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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3761-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES T. PRITCHETT,

Defendant-Appellant.

Submitted June 28, 2016 – Decided April 6, 2017

Before Judges Espinosa and Kennedy.

On appeal from Superior Court of New Jersey, Law Division, Salem County, Indictment No. 14-03-0144.

Joseph E. Krakora, Public Defender, attorney for appellant (Stephen W. Kirsch, Assistant Deputy Public Defender, of counsel and on the brief).

John T. Lenahan, Salem County Prosecutor, attorney for respondent (Lisa M. Rastelli, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

ESPINOSA, J.A.D.

Defendant entered a guilty plea to one count of third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1), after his

motion to suppress evidence seized from his person was denied. We reverse the denial of defendant's motion and his conviction.

Two witnesses testified at the suppression hearing, Chief John Pelura and Sergeant Melvin Vanaman of the Salem Police Department. We summarize their testimony.

At approximately 6:00 p.m. on December 12, 2013, Pelura was driving home from work in an unmarked vehicle. He explained why his attention was drawn to the car defendant was driving:

> [I]t was driving along the shoulder of the road, normally where cars would park. There were no cars parked there, however. He was traveling next to the curb line, as if he was going to park, and he shut his lights out about mid-block, but then continued driving southbound past two or three house[s], and then finally came to a stop in front of 1 Johnson Street.

Pelura estimated that the car traveled along the shoulder for about 150 to 200 feet and that its lights were turned off as it passed two houses. Pelura had been "involved with the investigation of multiple search warrants for narcotics in that neighborhood" as well as "several homicide investigations in that neighborhood."

Pelura looked in his rear view mirror to see if the driver alighted from the vehicle. The area across the street from the vehicle was frequently under surveillance and Pelura knew "people will park in the Avenues, and then, either walk across

the street to make narcotics transactions; or, people will come from across the street into the Avenues and make deliveries." The fact that neither defendant nor the passenger left the vehicle piqued his interest.

Pelura drove around the block. He testified that after he circled the block a second time,

> [defendant] was getting out of the driver's seat; and then, when he saw me, he got back into the car, and then, shut the door, but not so much to close it completely, just kind of so it was cracked open.

Pelura then drove around the block and parked in an alleyway where he could observe defendant's movements. He saw defendant walk purposefully to an address where "numerous narcotic search warrants" had been executed. Defendant emerged approximately two to three minutes later and walked back toward his car.

Pelura identified two facts as the basis for his suspicions. First, defendant went into a house with a history of narcotics search warrants and drug activity. Second, defendant parked "essentially, in the middle of nowhere and then walk[ed] across the street" rather than in a location more convenient to his destination.

Pelura approached defendant as he walked back to his vehicle, identified himself as a police officer and told him he

was conducting a narcotics investigation. There was, however, no active investigation being conducted that day. He described defendant's reaction as startled and nervous. Pelura conducted a Terry[1] patdown of defendant. He stated he did not manipulate or go into any of defendant's pockets; he "was simply looking for a weapon." No weapons were recovered.

Pelura then questioned defendant about where he was coming from. Defendant first stated he came from the liquor store but, after Pelura challenged him on that, defendant said he "went across the street to see [his] boy." Defendant was unable to provide a name for the person he went to see.

Pelura testified that Vanaman arrived at this time. Pelura then spoke to the passenger, observed an open container of alcohol, and turned around to see Vanaman handcuffing defendant. Pelura "secured" the passenger for "loitering, with intent to commit a CDS offense."

Vanaman testified he responded to assist Pelura "who reported that he was out with a suspicious male." When he arrived at the scene, defendant was "acting very nervously" and "seemed to be giving conflicting statements" regarding his

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

reasons for being in the area. Pelura asked Vanaman to remain with defendant while he spoke to the passenger.

Vanaman asked defendant for identification, which he produced. Vanaman ran a warrants check on defendant, which was negative for active warrants. Vanaman testified that defendant's actions caused him to conduct a patdown of defendant:

> [Defendant] continued to appear to become increasingly nervous. He was — he would turn his left side of his body away from me, and he kept touching his pockets. He would like run his hands from his sweatshirt to his pants, to checking his front and back pockets. Just like patting them, as if he was looking for something.
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> Then he — when he touched the front of his sweatshirt, I noticed that his facial expression changed, and he reached for his pockets, tried to put his hands in his pockets; and I asked him to not do that. I was standing there, he — when I went and reached for my lapel mike, to answer the dispatch, he again, kind of turned his body away from me, and, again, tried to reach his hand into that pocket, his left front pocket of his sweatshirt.

Vanaman testified that he grabbed defendant and "stopped his . . . hands from going into his pockets." Vanaman asked defendant, "What do you have in that pocket?" Defendant did not answer; "he was just standing there; he didn't . . . try and twist or resist at that moment." Vanaman then conducted a patdown for weapons. He ran his hands along defendant's pockets

on the outside of his clothing. In the left hand sweatshirt pocket that had been the focus of defendant's attention, Vanaman "felt a hard, almost golf ball size object, and . . . heard a slight crinkle of what sounds like some sort of plastic." He "believed the object to be some sort of CDS [controlled dangerous substance] material." Vanaman reached into defendant's pocket, retrieved the object he suspected to be heroin and placed defendant under arrest.

Vanaman testified he conducted the patdown because he "was nervous and suspicious of [defendant's] actions, that he may have some sort of weapon or something on him that could be dangerous." However, he also stated that defendant did not act aggressively toward him in any way.

In a written opinion, the trial judge found the facts supported a particularized and reasonable suspicion that justified Pelura's action in making a Terry stop. The judge also found Pelura's Terry frisk of defendant was unwarranted because the facts failed to support a justifiable suspicion that defendant was armed and dangerous and posed an immediate threat to his safety. The trial judge found this unlawful intrusion "of no import" because Pelura's frisk of defendant did not result in the recovery of any contraband.

The trial judge found Vanaman's frisk of defendant was supported by particularized and reasonable observations:

> He did not know that Chief Pelura had already frisked [defendant]. [Defendant] was becoming increasingly nervous. He kept turning his left side away. He repeatedly tried to put his hands in his sweatshirt pockets after being instructed to stop. Sergeant Vanaman knew that Chief Pelura was conducting a narcotics investigation. These facts support his reasonable belief that [defendant] was armed and posed an immediate threat to his and Chief Pelura's safety.

The trial judge further found that the heroin retrieved from defendant's pocket was lawfully seized pursuant to the plain feel doctrine.

> Sergeant Vanaman's belief that what he felt in [defendant's] left sweatshirt pocket is also supported by the credible evidence. He is an experienced [sic] with many narcotics related arrests. He felt a hard, "almost golf ball sized object" and heard a "crinkle like some plastic." His testimony that it was immediately apparent to him that this was a controlled dangerous substance is credible. At that point, [defendant's] shoulders dropped and he went limp. That together with his observations created probable cause to believe the object was a controlled dangerous substance under the Gates[2] totality of the circumstances test.

Accordingly, defendant's motion was denied. In his appeal, defendant presents the following argument:

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[2] Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 528 (1983).

THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED. THE STOP OF DEFENDANT WAS IMPROPER AT ITS INCEPTION, BECAUSE THERE WAS NO REASONABLE SUSPICION THAT AN OFFENSE HAD BEEN COMMITTED, AND THEN THE STOP WAS CONTINUED LONGER THAN IS CONSTITUTIONALLY PERMISSIBLE. MOREOVER, THERE WAS NO JUSTIFICATION TO SUBJECT DEFENDANT TO A SECOND FRISK; NOR WAS THERE PROBABLE CAUSE VIA "PLAIN FEEL" TO JUSTIFY SEIZING THE CONTRABAND THAT WAS DISCOVERED.

When a motion judge has denied a suppression motion, our review of the motion judge's factual findings "is highly deferential." State v. Gonzales, 227 N.J. 77, 101 (2016). Because the motion judge has the "opportunity to hear and see the witnesses and to have the 'feel' of the case," ibid. (quoting State v. Johnson, 42 N.J. 146, 161 (1964)), the motion judge's factual findings will be upheld so long as sufficient credible evidence in the record supports those findings, State v. Elders, 192 N.J. 224, 243-44 (2007). We review issues of law de novo. State v. Watts, 223 N.J. 503, 516 (2015).

An encounter that begins with a valid arrest or investigative stop may lead to a seizure that will be suppressed because the officer has unreasonably expanded the permissible scope of an otherwise valid search. See, e.g., State v. Privott, 203 N.J. 16, 28-32 (2010) (concluding the officer

unreasonably expanded the permissible scope of the search when he lifted defendant's shirt after conducting a proper investigative stop and protective patdown). A Terry stop, sometimes called an investigatory stop or investigative detention, is "more intrusive than a field inquiry," State v. Rodriquez, 172 N.J. 117, 126 (2002), and "is valid only if the officer has a 'particularized suspicion' based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing," id. at 127 (quoting State v. Davis, 104 N.J. 490, 504 (1986). Such particularized suspicion requires "'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." Id. at 126-27 (quoting Terry, supra, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906).

We "consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." State v. Tucker, 136 N.J. 158, 166 (1994) (quoting Florida v. Bostick, 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 L.Ed. 2d 389, 402 (1991)); see also State v. Sirianni, 347 N.J. Super. 382, 388-89 (App. Div.) (stating "[a]n inquiry may be

converted into an investigative detention if, given the totality of the circumstances, a reasonable person were to believe he was not free to leave"), certif. denied, 172 N.J. 178 (2002). Circumstances that merit consideration include: "the seriousness of the criminal activity under investigation, the degree of police intrusion, and the extent of the citizen's consent, if any, to that intrusion." Sirianni, supra, 347 N.J. Super. at 389 (citation omitted).

The conduct of the police officer has significant weight in determining whether a field inquiry has become an investigative stop. In Rodriquez, supra, 172 N.J. at 129, the officer asked whether the defendant and his companion "had anything on them that they shouldn't have." The Court noted "the tenor of the police questions" contributed to its finding that the encounter had progressed to an investigative detention. Ibid. The Court cited other cases in which a field inquiry was converted into an investigative detention through the nature of the questions asked, e.g., State v. Contreras, 326 N.J. Super. 528, 534, 540 (App. Div. 1999) (defendant was asked "if he had anything of that type [drugs or weapons] on his person"); State ex rel. J.G., 320 N.J. Super. 21, 30-31 (App. Div. 1999) (defendant was asked whether there was "anything on him that [he] shouldn't have"). The "critical inquiry" is whether the policeman has

"conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occurred between two ordinary citizens." Davis, supra, 104 N.J. at 497 n. 6. (quoting W.R. LaFave, 3 Search and Seizure, § 9.2 at 53 (1978)).

"[A]uthoritative questions that presuppose criminal activity or are otherwise indicative of criminal suspicion, thus making the suspect aware he is the focus of a particularized investigation, may be considered as part of the totality of circumstances in determining whether a field inquiry has escalated into an investigatory stop." Sirianni, supra, 347 N.J. Super. at 389. On the other hand, if an officer puts his questions "in a conversational manner, if he did not make demands or issue orders, and if his questions were not overbearing or harassing in nature," his manner would not result in a seizure of the person. Davis, supra, 104 N.J. at 497 n.6 (citing W.R. LaFave, 3 Search and Seizure, § 9.2 at 53-54).

Pelura's interaction with defendant was, almost from its outset, an investigative stop. Upon first approaching defendant, Pelura announced he was conducting a narcotics investigation, although there was no active investigation at that time. Pelura questioned defendant about his movements and challenged defendant's response because it did not conform to his observations. The trial judge found this level of intrusion

justified by facts that supported a reasonable suspicion that defendant was engaged in criminal activity but found the patdown that followed unjustified.

In our view, the justification for an investigative detention was weak. We agree with the motion judge there was no evidence to support a reasonable belief that a protective Terry frisk was warranted, but we disagree with the trial judge's conclusion that, because Pelura's frisk of defendant did not result in the recovery of any contraband, the unlawful intrusion that followed was "of no import." We cannot agree that an unlawful intrusion has no consequence simply because it did not lead to the seizure of evidence.

Here, the police intrusion did not end after the unproductive patdown. Although Pelura had obtained no further incriminating evidence as a result of questioning defendant and defendant manifested no suspicious behavior other than appearing nervous, the detention continued. Vanaman testified that when he arrived, Pelura instructed him to remain with defendant. If there had been any question about defendant's freedom to leave, that was certainly dispelled upon Vanaman's arrival and Pelura's instructions.

Vanaman questioned defendant further, asked for identification, which defendant produced, and conducted a warrant check, which revealed no active warrants.

Both officers cited defendant's nervous behavior as giving them cause for concern. But both officers also testified that defendant did not act aggressively toward them in any way. Vanaman stated it was defendant's continued movements toward his pocket that elevated his concern to the point where he deemed a patdown for weapons necessary.

The motion judge found Vanaman had a reasonable belief defendant was armed and posed an immediate threat to the safety of the officers because: he did not know Pelura had already frisked defendant; defendant was becoming increasingly nervous, repeatedly trying to put his hand in his pocket; and he "knew" Pelura "was conducting a narcotics investigation."

We are constrained to note the finding that Vanaman "knew" a narcotics investigation was under way is contradicted by the record. Vanaman testified he responded to the scene because Pelura was with a suspicious male and that when he arrived, Pelura did not describe any investigation to him. The only testimony in this regard came from Pelura, who testified there was no active investigation at that time. There was also no

evidence that defendant was known to engage in narcotics activity.

We note that, before conducting a patdown, Vanaman grabbed defendant's arm, preventing him from reaching the pocket in question and presumably thwarting the possibility defendant was reaching for a weapon. Still, we will accept the motion judge's finding that Vanaman believed defendant was armed and dangerous, giving deference to the judge's ability to assess his credibility.

The initial frisk described by Vanaman -- running his hands along defendant's pockets on the outside of his clothing -- complied with the scope of a protective patdown authorized by Terry. No weapons were recovered and Vanaman did not suspect the "hard, almost golf ball size object" he felt in defendant's pocket was a weapon. The motion judge found his retrieval of the heroin from defendant's pocket was permissible under the "plain feel" exception to the warrant requirement. We disagree.

"A threshold requirement for the application of the plain feel exception is that the character of the contraband be 'immediately apparent.'" State v. Evans, ___ N.J. Super. ___, ____ (App. Div. 2017) (slip op. at 18-19) (quoting Minnesota v. Dickerson, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 345 (1993)). There is a critical difference between the

existence of probable cause to believe an object is contraband, as the court found here, and evidence that the character of the detected object as contraband was "immediately apparent." See id. at ___ (slip op. at 19). In Dickerson, the Supreme Court found the officer's manipulation of a suspected object removed the seizure from the application of the plain feel doctrine because the officer exceeded the permissible scope of a Terry stop when he manipulated the bulge after concluding it was not a weapon:

> [T]he officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "the sole justification of the search [under Terry:] . . . the protection of the police officer and others nearby." It therefore amounted to the sort of evidentiary search that Terry expressly refused to authorize, and that we have condemned in subsequent cases.
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> [508 U.S. at 378, 113 S. Ct. at 2138-39, 124 L. Ed. 2d at 347-48 (alterations in original) (citations omitted).]

When Vanaman touched the hard golf ball-like object and heard the crinkle of plastic, he "believed the object to be some sort of CDS material" and had probable cause for that belief. However, it was only by removing the object in a warrantless search that the object could be identified as a controlled dangerous substance. Like the officer in Dickerson, he did so after it was clear defendant did not have a weapon in his

pocket. Because the search exceeded the permissible scope of a Terry patdown, it also "amounted to the sort of evidentiary search" that was condemned as unauthorized by Terry. Id. at 378, 113 S. Ct. at 2139, 24 L. Ed. 2d at 347. The warrantless seizure of the heroin from defendant's pocket cannot, therefore, be justified through an application of the plain feel doctrine.

Reversed.