking doctrine does not apply. The police were unaware of anyone, including children who lived next door, going into the

house that warranted a reasonable belief that someone was inside and may need assistance. There was also no response when the police knocked on the door and called out to see if someone was inside the house. Hence, there was no emergency to justify entry into the house to conduct a search to provide aid to anyone.

Affirmed.