SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3611-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JIHAD EWING,

Defendant-Appellant.

Submitted April 26, 2017 – Decided August 30, 2017

Before Judges Fuentes and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 14-09-2760.

Eugene P. Tinari, attorney for appellant.

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Maura G. Murphy, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Jihad Ewing appeals from a January 19, 2016 judgment of conviction for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). Defendant moved to suppress the handgun

seized without a warrant, which formed the evidential basis for the gun possession charge. When his motion was denied, defendant entered a negotiated guilty plea and was sentenced to a five-year term of imprisonment, with a three-year period of parole ineligibility, in accordance with the Graves Act, N.J.S.A. 2C:43-6(c). On appeal, defendant challenges the denial of his motion to suppress the handgun, arguing the police had neither "reasonable suspicion [nor] probable cause to stop the [d]efendant's vehicle nor could they establish a reasonable and articulable suspicion that defendant was armed." We disagree and affirm.

I.

At the suppression hearing conducted on July 10 and September 11, 2015, the following facts were adduced. On December 15, 2011, New Jersey State Troopers Salvatore Lopresti, Jr., and Bryan Burke, both veteran officers, were patrolling Sixth Avenue and Ferry Street in Camden in an unmarked black SUV as part of a surge detail to combat "open air drug" and other violent criminal activity. At approximately midnight, the troopers observed a silver Dodge wagon with tinted windows "just parked randomly on the side of the road" in a dark, deserted residential area with "no other vehicles or traffic around." According to Lopresti, the vehicle was suspicious based on "where it was parked, . . . the location it was parked, [and] how it was parked." Lopresti testified, "there's not really

a parking spot there for that vehicle." Burke testified that the vehicle was suspicious because "[i]t wasn't in a parking space" and "[i]t was kind of stopped in the middle of the road." Moreover, according to Burke, he could see that "the driver had his foot on the brake" because "the brake lights were on[.]"

The troopers pulled up about four to five feet behind the vehicle with their headlights shining directly into the vehicle. While Burke, who was driving, testified that he activated the emergency lights, Lopresti could not recall whether the emergency lights were activated. From behind the vehicle, the troopers observed two occupants in the car, the driver and a front seat passenger. According to Lopresti, for about two seconds, the front seat passenger and the driver "duck[ed] out of view[,]" as if "they were doing something underneath . . . their seat," and then "popp[ed] back up." Lopresti believed the occupants of the vehicle were trying to hide something. Burke testified he could "see the suspension shift on the tires of the car moving back and forth a little bit, along with the movement of the driver's silhouette[,]" and "it appeared that the driver's silhouette did kind of lower himself below the headrest of the vehicle."

While observing the movement in the Dodge wagon, the troopers immediately exited their vehicle and approached the car, Lopresti going to the passenger's side and Burke going to the driver's

side. Burke knocked on the window to identify himself and asked the driver to put down his window. Burke repeated the request when the driver did not put the window down all the way. After Burke repeated the request, the driver complied. Fearing for his safety, Burke told the driver to exit the vehicle so that he could perform a frisk for weapons. The driver, later identified as defendant, stated "I have a gun." At that point, Burke handcuffed defendant and patted him down. From defendant's waistband, Burke recovered a semi-automatic handgun loaded with hollow-nosed bullets, and placed defendant under arrest.

In ruling on the suppression motion, preliminarily, the judge found both troopers' testimony to be credible, noting "they answered the questions without hesitation[,] or any apparent evasion, and when they were not sure of an answer[,] answered in the appropriate manner." The judge then made factual findings consistent with the troopers' testimony. The judge found that the troopers were patrolling an area "known for open air drug sets and criminal activity" when "they observed defendant's vehicle" in circumstances that aroused their suspicions. The judge also credited both troopers' testimony that "they observed movements in defendant's vehicle after . . . the troopers pulled behind defendant's vehicle." The judge explained,

> In their testimony both troopers stated that the observation of these movements made them suspicious, and that, through their training and experience, these actions were consistent with someone attempting to conceal something in the vehicle.

Finding that the troopers had reasonable suspicion to conduct an investigatory stop, and specific and articulable facts that would warrant heightened caution to justify ordering defendant out of the car for officer safety, the judge upheld the search and seizure. Regarding the propriety of the initial encounter, the judge reasoned:

> As in [State v. Hughes, 296 N.J. Super. 291 (App. Div. 1997)], the knowledge and experience of Troopers Burke and Lopresti, coupled with their observations of defendant's vehicle stopped either in the middle or towards the side of the road, not in a parking space, with no cars nearby, with no . . . houses nearby, near midnight, in a high crime area aroused their suspicion. . . .
>
> Hughes . . . suggests that the use of emergency lights or searchlights amounts to a seizure under the Fourth Amendment, thus requiring reasonable suspicion.
>
> Given the inconclusive testimony regarding the activation of the emergency lights, this [c]ourt will analyze the circumstances of defendant's arrest under the more exacting standard in which reasonable suspicion must have existed at the time [the] troopers engaged the emergency lights.
>
> Assuming, for purposes of this motion, that the emergency lights were activated, an investigatory stop commenced when Trooper

> Burke activated the emergency lights . . . because simultaneous with that action police exited their vehicle and moved to either side of the defendant's stopped vehicle, thus giving rise to circumstances where, after consideration of the "totality of the circumstances a reasonable person would feel that the police had encroached on his or her freedom to leave." [State v. Daniels, 393 N.J. Super. 476, 484 (App. Div. 2007)].
>
> Here, under these facts, as this [c]ourt finds them to be, reasonable suspicion existed because the testimony of Troopers Burke and Lopresti demonstrated . . . "a particularized and objective basis for suspecting the person stopped of criminal activity[.]" [State v. Stovall, 170 N.J. 346, 356 (2002).] [U]nlike [State v. Dangerfield, 339 N.J. Super. 229 (App. Div. 2001)], where the Supreme Court held that officers did not have reasonable suspicion or probable cause to stop the defendant based solely upon the fact that the defendant was in a high crime area and the defendant took flight upon observing law enforcement, troopers in the present matter established reasonable suspicion through the circumstances of encountering defendant, the actions of defendant, and the high crime area in which the trooper encountered defendant.
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> . . . .
>
> Taken together, these facts amount to greater reasonable suspicion than "mere presence in an area known for its drug activity," as held in Dangerfield[.]

In evaluating the propriety of ordering defendant to exit the vehicle, citing State v. Smith, 134 N.J. 599 (1994), the judge acknowledged that "ordering a person from a vehicle requires more than a hunch" and "an officer must be able to point to specific

and articulable facts that would warrant heightened caution to justify ordering the occupants to step out of a vehicle." The judge found that based on the time, location and circumstances of the encounter, and after observing movement in defendant's vehicle, which aroused the trooper's suspicions and engendered their belief that the occupants "[were] concealing something in the vehicle[,] . . . Trooper Burke credibly testified that at that moment he began to fear for his safety, and he was concerned that defendant may have had a firearm in the vehicle." According to the judge, "[d]efendant's reluctance to roll down his window," despite his ultimate compliance after repeated requests from Trooper Burke, further "raised the level of suspicion."

The judge concluded:

> Here, based upon the credible testimony, Troopers Burke and Lopresti demonstrated specific and articulable facts that justified Trooper Burke's ordering of defendant out of his vehicle.
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> . . . .
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> Finally, whether the handgun was lawfully seized pursuant to a frisk of defendant's person, pursuant to [Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)] a limited exploratory frisk of the subject's person is permissible to preserve the safety of an officer if under the circumstances the officer reasonably believes that the suspect may be armed and dangerous. [State v. Arthur, 149 N.J. 1, 13 (1997)].

. . . .

> Here, prior to performing a frisk defendant stated to Trooper Burke, "I have a gun," . . . as he exited the vehicle. As of this time no frisk had been conducted. . . . [A]s the defendant told Trooper Burke that he had a weapon, Trooper Burke had a reasonable belief that defendant was armed and dangerous.

II.

On appeal, defendant argues:

> 1. THE TRIAL COURT ERRED WHEN IT DENIED THE [APPELLANT'S] MOTION TO SUPPRESS PHYSICAL EVIDENCE.
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> > A. THE LEVEL OF SUSPICION NECESSARY FOR A TRAFFIC STOP BASED ON A TRAFFIC VIOLATION UNDER WHREN V. [U.S.][1] IS PROBABLE CAUSE, NOT REASONABLE ARTICULABLE SUSPICION.
> >
> > B. THERE WAS NO REASONABLE ARTICULABLE SUSPICION OR PROBABLE CAUSE TO CONDUCT A VEHICLE STOP OF THE APPELLANT'S VEHICLE.
> >
> > C. THERE WAS NO REASONABLE ARTICULABLE SUSPICION OR PROBABLE CAUSE TO CONDUCT AN INVESTIGATORY DETENTION AND SUBSEQUENT FRISK.

We review a motion judge's factual findings in a suppression hearing with great deference. State v. Gonzales, 227 N.J. 77, 101 (2016). In our review of a "grant or denial of a motion to

[1] Whren v. U.S., 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

suppress [we] must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Gamble, 218 N.J. 412, 424 (2014). We defer "to those findings of the trial judge which are substantially influenced by [her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). We owe no deference, however, to the trial court's legal conclusions or interpretation of the legal consequences that flow from established facts. Our review in that regard is de novo. State v. Watts, 223 N.J. 503, 516 (2015); State v. Vargas, 213 N.J. 301, 327 (2013).

In State v. Rosario, 229 N.J. 263, 272 (2017, our Supreme Court recently reaffirmed that a police officer may conduct an "investigative detention, also called a Terry[2] stop or an investigatory stop," if during an encounter with a citizen the officer has "'reasonable and particularized suspicion . . . that an individual has just engaged in, or was about to engage in, criminal activity.'" Ibid. (quoting State v. Stovall, 170 N.J. 346, 356 (2002). Here, the motion judge found Burke met this

[2] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

standard when he and his partner decided to investigate defendant's vehicle. It is beyond dispute that the Troopers had probable cause to arrest defendant once defendant voluntarily stated: "I have a gun." As the motion judge correctly noted, defendant made this statement before he exited the vehicle, thus obviating the need for Burke to conduct a Terry pat down.

Affirmed.