SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5411-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LARRY D. FISHER,

Defendant-Appellant.

Argued October 3, 2017 – Decided November 27, 2017

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 15-08-1690.

Edward C. Bertucio argued the cause for appellant (Hobbie, Corrigan & Bertucio, PC, attorneys; Mr. Bertucio and Elyse S. Schindel, on the briefs).

Arielle E. Katz, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Ms. Katz, of counsel and on the brief).

PER CURIAM

Defendant appeals the denial of his motion to suppress evidence; he argues:

> POINT I
>
> THE JUDGMENT OF CONVICTION SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED WITH A WARRANT.
>
> A. THE EXECUTION OF THE SEARCH WARRANT VIOLATED THE "KNOCK AND ANNOUNCE" RULE.
>
> B. THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT FOR THE RESIDENCE. THERE WAS ALSO NO BASIS TO INCLUDE A SEARCH FOR WEAPONS IN THE SEARCH WARRANT APPLICATION.

We agree with the motion judge that probable cause existed for the issuance of the search warrant, the firearm was properly seized, and the execution of the warrant did not violate the knock and announce rule. Accordingly, we affirm.

Detective John Gartner submitted two affidavits in support of applications for search warrants for defendant's Lakewood residence and a Lexus registered in his name. Gartner's affidavits recited that a confidential informant (CI), whose past cooperation with Gartner's unit led to the arrest of four persons "for a quantity of heroin and cocaine," told Gartner that the CI could buy marijuana from an individual he identified in a photograph as defendant, at defendant's residence.

Gartner also described in detail two controlled purchases of marijuana from defendant by the CI. Gartner submitted that he and another detective witnessed the CI arrange, by telephone, the purchase. Thereafter, the detectives searched the CI for money and contraband with negative results, provided him with money to make the purchase, and transported him to a location near defendant's residence. Gartner described what he and other detectives observed during their constant surveillance of the CI and defendant. The CI arrived at defendant's residence and made contact with him. The defendant then exited the residence, appeared to direct the CI away from the residence, entered the Lexus and drove to meet the CI. Defendant met the CI, who entered the Lexus, and drove the CI back to the residence. The CI exited the Lexus, met directly with detectives, described the purchase of marijuana from defendant, and turned the substance over to Gartner. The detectives again searched the CI for drugs and contraband with negative results. The substance field-tested positive for marijuana. Gartner's affidavits also recited a second, similar purchase made by the CI from defendant at defendant's residence.

Gartner also related that the Lakewood address was listed as defendant's residence in New Jersey Division of Motor Vehicle records and defendant's Computerized Criminal History.

The motion judge found probable cause was established by the surveilled controlled purchases of confirmed marijuana by the CI whose previous cooperation with law enforcement led to four arrests for possession of heroin and cocaine. The judge ruled the purchases confirmed the CI's tip regarding his ability to purchase marijuana from defendant.

Defendant argues the motion judge erred because the CI's tip was without sufficient foundation — the CI's basis of knowledge — to justify the issuance of the warrant; and the detectives never participated in or witnessed a drug transaction with defendant or a drug transaction at the residence.

When determining whether probable cause exists for a warrant, a reviewing court must consider only the "four corners" of the affidavit and any sworn testimony given before the issuing judge. State v. Wilson, 178 N.J. 7, 14 (2003). A defendant has the burden to show the absence of probable cause. State v. Keyes, 184 N.J. 541, 554 (2005).

When information is based on an informant's tip, "the issuing court must consider the 'veracity and basis of knowledge' of the informant[,]" id. at 555 (quoting State v. Jones, 179 N.J. 377, 389 (2004)), as well as law enforcement's ability to corroborate the tip, id. at 556. Under the first factor, although not conclusive, an informant's past reliability can be probative of

veracity. State v. Sullivan, 169 N.J. 204, 213 (2001). Under the second factor, we consider whether the informant can demonstrate that he received the information in a reliable way, and in the absence of such disclosure, whether the informant's tip is sufficiently detailed. Ibid. "Because the information contained in a tip is hearsay, police corroboration of that information 'is an essential part of the determination of probable cause.'" Ibid. (quoting State v. Smith, 155 N.J. 83, 95, cert. denied, 525 U.S. 1033, 119 S. Ct. 576, 142 L. Ed. 2d 480 (1998)). Corroborating facts may include "controlled drug purchases performed on the basis of the informant's tip, the positive test results of narcotics obtained during a controlled purchase, and records corroborating an informant's account of the location of suspended drug activity." Jones, supra, 179 N.J. at 390.

In Sullivan, a confidential informant told a detective that the defendant had been selling cocaine out of his apartment. Sullivan, supra, 169 N.J. at 207. After receiving that information, the detective arranged a controlled purchase with the informant. Id. at 208. During the purchase, the detective observed the informant go into the apartment and exit the building moments later. Ibid. The informant gave the detective vials containing a substance later determined to be cocaine. Ibid. The detective observed the informant make a similar purchase from the

defendant a week later. Id. at 208-09. Based on these facts, the trial court issued a warrant authorizing the police to search the defendant's person and the apartment. Id. at 209.

The Sullivan Court held, although the informant had no history of providing reliable information to the police, the two controlled purchases of cocaine established his reliability. Id. at 214-15. The Court concluded the detective properly corroborated the informant's tip by reviewing a utility bill to verify defendant's residence at the address provided by the informant, and by confirming that the substance purchased was cocaine. Id. at 216. The inability of the police to observe the informant enter the specific apartment was not considered fatal. Ibid.

Here, the CI demonstrated past reliability by assisting in four drugs arrests. Moreover, the CI completed two controlled purchases from defendant after meeting defendant at his residence. Law enforcement surveillance confirmed the CI's actions, and those of defendant, except for the actual transactions. The substance handed over by the CI to the detectives field-tested positive for marijuana. Although the detective did not supply the CI's basis of knowledge, the CI's past cooperation, combined with the controlled purchases that were confirmed by police surveillance, sufficiently established probable cause for the issuance of the search warrant.

Defendant correctly observes that the issuing judge was presented with no information that would justify the inclusion of "weapons" in the search warrant for defendant's residence. Contrary to defendant's contention before the motion judge and on appeal, that flaw was not fatal to the warrant.

Save for the single word — "weapons" — the warrant was proper. We agree with the motion judge who found no evidence of bad faith on the part of the affiant. When the detective recited the items for which he wanted to search pursuant to the warrant, he did not include weapons, nor did he mention weapons in any other part of the affidavit. The inclusion of the word seems to be a scrivener's error. It is a "technical . . . irregularit[y] in the warrant" which, in the absence of bad faith, does not render the search or seizure unlawful. R. 3:5-7(g).

Moreover, the firearm was not seized from defendant's apartment pursuant to the warrant. The motion judge found defendant, after being advised of his Miranda warnings,[1] volunteered the location of the firearm that was secreted in an air-conditioning unit.[2] We give deference to those findings.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Because the firearm was secreted, and defendant directed police to it, we do not agree with the motion judge, or the State's

State v. Elders, 192 N.J. 224, 244 (2007). The police did not conduct an "exploratory investigation and pry[] into hidden places for that which is concealed" so as to constitute a search. State v. Anglada, 144 N.J. Super. 358, 361 (App. Div. 1976). Defendant forewent any search and seizure protections by voluntarily disclosing the location of the firearm. See Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967) ("What a person knowingly exposes to the public, even in his own home . . . is not a subject of Fourth Amendment protection").

The search warrant was not rendered infirm by the inclusion of the term "weapons," and the firearm was properly seized after defendant volunteered its location.

Defendant argues the execution of the search warrant violated the knock and announce rule because the warrant did not contain a no-knock provision, and there were no exigent circumstances to justify the no-knock entry into defendant's residence with a breaching ram. The State argues the police did not violate the knock and announce rule because they knocked, waited a reasonable amount of time before entering and had reasonable suspicion that defendant was attempting to either hide or destroy the evidence of drugs.

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argument on appeal, that the firearm was properly seized pursuant to the plain view doctrine.

The motion judge considered testimony from Sergeant Christopher Spagnuolo, who was present and in charge of the unit that first entered defendant's residence. The judge found that the officers knocked and announced their presence to defendant twice before breaching the door. Specifically, she found Officer Messer knocked and loudly announced, "Police. Search Warrant. Open the door[,]" whereafter movement was heard near a window. Another announcement of, "Police. Search Warrant. Open the door[,]" was made. After another pause without any response, the door was breached and entry made. The motion judge also found another detective saw a black bag tossed out a residence window.

Again, we give deference to these findings "which are substantially influenced by [the motion judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Elders, supra, 192 N.J. at 244. "An appellate court should not disturb the trial court's finding merely because 'it may have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case." Ibid. (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." Ibid. Only in those circumstances

should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." Ibid. However, we need not defer to a trial court's interpretation of the law. State v. Shaw, 213 N.J. 398, 411 (2012). We review legal issues de novo. Ibid.

The record supports the judge's findings. Spagnuolo testified Messer was the first officer in a "stack" of fourteen or fifteen Lakewood S.W.A.T. officers that approached the front door of defendant's residence. He said Messer opened the screen door, knocked "very loudly" and announced, "Lakewood Police. Search warrant. Open the door." Spagnuolo testified Messer then said that "he [could] hear movement inside the house and . . . rustling around inside the house and movement at a window." Approximately ten seconds after the first knock, Spagnuolo said he commanded Messer to announce again. Messer knocked "loudly" and made the same announcement. Approximately ten seconds after the second knock, receiving no response from inside the house, Spagnuolo ordered the door breached.

New Jersey courts recognize the Fourth Amendment implications of the knock and announce rule. See e.g. State v. Johnson, 168 N.J. 608, 625-26 (2001) (finding a no-knock entry was impermissible under both the Fourth Amendment and the analogous provision in the New Jersey Constitution). When officers knock and announce but

there is no response, a reasonable time must elapse between the announcement and the forced entry. Id. at 621-22. In drug cases, a reasonable wait time is generally measured by the amount of time it would take to dispose of drugs, and not the time it would take a resident to reach the door. See State v. Robinson, 200 N.J. 1, 17 (2009) (holding that a delay of twenty to thirty seconds between knock and announcement and forcible entry was reasonable where the object of the warrant was drugs and there was a potential for the destruction of evidence while entry was delayed). See also State v. Rodriquez, 399 N.J. Super. 192, 202 (App. Div. 2008) (concluding that a wait of fifteen to twenty seconds after announcement was reasonable).

The testimony credited by the judge and confirmed by the record establish that the police knocked and announced their presence and waited a reasonable period before forcibly entering the residence; the wait time was reasonable, especially considering that the object of the warrant was the seizure of drugs, and movements inside after the first knock indicated their potential destruction. The entry team did not violate the knock and announce rule, and properly executed the search warrant.

We do not conclude that the breach was necessitated, in part, by the detective's observation of a black bag being tossed out a

window. There is no testimony or other evidence that would prove the entry team knew the bag was thrown before the breach.

Defendant also challenges the denial of his motion to suppress his statement, contending:

> POINT II
>
> THE JUDGMENT OF CONVICTION SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS IN VIOLATION OF THE FOURTH AMENDMENT AND ARTICLE I, PARAGRAPH 7 OF THE NEW JERSEY CONSTITUTION.

Defendant argues that the motion judge erred because, notwithstanding her finding that police administered Miranda warnings to defendant, and that he acknowledged his understanding of those rights, she "did not address the fact that [his] statement [at police headquarters] was the product of an illegal arrest and illegal searches," requiring suppression of the statement as fruit of the poisonous tree.

We find insufficient merit in this argument to warrant discussion. R. 2:11-3(e)(2). Since there was no illegal arrest or search, defendant's statement at police headquarters was not fruit of the poisonous tree.

Affirmed.