NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5249-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SAYVON LAWS, a/k/a
KAYVON LAWS,

Defendant-Appellant.

Submitted May 11, 2016 – Decided June 8, 2017

Before Judges Kennedy and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment Nos. 13-01-0182 and 13-04-0640.

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

Robert Lougy, Acting Attorney General, attorney for respondent (Frank Muroski, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Following the denial of his motion to suppress evidence, defendant pled guilty to second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), and third-degree aggravated assault on a police officer, N.J.S.A. 2C:12-1(b)(5)(a), and was thereafter sentenced to five years' incarceration, subject to a three-year period of parole ineligibility, in accordance with a plea bargain. He now appeals the denial of his motion to suppress and argues as follows:

> POINT I — IN A CASE WHERE DEFENDANT CLAIMED THAT THE GUN WHICH SUPPORTED HIS STOP WAS NOT IN PLAIN VIEW, THE COURT'S RULING TO QUASH DEFENDANT'S SUBPOENA AND PREVENT A REPORTER FROM THE ASBURY PARK PRESS FROM TESTIFYING ABOUT HER PUBLISHED ARTICLE CONTAINING CONFLICTING INFORMATION VIOLATED THE DEFENDANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM BY [RESTRICTING] HIS ABILITY TO CONFRONT THE STATE'S VERSION OF PLAIN VIEW.

We have considered this argument in light of the record and the law, and we affirm.

We begin with a brief recitation of the facts underlying the appeal. On October 19, 2012, Asbury Park police officer Raisin was on patrol in an unmarked police car with another officer when he saw defendant walking down Sunset Avenue with what appeared to be a gun handle protruding from his jacket pocket. Upon pulling up next to defendant, Raisin got out of the car and said, "I just want to make sure that's not a gun on you." Defendant responded by lifting his shirt and denying he

had a weapon. This action, however, caused the gun butt to protrude "even more" from his jacket pocket, and confirmed Raisin's earlier suspicion that defendant had a gun in his pocket.

As Raisin reached for the gun, defendant immediately punched the officer in the face four times. The officers eventually subdued defendant after spraying him with a police-issued chemical spray. The weapon was retrieved and was discovered to be an operable handgun loaded with live .45 caliber rounds.

Defendant testified at the suppression hearing that he had a gun in his pocket, but asserted that the weapon was in a closed and zippered pocket other than the one identified by the officer. Defendant also sought to subpoena an Asbury Park Press reporter who wrote a story about the incident in which it was reported that the officers saw the weapon in defendant's "waistband." The story cited Asbury Park Police Captain Anthony Salerno as the source of the information.

Although the Law Division quashed the subpoena, Captain Salerno testified at the suppression hearing and defendant was permitted to extensively cross-examine Raisin about the story in the paper. Raisin said he did not speak to the reporter or to Captain Salerno about the incident.

Captain Salerno acknowledged he spoke to the reporter about the incident, but confirmed he had not spoken to either of the arresting officers prior to the publication of the article in the Asbury Park Press.

The judge found the testimony of the officers to be credible and denied suppression. Defendant now appeals and argues that the quashing of the subpoena denied his constitutional right of confrontation and compulsory process.

Initially, we address defendant's argument that Judge Ronald Lee Reisner erred in granting the Asbury Park Press' motion to quash defendant's pre-trial subpoena seeking the testimony of a reporter. A judge's decision to quash a subpoena is reviewed for abuse of discretion. State v. Medina, 201 N.J. Super. 565, 580-81 (App. Div.), certif. denied, 102 N.J. 298 (1985).

Substantively, the Asbury Park Press argued that they were entitled to the protections afforded newspersons, pursuant to the New Jersey Shield Law, N.J.S.A. 2A:84A-21, and N.J.R.E. 508 (codifying the Shield Law into Rules of Evidence). However, the motion judge did not grant the newspaper's motion on the basis of this privilege, but rather based upon procedural defect.

Following a hearing, the judge found that Rule 1:9-1, which incorporates Rule 4:4-4, requires service of a subpoena upon a

non-party by personal service. See N.J. Cure v. Estate of Hamilton, 407 N.J. Super. 247, 250-51 (App. Div. 2009) (holding that mailed service to an unwilling non-party subject to personal service renders the subpoena ineffective). As defendant left the subpoena for the reporter with the security guard at the door of the Asbury Park Press office, this did not constitute effective service. We find no abuse of discretion. The motion judge properly deemed this error fatal to defendant's application, and rightly quashed the subpoena.

The defendant, thereafter, did not re-serve the subpoena, and thus, he has no standing to challenge the quashing of the subpoena on substantive grounds.

Next, we turn to Judge Joseph W. Oxley's denial of defendant's suppression motion. In 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 in the record.'" State v. Elders, 192 N.J. 224, 243 (2007) (quoting State v. Elders, 386 N.J. Super. 208, 228 (App. Div. 2006), aff'd in part and rev'd in part, 192 N.J. 224 (2007)). Deference is especially appropriate when the trial court has the "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Id. at 244 (quoting State v.

Johnson, 42 N.J. 146, 161 (1964)). Nevertheless, we are not required to accept findings that are "clearly mistaken" based on our independent review of the record. Ibid. Moreover, we need not defer "to a trial . . . court's interpretation of the law," as "[l]egal issues are reviewed de novo." State v. Vargas, 213 N.J. 301, 327 (2013).

The plain view doctrine is a recognized exception to the Fourth Amendment's requirement for police to obtain a warrant prior to conducting a search. Texas v. Brown, 460 U.S. 730, 735, 103 S. Ct. 1535, 1539, 75 L. Ed. 2d 502, 509 (1983); State v. Bruzzese, 94 N.J. 210, 236 (1983). There are three requirements for the plain view doctrine[1]:

> First, the police officer must be lawfully in the viewing area.
>
> Second the officer has to discover the evidence "inadvertently," meaning that he did not know in advance where evidence was located nor intend beforehand to seize it.
>
> Third, it has to be "immediately apparent" to the police that the items in plain view were evidence of a crime, contraband, or otherwise subject to seizure.

[1] The New Jersey Supreme Court has recently revisited the plain view exception in State v. Gonzales, 227 N.J. 77, 82 (2016), where it dispensed of the inadvertence requirement for a plain-view seizure. Finding this to be a new rule of law, the Court's holding is applied prospectively and does not control our analysis. Ibid.

> [Bruzzese, supra, 94 N.J. at 236 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 465-70, 91 S. Ct. 2022, 2037-40, 29 L. Ed. 2d 564, 582-85 (1971)).]

Applying these principles, we discern no basis for disturbing the motion judge's determination that the officers observed defendant's gun in plain view, thereby satisfying the exception to the warrant requirement. Here, finding the testimony of the officers to be clear and unequivocal, the motion judge determined that all three of the requirements of the plain view doctrine had been satisfied. The officers were lawfully patrolling the 700 block of Sunset Avenue in Asbury Park, a location where two individuals had been shot multiple times the day prior, when they witnessed defendant walking. The officers observed the handle of a handgun protruding from defendant's jacket pocket, and based upon their prior interactions with defendant, the officers knew that it was highly unlikely for that he had a permit to carry such a weapon. All of these findings are supported by substantial credible evidence in the record and therefore we discern no basis to set aside the judge's order denying the motion to suppress.

Affirmed.