

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2722-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONNA M. ALESSI,

Defendant-Appellant.

Argued January 11, 2017 – Decided March 1, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Hunterdon County, Indictment No.
14-03-0092.

Jaime B. Herrera, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Ms. Herrera, of counsel and on the brief).

Jeffrey L. Weinstein, Assistant Prosecutor,
argued the cause for respondent (Anthony P.
Kearns, III, Hunterdon County Prosecutor,
attorney; Mr. Weinstein, of counsel and on the
brief).

PER CURIAM

Defendant, Donna M. Alessi, appeals her conviction after a
jury trial for burglary, filing false reports, and hindering. On

appeal, Alessi contends that due to violations of her Fourth and Fifth Amendment rights, an oral statement she provided to police during the course of the investigation required suppression. Alessi also contends that there was error in the trial record and the jury instructions. Since we conclude that Alessi's statement was provided after an unconstitutional stop and seizure, we reverse the conviction and remand for a new trial.

Alessi and co-worker, Philip Izzo, commenced a dating relationship in 2011. At the time, Izzo was married and resided with his wife and children. During their dating relationship, Izzo was a construction official for Raritan Township (the Township). In that capacity, he supervised the construction staff, including two technical assistants and an inspector. The inspector, Mark Fornaciari, filed a lawsuit naming Izzo and the Township as defendants. The basis of the lawsuit was a whistleblower claim filed under New Jersey's Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8.¹

In preparation of his defense, Izzo obtained documents from the construction office, including documents from Fornaciari's personnel file, of which he kept a copy in his truck.

¹ Izzo was the subject of the lawsuit, which claimed that he ordered Fornaciari "to inspect a restaurant construction project even though it lacked the necessary state approvals." The lawsuit was settled in 2014.

Subsequently, Izzo discussed the lawsuit with Alessi and showed her the personnel documents he obtained. These documents played a critical role in the police investigation.

Sometime in the spring of 2013, the relationship between Alessi and Izzo terminated, due in part to Izzo's marital status as well as his relationship with another woman. Thereafter, there were claims of harassing conduct made by Alessi and Izzo against each other.

In June 2013, Izzo was at a bar in Hillsborough. His truck was parked in the bar's lot. Alessi went to the bar and, after observing Izzo's truck, entered it without Izzo's permission or knowledge. She removed some personal items and the documents relating to Fornaciari's personnel file. Unknown to Alessi, her actions were captured on the bar's surveillance video. The video was utilized during the police investigation and at trial.

Upon obtaining the Fornaciari documents, Alessi mailed them to Fornaciari at the address listed in the civil complaint. Included was an unsigned cover letter stating her hope that the documents would be of assistance. Alessi also provided negative information about Izzo's job performance, and noted that Izzo said he wanted to "bury Fornaciari."

Alessi went to the Hillsborough Post Office. While attempting to mail the envelope containing the documents and cover letter, a

postal worker advised her of the requirement to list a return address. Alessi listed one of the technical assistants at the Raritan construction office as the return addressee. Due to an issue with the address utilized by Alessi, the envelope was "returned" to the construction office. After the contents of the envelope were revealed, the Township engaged in an investigation that determined the technical assistant, listed as the return addressee, did not send the envelope and that Fornaciari's personnel file may have been illegally removed. The township administrator then contacted the Raritan Township Police Department (RTPD).

RTPD Detectives Thomas Camporeale and Benedict Donaruma commenced an investigation utilizing information taken from the envelope to ascertain when the envelope was mailed. They acquired and viewed the post office's surveillance video from that date. However, the detectives were unable to identify the sender of the envelope after review of the video.

Izzo was interviewed as part of the police investigation. Although Izzo initially denied removing the documents from the personnel file, he subsequently acknowledged his involvement. The investigation also led to the discovery of Izzo's relationship with Alessi.

After obtaining Alessi's driver's license photo, the detectives were able to identify her as the woman in the post office video. Thereafter, Donaruma and RTPD police officers placed phone calls to Alessi and went to her residence on multiple occasions in an attempt to speak with her about the Izzo investigation. Due to Alessi's lack of response, the attempts by the RTPD were unsuccessful.

In the early morning hours of July 30, 2013, Donaruma went to Alessi's residence and knocked on her door. There was no answer despite Donaruma's observation of Alessi's car outside the residence. Donaruma waited outside Alessi's residence until she eventually emerged from inside, entered her vehicle, and drove away. Donaruma then followed her, activated his emergency lights, and pulled her over. Donaruma's sole purpose for the motor vehicle stop was to question Alessi in furtherance of the Izzo investigation.

At the time of the stop, Donaruma was wearing a shirt that clearly identified him as a police officer. His firearm was displayed. The detective questioned Alessi for over an hour, first on the street and later, upon Alessi's request, in her development's parking lot.²

² The conversation between Donaruma and Alessi was videotaped but not audibly recorded or memorialized by written notes.

Alessi eventually requested to leave due to her not wanting to be late for her job, but agreed to come to police headquarters later that day. Alessi later contacted Donaruma and arranged to meet with him over her lunch hour. However, Alessi did not want her car seen in the police headquarters' parking lot due to a concern that Izzo would see her vehicle. By agreement, Alessi parked her car at a local Target store. She was transported from that location by Donaruma and another officer to police headquarters. While there, she was provided with Miranda warnings.³ After some colloquy with Donaruma, Alessi invoked her right to counsel despite assurances from the detective that she was not the target of the investigation.⁴

At the N.J.R.E. 104 hearing, Donaruma testified he informed Alessi he pulled her over to question her about mailing the envelope. After speaking with her for several minutes, Alessi indicated she did not feel comfortable talking out in the open and suggested they "move up to the top portion of her development lot." Donaruma further testified that he informed Alessi multiple

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁴ The statements made by Alessi at police headquarters were not admitted by the court based upon her invocation of her right to counsel. A later statement, taken in the presence of her attorney, was used at trial. It is only the roadside oral statement that Alessi challenges.

times that she was able to leave at any time but she did not indicate a desire to leave until she realized she was running late for work. The detective stated that he showed Alessi the letter accompanying the documents, along with the surveillance video from the post office. Whereupon Alessi admitted she was the sender. According to Donaruma, Alessi said she wrote the letter at the behest of Izzo, whom she feared.⁵

Based on the information provided by Alessi, Izzo was arrested on charges of second-degree official misconduct and third-degree misapplication of entrusted property. After his arrest, Izzo provided police with a statement which contradicted the information provided to them by Alessi.

During the investigation, the RTPD obtained phone records for both Izzo and Alessi. Additionally, the police obtained and reviewed the surveillance video from the bar. Izzo, now cooperating with the investigation, agreed to submit to a polygraph exam, which he passed. Based upon the information provided by Izzo, along with the phone records, surveillance videos, and polygraph test results, the RTPD arrested Alessi on charges of burglary, false reports, and hindering apprehension.

⁵ There was a factual dispute between Donaruma's and Alessi's accounts of the dialogue and the content of her statement. The resolution of the differing accounts is not relevant to our determination.

A Hunterdon County grand jury returned Indictment 14-03-0092 charging Alessi with third-degree burglary, N.J.S.A. 2C:18-2(a)(1) (count one); fourth-degree false reports to a law enforcement officer, N.J.S.A. 2C:28-4(a) (count two); and third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(4) (count three).

Alessi filed a motion to suppress her oral statement to Donaruma. In her motion, notwithstanding the circumstances under which Alessi's vehicle was stopped, she did not challenge the legality of the stop.

At the conclusion of the hearing, the judge denied the motion; holding there was no Fifth Amendment violation. Specifically, the judge determined that Alessi was not in custody when the roadside detention and subsequent questioning occurred. With regard to the stop itself, the judge noted that the detective intended to speak with Alessi at her home, but when he was unable to do so, "she was pulled over and told why she was stopped." The judge held that Alessi was not subject to a custodial interrogation in that the stop was more in the "nature of the investigative detention," so there could be no deprivation of her Miranda rights.

In addition to Alessi's challenge to the admission of her oral statement, she also argues there were other errors relative to the trial and jury instructions that require reversal. We

recite the following taken from the trial record relative to those claims of error.

At trial, during cross-examination by the defense, Izzo testified that while being interrogated by police, he took and passed a polygraph test to prove that he had nothing to hide. Defense counsel did not object to the statement, nor did the judge strike it or provide a curative instruction. The State did not reference the polygraph testimony during the trial, including during the opening and summation.

The judge instructed the jury that Alessi was charged "with committing the crime of burglary" when she "knowingly did enter a vehicle belonging to Philip Izzo with purpose to commit a crime therein." Neither the State nor Alessi requested the jury be instructed on the lesser-included offense of criminal trespass. The judge did not provide the instruction sua sponte.

The judge charged the jury with the elements of "hindering her own apprehension or prosecution . . . for burglary, theft and misusing entrusted documents." The verdict sheet provided to the jury indicated that they could find Alessi "guilty" or "not guilty" of this charge, but did not require the jurors to determine whether Alessi hindered her apprehension for burglary, theft, or misusing entrusted documents. There was no objection to the charge.

On appeal, Alessi argues:

POINT I

THE INITIAL STOP OF MS. ALESSI'S VEHICLE VIOLATED HER FOURTH AMENDMENT RIGHTS BECAUSE DETECTIVE DONARUMA DID NOT HAVE A REASONABLE, ARTICULABLE SUSPICION SUPPORTING THE STOP, AND ALESSI'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE UNLAWFUL DETENTION BECAME A CUSTODIAL INTERROGATION.

A. Factual background.

B. Detective Donaruma did not have a reasonable, articulable suspicion justifying the stop of Ms. Alessi's vehicle on July 30, 2013.

C. Because the roadside detention evolved into a custodial interrogation, Ms. Alessi was entitled to Miranda protection.

POINT II

THE JURY INSTRUCTIONS ON HINDERING APPREHENSION DEPRIVED MS. ALESSI OF HER DUE PROCESS RIGHT TO A UNANIMOUS VERDICT BY FAILING TO REQUIRE THE JURY TO REACH A UNANIMOUS VERDICT ON WHETHER ALESSI INTENDED TO HINDER HER APPREHENSION FOR BURGLARY, THEFT, OR "MISUSING ENTRUSTED DOCUMENTS." THE ERROR WAS COMPOUNDED BY THE JUDGE'S FAILURE TO INSTRUCT THE JURY ON THE ELEMENTS OF "MISUSING ENTRUSTED DOCUMENTS," A CRIMINAL ACT THAT DOES NOT APPLY TO ALESSI'S CONDUCT IN THIS CASE. (Not Raised Below)

POINT III

THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY ON CRIMINAL TRESPASS AS A LESSER[-]INCLUDED OFFENSE TO BURGLARY. (Not Raised Below)

POINT IV

IZZO'S STATEMENT THAT HE PASSED A POLYGRAPH TEST WAS INFLAMMATORY AND UNDULY PREJUDICIAL, AND CLEARLY CAPABLE OF PRODUCING AN UNJUST RESULT. (Not Raised Below)

We commence our discussion by noting that Alessi did not challenge the stop of her motor vehicle before the Law Division as violative of the Fourth Amendment or the New Jersey Constitution. U.S. Const. amend IV; N.J. Const. art. I, § 7. Since the issue was not raised before the trial court, we review it for plain error. R. 2:10-2; see State v. Macon, 57 N.J. 325, 337 (1971). We reverse on the basis of unchallenged error only if the error was "clearly capable of producing an unjust result." State v. Ross, 218 N.J. 130, 143 (2014) (quoting R. 2:10-2).⁶

"The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against

⁶ Notwithstanding Alessi's failure to raise the issue of the motor vehicle stop, the judge made findings regarding the nature of the stop. In State v. Witt, 223 N.J. 409, 419 (2015), our Supreme Court reversed this court's determination that the stop of a defendant's car was unconstitutional because the issue was raised for the first time on appeal. The Court held the "belatedly raised issue" should not have been entertained, as the State was deprived of the opportunity to establish a record below in defense of the claim. Ibid. Specifically, in Witt, because the issue was never raised at the trial level, the officer who carried out the vehicle stop was never afforded an opportunity to take the stand and give his own account of events. Ibid. Here, unlike in Witt, Donaruma testified that the stop was based solely for the purpose of questioning Alessi as a witness and not due to a motor vehicle violation or suspicious criminal activity.

unreasonable searches and seizures.'" State v. Dickey, 152 N.J. 468, 475 (1998) (alteration in original) (citation omitted). As Dickey noted, "[t]emporary detention of individuals during the stop of a motor vehicle by the police, even if only for a brief period and for a limited purpose constitutes a seizure of persons within the meaning of the [Fourth Amendment's] provision[,]" thereby requiring reasonable and articulable suspicion to justify the detention. Ibid. (citation and internal quotation marks omitted).

Police encounters with individuals generally occur at three distinct levels: a field inquiry; an investigatory stop; and/or an arrest. State v. Nishina, 175 N.J. 502, 510-11 (2003). There are constitutional considerations at all levels of encounters. Ibid. Although not called upon to decide the issue on Fourth Amendment grounds, the court, in its determination of the Fifth Amendment issue, found the stop was "an investigatory detention."

An investigative or so-called "Terry" stop does not require probable cause to believe a person has committed or is about to commit an offense. Id. at 510. Rather, "[a] police officer may conduct an investigatory stop if, based on the totality of the circumstances, the officer ha[s] a reasonable and particularized suspicion to believe that an individual has just engaged in, or was about to engage in, criminal activity." State v. Stovall, 170

N.J. 346, 356 (2002) (citing Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)).

Here, there were no particularized facts justifying the stop, beyond the desire of Donaruma to speak to Alessi about the ongoing investigation of Izzo. There was no articulable and reasonable suspicion that Alessi either committed a motor vehicle offense or was engaged in criminal activity. See State v. Locurto, 157 N.J. 463, 470 (1999); State v. Davis, 104 N.J. 490, 505 (1986). As such, the stop and resultant seizure of Alessi was unconstitutional.

Predicated upon our determination that the stop and seizure of Alessi was unlawful, we next address whether the statement requires suppression. State v. Smith, 155 N.J. 83, 100, cert. denied, 525 U.S. 1033, 119 S. Ct. 576, 142 L. Ed. 2d 480 (1998). In the ordinary course, "[e]vidence obtained as the fruit of an unlawful search or seizure must be suppressed." Ibid. (citations omitted).

However, the precept stated in the exclusionary rule will not apply where the connection between police illegality and the seizure of evidence is sufficiently attenuated. See e.g., State v. Williams, 192 N.J. 1, 15 (2007); Smith, supra, 155 N.J. at 100. We look to three factors to assess attenuation: "(1) the temporal proximity between the illegal conduct and the challenged evidence;

(2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct." Williams, supra, 192 N.J. at 15.

The United States Supreme Court recently addressed the issue of attenuation in Utah v. Strieff, ___ U.S. ___, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016). The Court, in a 5-3 decision, held that, based upon the attenuation factors from Brown v. Illinois, 422 U.S. 590, 955 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), the discovery by police of a valid pre-existing and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest. Strieff, supra, ___ U.S. at ___, 136 S. Ct. at 2063, 195 L. Ed. 2d at 410.

The majority in Strieff found the first factor, temporal proximity, favored suppression. Id. at ___, 136 S. Ct. at 2062, 195 L. Ed. 2d at 408. In contravention, the majority found the other two factors favored the State; i.e., intervening circumstances (the arrest warrant) and lack of flagrant police conduct ("at most negligent"). Id. at ___, 136 S. Ct. at 2062-63, 195 L. Ed. 2d at 408. The Court reasoned that Strieff's arrest was "independently compelled by the pre-existing warrant" and that it was "undisputedly lawful to search Strieff as an incident to his arrest[.]" Id. at ___, 136 S. Ct. at 2063, 195 L. Ed. 2d at

409. The Court held the intervening circumstances of the warrant weighed heavily in favor of the State and was a significant factor in the decision. Id. at ____, 136 S. Ct. at 2063, 195 L. Ed. 2d at 410.

In Williams, our Supreme Court held that the defendant's conduct in eluding police after an unconstitutional investigative stop was "an intervening act – the crime of obstruction – that completely purged the taint from unconstitutional investigatory stop." Williams, supra, 192 N.J. at 18. The Court noted during its recitation of the three factors that, "the second factor, intervening events, can be the most important factor in determining whether [evidence] is tainted." Id. at 16 (alteration in original) (citation and internal quotation marks omitted).

In application of the first factor to this case, i.e., the "temporal proximity" between the unconstitutional seizure and her statement, we conclude this favors Alessi. To be sure, the seizure and resultant statement was "contemporaneous." Although this factor favors suppression, it is the least weighty of the three factors. State v. Worlock, 117 N.J. 596, 622-23 (1999) (citations omitted).

In contrast to the weight afforded temporal proximity, the second factor, as noted in Williams, plays a more significant role in the determination of taint. Here, unlike in Strieff and

Williams, there were no intervening circumstances or events between the seizure and the statement; no arrest warrant and no flight. Consequently, we hold that the second factor favors suppression.

Although we would not term Donaruma's decision to effectuate the stop "flagrant misconduct," there is no doubt it was illegal. The absence of flagrant misconduct will not save from exclusion otherwise illegally obtained evidence where, as here, there was no attenuation by proximity or intervening circumstances.

Thus, we hold that there was no attenuation between the illegal stop and seizure and the provision of the statement sufficient to preclude the application of the exclusionary rule. As such, the statement's admission was erroneous.


We next address whether the admission of the statement constituted plain error. See R. 2:10-2. In this vein, after consideration of the constitutional implications involved, we are satisfied the unlawful stop and seizure of Alessi, and the oral statement she provided to Donaruma, clearly influenced the outcome of the trial. Pointedly, two of the three charges for which Alessi was convicted, hindering and false reports, were the product of her statement. Without question, the only basis on which the verdict on these charges could have been reached was by consideration of the statement Alessi provided during the stop.

Thus, "the error led the jury to a result it otherwise might not have reached." Macon, supra, 57 N.J. at 336; see State v. Cain, 224 N.J. 410, 432-33 (2016).

Given our ruling that it was plain error to admit Alessi's statement, we reverse the conviction and remand for a new trial. In light thereof, we do not address the other points of error raised on appeal.

Reversed and remanded. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION