

**NOT FOR PUBLICATION WITHOUT THE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-4998-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES A. BAILEY,

Defendant-Appellant.

Argued March 23, 2017 – Decided May 12, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
13-10-1303.

Peter T. Blum, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Mr. Blum, of counsel and on the briefs).

Narline Casimir, Assistant Prosecutor, argued
the cause for respondent (Angelo J. Onofri,
Mercer County Prosecutor, attorney; Ms.
Casimir, of counsel and on the brief).

PER CURIAM

Defendant James Bailey appeals from a May 1, 2015 judgment
of conviction after the entry of a guilty plea. We affirm.

The State presented the following facts at the suppression hearing. On July 22, 2013, Detective Scott Peterson and his partner, Detective Gregory Hollo, of the Trenton Police Department, were assigned to a crime suppression task force in Trenton. The detectives were in an unmarked police car. At around 6:18 p.m., a radio dispatch reported a man with a gun, described as a bald black man wearing a white t-shirt and blue jeans and walking with a pit bull. The detectives responded to the area.

Peterson described the area as a "high crime" where "several" homicides and "several shootings" have occurred. Peterson testified he and his partner arrived within seconds but did not see anyone fitting the description of the man with the firearm. The detectives began canvassing the area in their vehicle, and after about thirty seconds, observed defendant, who matched the description, standing in front of a corner bodega, with four to six individuals.

Peterson pulled the car in front of the bodega. As his vehicle approached the corner, Peterson made eye contact with defendant who appeared startled. Peterson put the vehicle in park, and he and Hollo exited the vehicle with their firearms drawn in a ready position. The detectives were wearing polo shirts with their patch on it along with ballistic vests, identifying them as police. As they walked towards the group, Peterson told

somebody to grab the pit bull, as he was unsure if it would attack. As the detectives approached the individuals, defendant began walking towards a bicycle on the sidewalk while Hollo yelled "Trenton police, stop, stop right there."

Hollo grabbed defendant by his waistband with his left hand, with his firearm at his side, as defendant approached the bicycle. Peterson described Hollo as "slowly pulling [defendant] back towards . . . our vehicle." Defendant then reached into his waistband with his right hand, retrieved a firearm, and handed it to Peterson. The detectives arrested defendant. According to Peterson, the time lapse was approximately four minutes from the time of the radio broadcast to the recovery of the firearm.

A Mercer County grand jury returned an indictment charging defendant with second-degree unlawful possession of a handgun, contrary to N.J.S.A. 2C:39-5(b); third-degree resisting arrest, contrary to N.J.S.A. 2C:29-2(a)(3); and second-degree certain persons not to possess a firearm, contrary to N.J.S.A. 2C:39-7(b).

Defendant moved to suppress the gun, arguing the police lacked sufficient reasonable suspicion to conduct an investigatory stop and lacked probable cause to arrest. The trial judge denied defendant's motion, finding under the totality of the circumstances the detectives were justified in the investigatory detention of defendant. Specifically, the judge noted "the nature

of the area and . . . defendant's reaction to seeing the police arrive corroborate a particularized suspicion," and "the serious and specific type of crime infecting the area . . . corroborates the reliability of the [9-1-1] call." The judge also noted the 9-1-1 call's description of defendant with a pit bull and the quick reaction time of the detectives arriving on the scene "weighs in favor of the reliability of that evidence."

Defendant pled guilty on March 9, 2015, to second-degree certain persons not to possess a firearm. During defendant's plea colloquy, he admitted he was in possession of a firearm on the day he was arrested and knew he was not permitted to carry a firearm because of a previous conviction for aggravated assault. In exchange for dismissal of the remaining charges, the State agreed to recommend a five-year term of imprisonment with a mandatory five-year period of parole ineligibility. Defendant preserved his right to appeal the motion to suppress.

The trial judge sentenced defendant on April 21, 2015, to a five-year prison term with a five-year period of parole ineligibility. This appeal followed.

Defendant raises the following argument on appeal:

SUPPRESSION OF EVIDENCE IS REQUIRED BECAUSE [DEFENDANT] WAS ILLEGALLY SEIZED BASED UPON AN UNEXPLAINED AND UNCORROBORATED ANONYMOUS TIP TELEPHONED TO THE POLICE. U.S. CONST. AMENDS. IV, XIV; N.J. CONST. ART. I, PARA. 7.

When reviewing a motion to suppress, we "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence on the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). "Those findings warrant particular deference when they are 'substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the "feel" of the case, which the reviewing court cannot enjoy.'" Ibid. (quoting Robinson, supra, 200 N.J. at 15). "To the extent that the trial court's determination rests upon a legal conclusion, we conduct a de novo, plenary review." Ibid. (citing State v. J.D., 211 N.J. 344, 354 (2012); State v. Gandhi, 201 N.J. 161, 176 (2010)).

Both the United States and New Jersey Constitutions protect individuals against unreasonable searches and seizures. U.S. Const. amend IV; N.J. Const. art. I, ¶ 7. Because the search at issue was executed without a warrant, it is presumed facially invalid; to overcome this presumption, the State must show that the search falls within one of the well-recognized exceptions to the warrant requirement. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043, 36 L. Ed. 2d 854, 858 (1973). The State bears the burden of demonstrating that the seizure was legal. State v. Valencia, 93 N.J. 126, 133 (1983).

An investigative stop, or a Terry¹ stop, allows police to "detain an individual temporarily for questioning." State v. Maryland, 167 N.J. 471, 486 (2001) (citing Terry, supra, 392 U.S. at 22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). To justify an investigative stop, the police must have "a 'particularized suspicion' based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing." State v. Davis, 104 N.J. 490, 504 (1986). Additionally, "[t]he 'articulable reasons' or 'particularized suspicion' of criminal activity must be based upon the law enforcement officer's assessment of the totality of circumstances" Ibid. "Reasonable suspicion necessary to justify an investigatory stop is a lower standard than the probable cause necessary to sustain an arrest." State v. Stovall, 170 N.J. 346, 356 (2002) (citing State v. Citarella, 154 N.J. 272, 279 (1998)).

Defendant in the present case was seized when the detectives exited their vehicle with their guns drawn. Our inquiry therefore rests on whether the officers had a "reasonable suspicion" to justify the investigatory stop and search of defendant.

We consider the "totality of the circumstances surrounding the police-citizen encounter" when determining the reasonableness

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

of the stop. State v. Privott, 203 N.J. 16, 25-26 (2010) (quoting Davis, supra, 104 N.J. at 504). We consider "a police officer's 'common and specialized experience,' and evidence concerning the high-crime reputation of an area." State v. Moore, 181 N.J. 40, 46 (2004) (citations omitted). While a high crime area alone is not a sufficient basis to justify the stop, "the location of the investigatory stop can reasonably elevate a police officer's suspicion that a suspect is armed." State v. Valentine, 134 N.J. 536, 547 (1994).

An informant's tip may also provide an officer with reasonable suspicion to stop a person. State v. Amelio, 197 N.J. 207, 212 (2008). However, "[a]n anonymous tip, standing alone, is rarely sufficient to establish a reasonable articulable suspicion of criminal activity." State v. Rodriguez, 172 N.J. 117, 127 (2002) (citing Alabama v. White, 496 U.S. 325, 329, 110 S. Ct. 2412, 2415, 110 L. Ed. 2d 301, 308 (1990)). We look to an informant's "veracity," "reliability" and "basis of knowledge" when determining the sufficiency of the tip. Ibid. (quoting White, supra, 496 U.S. at 328, 110 S. Ct. at 2415, 110 L. Ed. 2d at 308). The police should also conduct "some independent corroborative effort" in order to verify the reliability of the tip. Ibid. Our Court has held a call placed to 9-1-1 "carries a fair degree of reliability" as it is a crime to make a false report to the 9-1-1

telephone system. State v. Golotta, 178 N.J. 205, 219 (2003); see also N.J.S.A. 2C:33-3(e). Even an anonymous tip, when placed through the 9-1-1 call system and "contains sufficient information to trigger public safety concerns and . . . provide[s] an ability to identify the person," can be sufficient to establish reasonable suspicion for an investigatory stop of that person. State v. Gamble, 218 N.J. 412, 429 (2014).

In Golotta, the Court provided a three-prong test police must satisfy to justify an investigative detention based on a 9-1-1 caller's tip. 178 N.J. at 221-22. The State must show (1) "[t]he information must convey an unmistakable sense that the caller has witnessed an ongoing offense that implicates a risk of imminent death or serious injury to a particular person"; (2) "[t]he caller also must place the call close in time to his first-hand observations"; and (3) "the 9-1-1 caller must provide a sufficient quantity of information, such as an adequate description of the [individual], its location and bearing, or 'similar innocent details, so that the officer, and the court, may be certain that the [individual] is the same as the one identified by the caller.'" Golatta, supra, 178 N.J. at 221-22 (quoting United States v. Wheat, 278 F.3d 722, 731 (8th Cir. 2001)).

We begin by noting the detectives were conducting an investigatory stop when they approached defendant. The act of an

officer exiting his vehicle with a firearm drawn does not automatically constitute an arrest. Baker v. Monroe Twp., 50 F.3d 1186, 1193 (3rd Cir. 1995) ("There is no per se rule that pointing guns at people, or handcuffing them, constitutes an arrest.") Under the circumstances, it was reasonable for the detectives to draw their firearms when approaching an individual who matched the description of a man who would be armed and dangerous. The detectives were "authorized to take such steps as were reasonably necessary to protect [their] personal safety and to maintain the status quo during the course of the stop." United States v. Hensley, 469 U.S. 221, 235, 105 S. Ct. 675, 683-84, L. Ed. 2d 604, 616 (1985). In Hensley, the United States Supreme Court held that an officer's conduct in approaching with gun drawn in a Terry stop "was well within the permissible range in the context of suspects who are reported to be armed and dangerous." Id. at 223-24, 235, 105 S. Ct. at 677-78, 684, 83 L. Ed. 2d at 608-09, 616. Therefore, when the detectives exited their vehicle with their firearms drawn defendant was not yet under arrest.

The trial judge correctly found the totality of the circumstances supported a finding of reasonable suspicion to justify the investigative stop. The caller's tip demonstrated defendant posed a threat to the public by walking in a high-crime area with a firearm. The caller's description of defendant as

bald black male, wearing a white shirt and blue jeans, and walking with a pit bull was also sufficiently detailed to satisfy the third prong in Golatta. In addition to the caller's tip, the high-crime nature of the area and the detectives' quick response to the area following the radio dispatch corroborate the call to find reasonable suspicion. The detectives also canvassed the area before finding defendant matching the description provided by the caller, thereby corroborating the tip prior to the stop. Defendant's startled reaction to the detectives arriving, as well as his walking away from the scene as Detective Hollo yelled for him to stop, contribute to the totality of the circumstances to justify the investigative stop. Based upon these circumstances, the trial court correctly found there existed reasonable suspicion for the detectives to stop and search defendant.

Defendant argues his case is similar to Florida v. J.L., where the Supreme Court found an anonymous caller reporting a "young black male standing at a particular bus stop and wearing a plaid shirt" carrying a firearm lacked sufficient credibility to justify the stop. 529 U.S. 266, 274, 120 S. Ct. 1375, 1380, 146 L. Ed. 2d 254, 262 (2000). We are not persuaded. The caller here, while not identified by name, is not anonymous because Trenton Police had the caller's phone number and address. Additionally, defendant's startled behavior, his disobedience to

the detectives' commands, his location in a high-crime area, and the caller's description of defendant with a firearm, supported a finding of reasonable suspicion to justify the investigative stop of defendant.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION