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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2711-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JONATHAN CRUZ, a/k/a JOMATHAN CRUZ,

Defendant-Appellant.

Submitted April 25, 2017 – Decided June 19, 2017

Before Judges Leone and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment No.
14-10-1621.

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

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Kerry J. Salkin,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Jonathan Cruz appeals his December 4, 2015 judgment
of conviction. He challenges the trial court's denial of his

motion to suppress the air pellet gun found during a protective sweep of his home. We affirm.

I.

The following facts were found by the trial court. At approximately 6:00 a.m. on April 22, 2014, law enforcement officers executed an arrest warrant for defendant at his home in Jersey City. The arrest warrant stemmed from a complaint alleging defendant laid a small handgun in front of a woman and threatened to kill her. Officers knocked at the door and heard male and female voices behind the door. Approximately one to two minutes after they knocked, defendant's girlfriend answered the door and confirmed defendant was in the apartment. However, defendant did not make himself visible, and the officers did not know where defendant was. The lights were off and the officers could not see defendant from the door.

The officers entered the five-room apartment and split up to look for defendant. In his search for defendant, Sergeant John Joy entered the kitchen and opened the cabinet under the kitchen sink. He found an air pellet gun in plain view. Ten to twenty seconds later, other officers found defendant in the bathroom and arrested him. Joy seized the handgun.

Defendant was charged with unlawful possession of a handgun in violation of N.J.S.A. 2C:39-5(b); possession of a firearm for

an unlawful purpose in violation of N.J.S.A. 2C:39-4(a); and terroristic threats in violation of N.J.S.A. 2C:12-3.¹

Defendant moved to suppress the handgun. Sergeant Joy and defendant testified at the hearing. The trial court also viewed photos of the kitchen cabinet where Joy found the handgun. The court found Joy credible and rejected the alternative version of events proffered by defendant.² The court specifically credited Joy's assertion that a person could hide in the cabinet.

Judge Joseph V. Isabella denied defendant's motion to suppress in an April 10, 2015 order. The court stated in its accompanying written opinion that "the protective sweep of [d]efendant's apartment . . . was not unnecessarily invasive and only extended to a 'cursory inspection of those spaces where a person may be found'" (quoting Maryland v. Buie, 494 U.S. 325, 335, 110 S. Ct. 1093, 1099, 108 L. Ed. 2d 276, 287 (1990)).

Defendant subsequently pled guilty to an amended count charging fourth-degree aggravated assault with a firearm.

¹ Under the Criminal Code, an air pellet gun can be a "firearm" and thus a "handgun." N.J.S.A. 2C:39-1(f), (k).

² Defendant claimed that the police arrested him, asked him where the handgun was, and that he revealed it was under the kitchen sink after they threatened his girlfriend.

N.J.S.A. 2C:12-1(b)(4). The trial court imposed an eighteen-month sentence and dismissed the remaining charges.

Defendant appeals, claiming:

THE OFFICER'S ACT OF OPENING THE CABINET WAS NOT JUSTIFIED UNDER THE PROTECTIVE SWEEP DOCTRINE AND CONSTITUTED AN ILLEGAL WARRANTLESS SEARCH. AS A RESULT, THE PELLET GUN FOUND IN THE CABINET MUST BE SUPPRESSED.³

II.

We must hew to our standard of review. An appellate court is "bound to uphold a trial court's factual findings in a motion to suppress provided those 'findings are "supported by sufficient credible evidence in the record.'" State v. Watts, 223 N.J. 503, 516 (2015) (quoting State v. Elders, 192 N.J. 224, 243-44 (2007)). "Deference to those findings is particularly appropriate when the trial court has the "opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.'" Ibid. (quoting Elders, supra, 192 N.J. at 244). "Nevertheless, we are not required to accept findings that are 'clearly mistaken' based on our independent review of the record." Ibid. (quoting Elders, supra, 192 N.J. at 244). "We owe no deference to a trial . . . court's interpretation of the law, and

³ Defendant's claim was preserved, despite his guilty plea, pursuant to Rule 3:5-7(d).

therefore our review of legal matters is de novo." State v. Hathaway, 222 N.J. 453, 467 (2015).

III.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution both provide "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" and that no warrants shall issue except upon probable cause. U.S. Const. amend. IV; N.J. Const. art. I, § 7. "Our constitutional jurisprudence expresses a clear preference for government officials to obtain a warrant issued by a neutral and detached judicial officer before executing a search." State v. Edmonds, 211 N.J. 117, 129 (2012). Moreover, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." State v. Vargas, 213 N.J. 301, 313 (2013) (quoting United States v. U.S. Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 313, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752, 764 (1972)).

A.

Here, the officers had a valid arrest warrant. "An arrest warrant 'implicitly carries with it the limited authority to enter a dwelling' where the suspect lives when there is reason to believe the suspect is inside." State v. Brown, 205 N.J. 133, 145 (2011)

(quoting Payton v. New York, 445 U.S. 573, 603, 100 S. Ct. 1371, 1388, 63 L. Ed. 2d 639, 661 (1980)); see, e.g., State v. Jones, 143 N.J. 4, 15 (1995). It is undisputed the officers lawfully entered defendant's residence because they had an arrest warrant enabling them to enter and search for him.

"[T]he scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" State v. Marshall, 199 N.J. 602, 611 (2009) (quoting Maryland v. Garrison, 480 U.S. 79, 84, 107 S. Ct. 1013, 1016, 94 L. Ed. 2d 72, 80-81 (1987)). Thus, "until the point of [the defendant]'s arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that [he] might have been found." Buie, supra, 494 U.S. at 330, 110 S. Ct. at 1096, 108 L. Ed. 2d at 283.

Here, the trial court found that Sergeant Joy "only looked in places in the kitchen where it was possible that a person could be found." The court also determined defendant was not found until "moments after" Joy opened the cabinet beneath the kitchen sink and saw the handgun. Thus, the search was authorized by the arrest warrant. Id. at 332-33, 110 S. Ct. at 1097, 108 L. Ed. 2d at 285.

Defendant argues the police could not reasonably expect to find a person hiding in the cabinet under the kitchen sink. The

trial court believed Sergeant Joy's testimony that he had twice before found people hiding in similar cabinets under kitchen sinks and that the two-foot-high, three-foot-wide cabinet was large enough for defendant to fit inside. The court reached the same conclusion after viewing photos of the cabinet. We cannot say the trial court was clearly mistaken. Accordingly, Joy was permitted to open the cabinet in search of defendant pursuant to the arrest warrant.

B.

The trial court found opening the cabinet was also permissible as part of a protective sweep. "[A] 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." State v. Davila, 203 N.J. 97, 102 (2010) (quoting Buie, supra, 494 U.S. at 327, 110 S. Ct. at 1094, 108 L. Ed. 2d at 281).

"[A] protective sweep incident to an in-home arrest is permissible under the following circumstances." State v. Cope, 224 N.J. 530, 548 (2016). "First, the police may sweep the 'spaces immediately adjoining the place of arrest from which an attack' might be launched even in the absence of probable cause or reasonable suspicion." Ibid. (quoting Buie, supra, 494 U.S. at

334, 110 S. Ct. at 1098, 108 L. Ed. 2d at 286). "The officers may 'look in closets and other spaces'" in that area. Id. at 547 (quoting Buie, supra, 494 U.S. at 334, 110 S. Ct. at 1098, 108 L. Ed. 2d at 286). "Any wider sweep must be justified by 'specific facts that would cause a reasonable officer to believe there is an individual within the premises who poses a danger' to the arresting officers." Id. at 548 (quoting Davila, supra, 203 N.J. at 115).

"Second, the sweep must be 'narrowly confined to a cursory visual inspection of those places in which a person might be hiding.'" Ibid. (quoting Buie, supra, 494 U.S. at 327, 110 S. Ct. at 1094, 108 L. Ed. 2d at 281). Third, "the sweep should last 'no longer than is necessary to dispel the reasonable suspicion of danger' or 'to complete the arrest and depart the premises.'" Ibid. (quoting Davila, supra, 203 N.J. at 115).

Here, as in Cope, "[t]he police executed the arrest warrant for defendant while he was present in his apartment." Ibid. The trial court also found the officers' sweep lasted only about one minute and merely involved "a cursory visual inspection of those places in which a person might be hiding." Buie, supra, 494 U.S. at 327, 110 S. Ct. at 1094, 108 L. Ed. 2d at 281.

Unlike Buie and Cope, the officers here conducted the protective sweep immediately before the arrest. Our Supreme Court

has held "a protective sweep conducted on private property is not per se invalid merely because it does not occur incident to an arrest." Davila, supra, 203 N.J. at 120. That Buie approved protective sweeps "incident to an arrest does not appear significant to its reasoning, except, of course, that the arrest demonstrated lawful police presence in the home and enhanced the perceptible danger to the officers on the scene." Id. at 117. Davila extended Buie "to officers who are lawfully present in private premises for some purpose other than to effect an arrest." Id. at 116, 125. To make up for "the absence of probable cause to arrest" in such circumstances, the Court formulated slightly different requirements, namely a showing that "(1) law enforcement officers are lawfully within the private premises for a legitimate purpose, which may include consent to enter; and (2) the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger." Id. at 121, 125.

Here, the distinction between sweeping immediately before and after the arrest was inconsequential, because the sweep met the conditions set in Davila as well as Buie. The officers were lawfully within the apartment pursuant to the arrest warrant. Moreover, the apartment was small enough that the kitchen was immediately adjoining the place of defendant's impending arrest.

See Cope, supra, 224 N.J. at 548-49 (permitting the sweep of a back porch after the defendant was arrested in the living room). "[A] protective sweep incident to an in-home arrest [does not] require[] reasonable suspicion even when the sweep is of 'spaces immediately adjoining the place of arrest.'" Id. at 550-51 (citing Davila, supra, 203 N.J. at 114).

In any event, Sergeant Joy had "'articulable facts' and 'rational inferences' drawn from those facts that 'would warrant a reasonably prudent officer in believing that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene.'" Id. at 547 (quoting Buie, supra, 494 U.S. at 334, 110 S. Ct. at 1098, 108 L. Ed. 2d at 286). As in Cope, "the noise coming from the apartment," here the male and female voices, gave the officers reason to "believe[] 'multiple people [were] inside the apartment.'" Id. at 548 (second alteration in original).⁴ "No one in the apartment responded immediately to the officers' door knocks," and the one to two minute delay gave people time to hide in places from which attacks could be launched. Ibid.

Given that only the girlfriend came to the door, the officers had additional reason to believe defendant was concealing himself.

⁴ Defendant argues that in Cope the officers also heard a "'commotion.'" Cope, supra, 224 N.J. at 548. Nothing in Cope indicates that is a prerequisite to a protective sweep.

They also knew defendant was wanted for a crime of threatening someone with a firearm. Thus, the trial court properly found the officers had a reasonable suspicion the unlocated defendant might pose a danger. This was an additional danger not present in Cope where the defendant had already been "handcuffed and placed under arrest" before the sweep. Id. at 538.

Moreover, Sergeant Joy had previously found people hiding in cabinets under kitchen sinks. That articulated fact, together with the other facts related above, gave rise to a rational inference that defendant could hide under the sink and pose a threat to the officers. Accordingly, it was permissible to conduct a protective sweep and to open the cabinet.

C.

Under either of these scenarios, the officers were legally permitted to open the cabinet under the kitchen sink. When Sergeant Joy did so, the handgun within was in plain view. "Although [a protective] sweep 'is not a search for weapons or contraband,' such items may be seized if observed 'in plain view' during the sweep." Id. at 548. Here, "the police officers had the right to be where they were – in defendant's house effectuating a valid arrest warrant – and to seize any evidence of crime that was within their plain view." State v. Bruzzese, 94 N.J. 210, 242

(1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984).

Under the doctrine of plain view, a warrantless seizure by the police is justified when:

(1) the officer was "lawfully in the viewing area," (2) the officer discovered the evidence "'inadvertently,' meaning that he did not know in advance where the evidence was located nor intend beforehand to seize it," and (3) it was "immediately apparent" that the items "were evidence of a crime, contraband, or otherwise subject to seizure."

[State v. Earls, 214 N.J. 564, 592 (2013) (citation omitted).]⁵

Sergeant Joy was lawfully in a position to view the handgun in the cabinet under the kitchen sink because he was both executing the arrest warrant and conducting a protective sweep. Joy discovered the gun inadvertently because he was searching for defendant, not a handgun, and had no knowledge before the search of what the cabinet contained, whether a handgun was in the apartment, or where it might have been located. See Gonzales, supra, 227 N.J. at 103. Finally, it was immediately apparent the handgun was evidence of a crime or contraband. "[E]vidence of a crime is 'immediately apparent' under the plain-view doctrine when

⁵ While our Supreme Court prospectively removed the inadvertence requirement in State v. Gonzales, 227 N.J. 77, 101 (2016), the present appeal arises from a judgment that predates Gonzales, so we apply the previous three-part test.

the officer possesses 'probable cause to associate the property with criminal activity.'" Id. at 93 (quoting Texas v. Brown, 460 U.S. 730, 741-42, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d 502, 513 (1983)). The arrest warrant gave the officers probable cause to believe defendant used a handgun to threaten a woman. Thus, they could seize the handgun.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION