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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-4077-15T3
A-4679-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JASON M. MYERS, a/k/a
RASHON WATTS, RASON WATTS,
JEFFERY MYERS,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

YUSEF T. MYERS, a/k/a
YUSEF T. MYERS, JR.,
YUSUF T. MYERS,

Defendant-Appellant.

Submitted October 23, 2017 - Decided December 11, 2017

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment Nos.
14-09-0798, 14-09-0799 and 14-09-0800.

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

Joseph E. Krakora, Public Defender, attorney for appellant Yusef T. Myers (Frank M. Gennaro, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Sarah E. Ross, Deputy Attorney General, of counsel and on the briefs).

PER CURIAM

Following the denial of their motions to suppress the contents of a backpack seized pursuant to a warrant obtained after a car stop, co-defendants Jason M. Myers and Yusef T. Myers, cousins, pled guilty to second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5b; third-degree possession with intent to distribute heroin, N.J.S.A. 2C:35-5b(3) and N.J.S.A. 2C:35-5a(1); and second-degree certain persons offenses, N.J.S.A. 2C:39-7b, and were sentenced in accordance with a negotiated agreement to terms of eight years in State prison with a sixty-month period of parole ineligibility. They appeal, raising the following issues.

Jason Myers argues:

DEFENDANT'S MOTION TO SUPPRESS THE ITEMS SEIZED SHOULD HAVE BEEN GRANTED; POLICE DID NOT HAVE REASONABLE SUSPICION THAT A CRIMINAL OFFENSE WAS BEING COMMITTED WHEN

THEY STOPPED THE CAR IN WHICH DEFENDANT WAS
A PASSENGER.

Yusef Myers argues:

POINT ONE

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE WAS
IMPROPERLY DENIED.

POINT TWO

THE TRIAL COURT'S PROTECTIVE ORDER UNDULY
LIMITED THE DEFENSE.

Only one witness testified at the suppression hearing on defendants' motions, Plainfield Detective Fortunka, a nine-year veteran of the force assigned to the Narcotics and Vice Division of the Criminal Investigation Bureau. Fortunka testified he had been involved in hundreds of narcotics investigations and arrests and had specialized training in the area. According to Fortunka, he opened an investigation of Yusef Myers, approximately six months before his arrest with Jason Myers, after receiving a tip from a confidential informant in October 2013 that Yusef was dealing drugs in Plainfield.

Fortunka had worked with the informant before and considered him reliable based on arrests and seizures in four other narcotics investigations. Between the time the informant tipped Fortunka off about Yusef Myers and the arrest of defendants in May 2014, leads the informant provided led to

about a dozen other investigations, resulting in more arrests and seizures of narcotics and currency.

The informant told Fortunka that Yusef Myers "was involved in distribution of heroin and marijuana through the City of Plainfield and the surrounding area." The informant claimed Yusef used two cars, a beige or tan Acura and a black BMW SUV, and three locations to run his operation: his address in Plainfield, another residence in that city and an apartment in Piscataway. Based on the informant's tip, Fortunka began an active investigation involving, among other things, a criminal records check, motor vehicle searches, property searches, interviews of arrestees and surveillance of Yusef.

As a result of those efforts, Fortunka learned the Acura was registered to an elderly female relative of Yusef's, although Fortunka never saw her drive it. He did see Yusef, and sometimes Jason, driving the car between Yusef's home and an address on Watchung Avenue in Plainfield or the apartment in Piscataway. The detective testified those trips were consistent with how drug dealers conducted operations; short stays, brief meetings with different people and indirect routes between destinations. Yusef's name was also mentioned in interviews of arrestees as someone involved in the drug trade. Although Jason Myers was never the target of surveillance, he was surveilled

either in the company of Yusef or driving the tan Acura. Fortunka's informant advised that Jason was a participant in Yusef's operation.

On May 19, 2014 at about 2:30 in the afternoon, the confidential informant called Fortunka to advise that Yusef Myers was going to move a large quantity of narcotics, in the informant's words "a lot of shit," later that day. The informant advised that at some point in the early evening, Yusef Myers would arrive in the area, and either Yusef, Jason or both would move the drugs from a particular address on East 7th Street in the Acura. Fortunka, who was off that day, reported to work and alerted his supervisor, other detectives from the Narcotics and Vice Division and members of the High Intensity Drug Trafficking Organization. He also alerted the on-call Assistant Prosecutor that they might be looking for a search warrant and called the Sheriff's Department to ensure the availability of a K-9 unit.

Following a briefing, the detective and a team of officers and detectives set up surveillance at the East 7th Street address. The team arrived while it was still daylight and observed Jason Myers on the porch of the East 7th Street address provided by the informant. Sometime after 5 p.m., Yusef drove up in the tan Acura and parked in front of the address. Yusef

met Jason on the porch and moments later the two were observed walking toward the Acura. Jason was carrying a large dark colored backpack, which an officer described as appearing "extremely full." Yusef opened the trunk and Jason placed the backpack inside. Yusef got into the driver's seat and waited while Jason went back to the house for a few moments. The two then drove off in the Acura.

Officers followed the two to Watchung Avenue where a take-down team pulled the car over at about 5:30 p.m., a few houses away from the house they had seen Yusef frequent. The detective observed an open Heineken bottle in the center console as he approached the Acura. He asked the men where they were coming from and who the bottle belonged to. Yusef told him he had just gotten off work and had picked Jason up at the East 7th Street address, and that the bottle belonged to Jason. Fortunka asked whether there was anything illegal in the car. Both men said no. When the detective asked about the bag in the trunk, both denied any knowledge of it.

Fortunka had the men step out of the car, and another detective told them he had watched Yusef open the trunk and Jason put the bag inside. Fortunka testified Yusef responded that nobody had observed him put anything in the trunk, which caused Jason to "whip[] his head up, look[] at Yusef and just

[say] 'What,'" angrily. After the men refused consent to search the car, a K-9 unit was called out. The unit appeared about fifteen minutes later and the dog indicated to its handler it smelled narcotics in the trunk.

Before Fortunka left to obtain a search warrant, he asked Yusef about the house on Watchung Avenue. Yusef initially denied knowing anybody there. When the officers told him he had been observed there in the past, he said he used to date a woman who lived on the second floor, but they were no longer involved. A person answering the door advised that Yusef did not live there but might use the basement for storage.

While Fortunka secured a search warrant for the Acura, other officers obtained permission from the homeowner to search the basement. There they discovered a large orange lockbox, which contained a bullet-proof vest, a large laundry bag with marijuana residue, a large shopping bag full of dry rice and a grinder. Fortunka testified that dry rice is used to package heroin. Searching the backpack pursuant to a warrant, the officers discovered three handguns, three large bags of marijuana, approximately fifty folds of heroin, a quantity of prescription narcotics, a bundle of cash secured by a rubber band and mail addressed to Yusef Myers.

On cross-examination, Fortunka conceded that neither his record searches and interviews of arrestees nor surveillance provided any conclusive proof that Yusef Myers was engaged in narcotics distribution. He agreed with Yusef's counsel that "basically [Fortunka] heard a lot of chatter about Yusef Myers, but [Fortunka] never really saw him with drugs, caught him selling drugs to anyone, [or] found him to be in an area where people were buying drugs." When pressed by defense counsel to say "exactly what [he] did as part of [his] investigation that uncovered Yusef Myers being involved in criminal activity," the detective revealed his department had made controlled buys from Yusef in the past.

The prosecutor objected to any inquiry regarding the controlled buys because of the risk it posed to the identity of the confidential informant, arguing they were irrelevant to the issue before the court. Specifically, the State noted the controlled transactions were not charged offenses, it had not relied on those purchases in its application for a search warrant for the Acura and was not relying on them as justification for the car stop. Defense counsel for both defendants sought discovery of the police reports of the controlled buys, which related only to Yusef Myers. Detective

Fortunka testified there were no controlled purchases from Jason Myers.

After hearing the detective testify in a brief in camera proceeding to consider the State's application for a protective order, Judge Donohue found Yusef Myers was not a street level dealer, but instead "he's very limited in the number of people that he does business with." The judge concluded that revealing any information about the controlled purchases would "distinctly narrow down" the identity of the confidential informant.

Defense counsel objected to the limits the ruling placed on their cross-examination of the detective, arguing the buys were "part of the reasonable suspicion" for stopping the Acura. The court disagreed based on the State's representation that it was expressly not relying on the controlled buys as contributing to the detective's reasonable suspicion for the stop. The court noted the State had not elicited the information on direct, and that it was the defense that brought out the buys on cross-examination. The court advised counsel it was the State's choice to exclude the buys from the evidence on which it relied for the stop, and the State's risk as to whether its remaining evidence would be sufficient to justify the stop.

Focusing on the tip the confidential informant provided him on the day of defendants' arrests, the detective agreed with

defense counsel the informant had not specified what kind of drugs he claimed defendants would be moving, where they were moving them to, or what sort of container they would be moving them in. The informant also never told the detective how he came to acquire the information he provided. Although the informant said defendants would be using the tan Acura to move the drugs, the detective conceded Yusef drove the Acura more often than he drove the BMW.

Defense counsel argued the tip by the informant on the day of the arrests was too general to support the car stop, and police had only been able to corroborate benign details. They also argued the six-month investigation preceding it, leaving aside the controlled buys on which the State was not relying, provided no conclusive evidence to augment the tip. Defendants contended the State's "proofs" were really no more than a series of hunches about what the detective thought was happening, not enough to support the reasonable suspicion necessary for the stop.

Judge Donohue rejected those arguments in a clear and cogent opinion from the bench. We quote the parts pertinent to the issues defendants raise on appeal.

I've had an opportunity to hear the testimony in this case, to hear the arguments of counsel. At the outset I would

like to say that I believe that Detective Fortunka was a credible and believable witness. The manner of his testimony gave me absolute confidence that what he was saying was the truth.

He didn't try to add anything on when there was – when he was questioned about the lack of inculpatory[,] incriminatory actions on the part of [Yusef] Myers found during the course of his surveillance. He didn't gild the lily at all. He said absolutely what he saw. He didn't argue with defense counsel. He absolutely confirmed the points that they tried to make. I find him to be a credible and believable witness.

It seems to me that defense counsels' argument is that the surveillance, the investigation provided by the Plainfield Police Department didn't show anything incriminatory, but that's not really the issue. This stop is based upon the informant's tip. And the corroboration of even non-incriminatory evidence can form the basis for a reasonable articulable suspicion.

As I indicated [during the colloquy], in State v. Zutic at 155 N.J. 103,¹ those type of non-incriminatory information goes to the totality of the circumstances. And I think perhaps that Zutic was written at the time when Aquilar² and Spinelli³ was the law

¹ State v. Zutic, 155 N.J. 103 (1998).

² Aquilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), overruled by Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983).

³ Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), overruled by Illinois v. Gates,

before Gates v. Illinois.⁴ But [Zutic] stands for the proposition that when the police get a CI tip and then they attempt to surveil and investigate it where – even where there is not enough information to find incriminatory [details], the fact that they corroborate non-incriminatory [details] can give rise to a reasonable articulable suspicion.

So where a CI comes forward and just taking the information from the – from the May tip they say they are going to move a lot of shit and it's going to be in the tan Acura and the police then see Jason and Yusef Myers, the targets of their investigation, in a tan Acura putting a bag that appears to be very full in the trunk of the vehicle. Now you have the corroboration. It's not necessarily incriminatory, but that gives under the totality of the circumstances the police a reasonable suspicion to stop the motor vehicle.

We agree.

Our standard of review on a motion to suppress is limited. See State v. Gamble, 218 N.J. 412, 424 (2014). We defer to the trial court's factual findings on the motion, unless they were "clearly mistaken" or "so wide of the mark" that the interests of justice require appellate intervention. State v. Elders, 192 N.J. 224, 245 (2007). "Deference to these factual findings is

462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983).

⁴ Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

required because those findings 'are substantially influenced by [an] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Gamble, supra, 218 N.J. at 424-25 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Our review of the trial court's application of the law to the facts, of course, is plenary. State v. Hubbard, 222 N.J. 249, 263 (2015).

The issue here is whether the police had reasonable suspicion to justify pulling over the Acura after earlier watching defendants place the backpack in the trunk. See State v. Golotta, 178 N.J. 205, 213 (2003) (describing reasonable suspicion as lower standard than probable cause to justify an arrest). All that is required was a "particularized suspicion" based upon objective observation that defendants were engaged or were "about to engage in criminal wrongdoing." State v. Davis, 104 N.J. 490, 504 (1986). That turns, in this case, on whether there was a substantial basis for crediting the informant's tip that defendants would be moving a large quantity of narcotics in the Acura at the time of the stop. See State v. Smith, 155 N.J. 83, 92 (1998).

Although we decide that question based on the "totality of the circumstances," see State v. Novembrino, 105 N.J. 95, 122 (1987), two factors essential to the inquiry are the informant's

"veracity" and his "basis of knowledge," Smith, supra, 155 N.J. at 93. An informant's "veracity" is often established by reliability in other investigations. See, e.g., Novembrino, 105 N.J. at 123. "Basis of knowledge" tests whether the information was acquired in a reliable way. Smith, supra, 155 N.J. at 94. A detailed tip or one "recounting information that could not otherwise be attributed to circulating rumors or be easily gleaned by a casual observer," implies a reliable basis of knowledge. Id. at 95. Similarly, "predicting hard-to-know future events" can establish reliability by implying "the informant derived that information directly as a witness or as one privy to a reliable witness or source." Ibid.

However those two factors are established, "[i]ndependent corroboration is necessary to ratify the informant's veracity and validate the truthfulness of the tip." Ibid. And while corroboration of innocuous details will not bolster a tip's reliability, Smith, supra, 155 N.J. at 99, corroboration of significant details, as Judge Donohue noted, even if non-incriminatory, will generate reasonable suspicion to justify an investigative stop. See Alabama v. White, 496 U.S. 325, 330-32, 110 S. Ct. 2412, 2416-17, 110 L. Ed. 2d 301, 309-10 (1990); State v. Zapata, 297 N.J. Super. 160, 172-74 (App. Div. 1997).

Applying those standards, we have no hesitancy in holding, as Judge Donohue did, that viewed objectively from the standpoint of an experienced and knowledgeable police officer, the totality of the circumstances was sufficient to support an articulable and reasonable suspicion that defendants were engaged in criminal activity.

Turning first to the informant, although Detective Fortunka did not provide detail about the informant's past contributions to investigations, the detective made clear that when the informant first mentioned Yusef Myers to him, the informant had already provided information in four other narcotics investigations that had resulted in arrests and seizures each time. By the time the informant provided the tip that led to defendants' arrest, the informant had provided information in a dozen more investigations with good results. While not conclusively establishing the informant's truthfulness in this case, the detective's testimony provided significant evidence of the informant's veracity. See Smith, supra, 155 N.J. at 96-97.

As to his basis of knowledge, the informant did not tell the detective how he knew of defendants' plans to move the drugs. But implicit in the information he provided was some special familiarity with defendants' affairs. See White, supra, 496 U.S. at 332, 110 S. Ct. at 2417, 110 L. Ed. 2d at 310. The

informant predicted that Yusef Myers would arrive at a particular address in the early evening, and that he and Jason Myers would then move a large quantity of drugs in the tan Acura. As defendants note, the tip was not flush with hard-to-know details, the informant did not tell the detective what the drugs were, what sort of container defendants would be moving the drugs in and where they were taking them to.

But it suggested some reliable basis of knowledge, which, significantly, police were able to corroborate. Staking out the address the informant provided, the police saw Yusef appear at that residence in the early evening, as the informant predicted he would, and then watched as Jason carried a large backpack, described as appearing "extremely full," to the Acura. Yusef opened the trunk and Jason placed the backpack inside. Yusef got into the driver's seat and, joined by Jason, the two drove toward another residence on Watchung Avenue the informant claimed Yusef used for his narcotics operation. The police had been able to confirm the informant's information that Yusef Myers used that residence by surveilling Yusef and the tan Acura for many months.

The State was not attempting to argue that those facts, either singly or in combination, were sufficient to establish probable cause for an arrest or search of defendants. All it

needed show was that the circumstances generated reasonable articulable suspicion to justify the investigative stop. Zutic, supra, 155 N.J. at 113. Looking at the whole picture, we are confident the court was correct in finding the State established the necessary "minimal level of objective justification" required by the reasonable suspicion standard for the stop. State v. Nishina, 175 N.J. 502, 511 (2003) (quoting United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989)).

Yusef Myers' additional contention that the trial court's protective order unduly limited the defense requires no extended discussion. N.J.R.E. 516 permits a witness to refuse to disclose the identity of an informant unless the judge finds that identity is already known or that disclosure is essential to a fair determination of the issues. See State v. Milligan, 71 N.J. 373, 383 (1976). The privilege belongs to the prosecution, State v. Williams, 356 N.J. Super. 599, 603 (App. Div. 2003), exists to protect "the public interest in a continuous flow of information to law enforcement officials," and extends to communications that would likely reveal the identity of the informant, Grodjesk v. Faghani, 104 N.J. 89, 96-97 (1986). It is not, however, absolute, as the public interest must be balanced against a defendant's right to prepare a

defense to the State's charges. Williams, supra, 356 N.J. Super. at 604.

Yusef Myers contends information about the controlled buys was essential to his defense because "it went to the heart of the crucial issue" on the suppression motion, "the reliability of the C[onfidential] I[nformant]." He claims there was little evidence in the record to support the court's finding that Yusef was not a "street level drug dealer," and it abused its discretion in concluding that disclosure of the two controlled buys during the State's six-month surveillance could very well reveal the identity of the informant because defendant sold to so few people.


In making that argument, Yusef Myers is clearly not suggesting the informant could exculpate him or his cousin Jason. See Roviario v. United States, 353 U.S. 53, 63-64, 77 S. Ct. 623, 629, 1 L. Ed. 2d 639, 647 (1957) (holding informer's privilege must give way when the informant was a material witness on a basic issue of the trial, making his testimony highly relevant and possibly helpful to the defense). Defendants, previously-convicted felons known to the police, were in possession of three guns and a significant quantity of drugs when they were arrested. The informant was not present for those arrests and thus could offer nothing to cast doubt on the

evidence offered by the State as to the identity of defendants or the contraband in their possession.

Instead, Yusef Myers seeks to suppress that evidence establishing his guilt by arguing that if disclosure of the controlled buys had been ordered it might have revealed they were small transactions, which might, in some unexplained way, have undermined the reliability of the informant's tip that defendants were going to transport a large quantity of illegal narcotics, thereby suggesting the arresting officers lacked reasonable suspicion for the stop, in which case the search would be illegal and the resulting evidence inadmissible. His claims, besides being completely speculative, do not suggest how disclosure could realistically be helpful to his defense. See Milligan, supra, 71 N.J. at 387-88. Accordingly, he offers us no basis on which we could conclude the trial court abused its discretion in issuing the protective order shielding information about the controlled buys. See State v. Garcia, 131 N.J. 67, 81 (1993).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION