SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5760-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JASON E. MOORE,

Defendant-Appellant.

Submitted March 28, 2017 – Decided May 16, 2017

Before Judges Messano and Grall.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 12-12-1139.

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

Jennifer Webb-McRae, Cumberland County Prosecutor, attorney for respondent (Kim L. Barfield, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Jason E. Moore (defendant or Moore) appeals the denial of his motion to suppress evidence obtained with two search warrants. After the denial, defendant and the State reached a plea agreement. In conformity with that agreement, defendant pled guilty to two of the eight counts naming him in an indictment returned by the grand jurors for Cumberland County. Defendant was charged with crimes related to the killing of Ervin M. Harper, the disposal of Harper's remains and the production and distribution of marijuana. More specifically, defendant pled guilty to count one, first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1) (amended from murder, N.J.S.A. 2C:11-3(a)(1)-(2)); and count four, second-degree disturbing or desecrating human remains, N.J.S.A. 2C:22-1(a)(1).

As agreed, the remaining charges against defendant were dismissed. The charges were: possessing a weapon with an unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); conspiring with co-defendants, Lewis I. Moore and Amber M. Price, to disturb and desecrate human remains, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:22-1 (count three); conspiring with the same co-defendants to hinder and hindering apprehension, N.J.S.A. 2C:5-2

and N.J.S.A. 2C:29-3 (counts five and eight)[1]; possessing a controlled dangerous substance, marijuana in a quantity of more than 50 grams, N.J.S.A. 2C:35-10(a)(3) (count nine); manufacturing, distributing or dispensing marijuana, N.J.S.A. 2C:35-5(a)(1) and -5(b)(11) (count ten); and possessing a weapon in the course of manufacturing, distributing or dispensing marijuana, N.J.S.A. 2C:39-4.1(a) (count eleven).

In conformity with the State's recommendation set forth in the plea agreement, the judge sentenced defendant to a twenty-year term of imprisonment for aggravated manslaughter, subject to terms of parole ineligibility and parole supervision required by the No Early Release Act, N.J.S.A. 2C:43-7.2, and to a consecutive five-year term of imprisonment for disturbing human remains. Both sentences are concurrent with a sentence defendant was then serving for drug crimes charged in Indictment 10-04-1149. The judge also imposed the appropriate fines, penalties and assessments, and at the State's request, dismissed the charges against defendant in the remaining counts of the indictment and eleven open cases.

[1] Count four also charged Lewis I. Moore and Price with desecration, 2C:22-1, and counts six and seven, respectively, charged Price and Lewis I. Moore with hindering apprehension.

At the time of his plea, defendant acknowledged shooting Harper twice with a .357 handgun as Harper stood in the "side driveway" of defendant's property. He further acknowledged burying Harper in a wooded area of his property and later unearthing and dismembering Harper's remains and placing them in trash bags that he then buried in remote woods away from his premises.

On appeal, defendant raises two issues for our consideration.

> POINT I
>
> BECAUSE IT WAS BASED ON STALE INFORMATION, PROBABLE CAUSE DID NOT SUPPORT THE ISSUANCE OF THE FIRST SEARCH WARRANT. CONSEQUENTLY, THE SECOND SEARCH WARRANT IS ALSO INVALID AS THE FRUIT OF THE FIRST.
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> POINT II
>
> BECAUSE THE SENTENCING COURT FAILED TO COMPLY WITH THE YARBOUGH GUIDELINES, A REMAND FOR RESENTENCING IS REQUIRED.

For the reasons that follow, we conclude the information supporting the issuance of the search warrant was not stale and adequately supported a finding of probable cause. Further, we determine that the judge gave full consideration to the guidelines for consecutive sentencing established in State v. Yarbough, 100 N.J. 627 (1985) (adopting criteria for trial judges to consider in determining whether concurrent or

consecutive sentences are warranted), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

I.

Two search warrants were issued — the first on February 5, 2011, and the second on March 11, 2011. Defendant submits that the first warrant was improperly issued on stale reports of a marijuana operation and inadequate information linking him or his searched premises to Harper's disappearance and demise. His only challenge to the second warrant is that it was supported by evidence obtained with the first, and as such, the evidence found in the second search must be suppressed as the fruit of an illegal search. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Barry, 86 N.J. 80, 87, cert. denied, 454 U.S. 1017, 102 S. Ct. 553, 70 L. Ed. 2d 415 (1981).

To prevail, defendant has the burden of overcoming the presumption of validity extended to a search conducted with a warrant; to do that, he must "prove 'that there was no probable cause supporting the issuance'" of the first warrant. State v. Jones, 179 N.J. 377, 388 (2004) (quoting State v. Valencia, 93 N.J. 126, 133 (1983)). In considering whether defendant met the burden, this court must give "substantial deference" to the discretionary determination made by the issuing judge. Jones,

supra, 179 N.J. at 388. Even if we were to find the supporting information "marginal," we would resolve the doubt by sustaining the search. State v. Kasabucki, 52 N.J. 110, 116 (1968) (citing United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 746, 13 L. Ed. 2d 684, 689 (1965)). Thus, the question is whether the judge was presented "with facts sufficient to permit the inference of the existence of probable cause" necessary to issue a warrant. State v. Novembrino, 105 N.J. 95, 128 (1987).

The issuing judge, was required "'to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime [would] be found in'" the place or places to be searched. State v. Smith, 155 N.J. 83, 93, cert. denied, 525 U.S. 1033, 119 S. Ct. 576, 142 L. Ed. 2d 480 (1998) (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). The judge had to "consider the totality of the circumstances, and . . . deal with probabilities." Schneider v. Simonini, 163 N.J. 336, 361 (2000) (citing Gates, supra, 462 U.S. at 230-31, 238, 103 S. Ct. at 2328, 2332, 76 L. Ed. 2d at 543-44), cert. denied, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001).

The affidavit must have provided a "substantial basis" for finding informant-accounts credible. State v. Sullivan, 169 N.J. 204, 212 (2001); accord Smith, supra, 155 N.J. at 92. In making that assessment, an officer and a judge may assume the veracity of concerned citizens, State v. Johnson, 171 N.J. 192, 216 (2002); recognize that detailed accounts of criminal activity provide something more substantial than rumor, Novembrino, supra, 105 N.J. at 121; rely on corroborating evidence investigating officers acquired, id. at 126; consider evidence of defendant's criminal history included in the affidavit, State v. Valentino, 134 N.J. 536, 550 (1994); and assign value to inferences the affiant drew based on his experience and training that "an untrained person could not" draw, Smith, supra, 155 N.J. at 99; see also Novembrino, supra, 105 N.J. at 126.

Defendant's claim of "staleness" bears on whether the totality of the information in the affidavit permitted the judge to find "a fair probability that contraband or evidence of a crime [would] be found" if defendant's premises were searched during the time permitted in the warrant. Smith, supra, 155 N.J. at 93. In short, staleness is a question of whether the probable cause still exists when the warrant is issued and at the time of the search. State v. Blaurock, 143 N.J. Super. 476,

479 (App. Div. 1976); see also Sgro v. United States, 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1932).

"[T]imeliness and its converse, staleness, must be measured by the [n]ature and regularity of the allegedly unlawful activity." United States v. Nilsen, 482 F. Supp. 1335, 1339 (D.N.J. 1980). Thus, "'[w]here the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.'" United States v. Harris, 482 F.2d 1115, 1119 (3d Cir. 1973) (quoting United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972)); accord Blaurock, supra, 143 N.J. Super. at 479-80 (relying on Harris and Johnson).

With those standards as a guide, we turn to consider the affidavit.

The affiant, Detective Ryan P. Breslin, applied for and obtained the first warrant on February 5, 2011. At that time, Breslin was serving as a detective in the Major Crime Unit of the Cumberland County Prosecutor's Office (CCPO). CCPO hired Breslin in November 2007, when Breslin had about one and one-half years of service in a local police department and had

graduated from the Vineland Police Academy. In his years with CCPO, Breslin had investigated homicides, and had investigated narcotics violations as a police officer. Breslin's training included search warrant preparation, narcotics investigation, and drug identification.

This investigation commenced in response to a missing persons complaint filed by Kim Jenkins. Jenkins is the cousin of Harper, the homicide victim. She reported that neither family members nor friends had heard from or seen Harper since January 20, 2011. She became concerned after a conversation with Harper's girlfriend, Queen Lindsey, who said she had last heard from Harper on January 13 via "Facebook," and he had said he had been in an argument with someone named "Jason."

Jenkins had also spoken to Harper's nephew, Vernon Corbin, also known as Vernon Blount. Vernon's mother, Ruby Blount, was Harper's sister. Vernon told Jenkins that on January 28, "guys" in a bar in Wildwood told him that "[t]hey got [Harper]." Jenkins "believed Vernon was talking about members of the Blood street gang because of a prior criminal investigation that Harper was involved in."

The detectives had "several interviews" with Harper's girlfriend, Lindsey. From her, they learned that she and Harper had been dating for about four or five years and, like other

couples, had problems that they worked out in a few days. She had not heard from Harper since January 19, when he removed his belongings from their apartment and went to live with Jason Moore. She had repeatedly called Harper's cell phone number, which she gave to Breslin. When Lindsey called, she was either sent to voicemail or received no answer. She gave the detectives two additional cell phone numbers for Harper. Lindsey told Breslin it "was very unusual" that Harper had not called her or family members since she last heard from him.

According to Lindsey, Harper did not have a car and always used Jason Moore's car. Lindsey reported that, Harper and Moore were friends and business partners and, in the past, Harper had stayed with Moore after Harper and she had argued.

Lindsey further reported she had called Moore since January 23 to speak to Harper. When she had done that in the past, Moore always had Harper get in touch with her. This time he did not.

Lindsey told Breslin that she was

> very suspicious of the stories that Moore was providing concerning the whereabouts of Harper. One of those stories was about Harper stealing a quantity of marijuana from Moore and Moore thr[owing] Harper out of the residence. A second story was, on Friday, January 21, 2011, Moore told Ms. Lindsey he believed Harper had been smoking marijuana and he was moving and talking very slowly. They

> (Moore and Harper) had gotten into an argument over money or a cell phone bill and Harper took a gun and left the residence. According to Moore, that was the last time he saw Harper (Friday, January 21, 2011).
>
> When Ms. Lindsey asked about Harper's clothing and pet dog, Moore told her Harper left all of his clothing at the residence and as a result of their argument he (Moore) shot the dog. Lindsey then told [the detectives] that he (Moore) later told her he didn't shoot the dog, he just let it go.

Lindsey advised Breslin that Harper had a silver-colored semi-automatic handgun. Although she had not seen Moore with a handgun, she suspected he had one because of what he said about shooting Harper's dog.

Lindsey knew about the Moore/Harper marijuana-distribution partnership. She said Moore grows marijuana in a garage on his property in Delmont, and Harper is one of his distributors. They had been in that business together since April or May 2010.

During the week of January 1, 2011, she went to Moore's house with Harper, and he showed her the indoor grow operation in Moore's garage. She described the "grow operation" located "in a hidden room in the garage with numerous lights on the ceiling," about twenty-five marijuana plants were growing "in what she described as five gallon buckets." And, there were pipes leading to the plants and an area with smaller "starter"

plants. The marijuana plants "were approximately three feet tall and bushy."

Lindsey further advised Breslin that during a conversation with Moore a week earlier, Moore asked if she planned to call the police and to let him know if she did, "because he needed to 'clean up' a few things[,] and he really needed until the first week or March to finish up." Breslin wrote, "[Lindsey] believes he was referring to the marijuana grow and the growth of plants."

Breslin explained why he believed the grow operation was ongoing:

> Based on training, education and experience of this officer and the officers involved . . . , we believe that information provided by Ms. Lindsey is consistent with an on going indoor marijuana grow. These facts, coupled with Ms. Lindsey's recent conversations with Moore about contacting the police[,] leads this detective and the detectives working on the investigation to believe that the indoor grow is occurring at this time. This information is consistent with the growth cycle of a marijuana grow and the maturity of the plants. The longer the plants are allowed to grow the greater the potency of the marijuana, and . . . the economic value of the product.

Breslin acquired other information about Harper's involvement in the marijuana business with Moore. According to Lindsey, "Harper plays a big role in the distribution of

marijuana from Moore," and she has personal knowledge of Harper getting multiple pounds of marijuana at a time from Moore and breaking them down into one ounce packages, which Harper would distribute to various people. She further indicated, "Harper was making a lot of money" and using it to take care of "her, his son . . . and pay bills. Knowing all of this information about the marijuana distribution also concerns Ms. Lindsey that Moore is being evasive and inconsistent about Harper's whereabouts."

Iesha Clark, the mother of Harper's son, spoke to Breslin on February 4, 2011. She was "familiar with Harper selling large quantities of marijuana with Moore, but could not go into specific details because of the children being present." Clark had last seen Harper on January 20 when he met her, took their son for dinner and returned him to her as planned. Clark told the detective that Harper was driving a gray Mazda that day and said it belonged to Moore. Clark advised that was "very unusual [for] Harper [to have] not contacted her since that date."

After receiving authorization, the detective checked all the cell phone numbers he had been given for Harper. Because the live global position of the phones showed no results, the detective believed they were powered off. Call detail records for the numbers "came back on [one] cell phone number . . . .

The other numbers had no activity." The last of the calls retrieved came during the late morning of January 22, and all those calls were directed to voicemail. "There were no outgoing phone calls made and there was no cell site tower information provided."

The detective received approval from the County Prosecutor to record a phone call from Lindsey to Moore, with Lindsey's consent, however, Moore did not answer. While the police were with Lindsey for the unsuccessful intercept, she received phone calls from relatives of Vernon, reporting that he was calling people and saying that Harper's body had been found.

Later, Ruby Blount called Breslin. She reported that she had been speaking with Harper more frequently since her son Vernon moved to New Jersey, and she said Harper had not been returning her calls. She reported that the last time they spoke, Harper was "stressed out" over his on-again off-again relationship with Lindsey and with Jason Moore, who "sells 'weed' and . . . gave Vernon enough 'weed' to get him on his feet." Ruby explained that Moore's involvement with Vernon "bothered Harper and he was trying to keep Vernon away from that activity." Harper had told her "he was living in Moore's basement," "using Moore's cars to get around," and working as a

partner of Moore's, who "had things in his house to grow and sell marijuana."

Ruby also told Breslin that Vernon called her on January 29 and told her Harper was missing. Ruby called Moore, who told her that he had let Harper stay in his house, but "put [him] out" because things were missing. She also said she had been to Moore's residence in 2008, which was in a "very rural" area.

Moore's criminal records disclosed a prior arrest in 2008 for an "indoor hydroponics marijuana grow in the garage" at a residence in Delmont, New Jersey, which is the address of defendant's premises identified in the search warrants at issue here.

The detectives also tried but failed to find Harper by contacting local medical facilities in Cumberland, Atlantic and Cape May Counties, the State Medical Examiner, and county correctional facilities throughout the State. None reported any contact with Harper.

On the information summarized above, Breslin believed there was probable cause for a warrant authorizing a search of the premises, house and garage and the silver Mazda registered to Moore for evidence of Harper's homicide, aggravated assault, criminal restraint, or kidnapping, and for evidence of marijuana possession, cultivation, and distribution.

Mindful of our deferential standard of review, we conclude that Breslin's affidavit contained ample evidence to support issuance of a warrant authorizing the search of defendant's home, garage and silver Mazda for evidence of marijuana distribution and crimes related to Harper's unexplained disappearance. The citizens who provided information were persons concerned about Harper, because he had broken off regular communications with them abruptly and without explanation. Their consistent accounts of the approximate date of their sudden loss of customary communication with Harper gave Breslin sufficient reason to believe Harper was a victim of a violent crime. Especially after an independent investigation ruled out other probable and less sinister explanations, such as hospitalization or incarceration.

In addition, these concerned individuals were repeating Harper's disclosures of trouble between him and defendant related to the marijuana business and defendant's involvement of Vernon. Those details, repeated by Harper's confidants, gave substantial reason to credit their information, and their information pointed to defendant.

There was additional corroborated information of trouble between Harper and defendant. Defendant gave the citizen-informants, who contacted him to inquire about Harper,

inconsistent explanations about the problems that led defendant to put Harper out of his home and for Harper to leave without his belongings. Defendant's accounts, albeit inconsistent, suggested Harper was at fault. Defendant even told Lindsey he had shot Harper's dog, which suggested defendant had a firearm, and then said he had just let the dog go. Moreover, the investigators obtained cell phone records that confirmed the informants' accounts of when Harper went missing and stopped answering his phone.

All of that provided ample support for "a practical, common-sense decision" that the totality of the circumstances, "including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information," supported a determination that there was "a fair probability" that "evidence of a crime" against defendant would be found on his premises. Smith, supra, 155 N.J. at 93.

The information in the affidavit provided the same quality and quantity of information establishing a fair probability that evidence of marijuana distribution would be found on defendant's premises and in the vehicle he allowed Harper to use. Lindsey's detailed account of what she saw in defendant's garage during the first week of January demonstrated the basis for her knowledge about the "grow" facility. Similarly, her living with

Harper for several years made her well-situated to observe and report Harper's packaging and distribution of marijuana and his access to sufficient funds to support her and Harper's son. Again, her description of his business was corroborated by the independent statements of the relatives and friends who, based on conversations with Harper, were well-aware of the nature of his partnership with defendant.

We agree with the judges who issued the warrant and denied the motion to suppress that the affidavit contained information establishing a fair probability that evidence of the marijuana production and distribution would be found on defendant's premises on February 5, when the warrant was issued. The information was not stale.

Lindsey's detailed report of what she saw in the garage in the first week of January, viewed with the other evidence, indicated an ongoing marijuana operation at the time of Harper's disappearance. That operation involved ceiling lights and pipelines that defendant would not likely have been able to dismantle and conceal by February 5. After all, defendant asked Lindsey for notice of any call she made to the police so he could clean up. Additionally, the inference Breslin drew about the marijuana grow-cycle, which was based on his training and experience, and inference available from defendant's prior

arrest during the execution of a warrant authorizing a search of the garage on this property in 2008 and its disclosure of a hydroponic-marijuana grow operation further supported that conclusion. The affidavit provided a substantial basis to believe that evidence of the marijuana business Lindsey saw in early January most likely would be there in early February.

For all of the foregoing reasons, we conclude that defendant failed to establish that the first warrant was obtained with stale information of a crime related to marijuana. Furthermore, there was sufficient information to establish probable cause that evidence of a crime against Harper would probably be found in the search of defendant's premises and the vehicle he allowed Harper to use. Thus, the evidence obtained during the search authorized by that warrant was lawfully recovered, not tainted.

Because defendant's lone challenge to the second warrant depends solely on the invalidity of the first, we have no reason to address the second affidavit.

II.

Defendant argues that the judge imposed consecutive sentences for aggravated manslaughter and desecration of human remains without addressing the guidelines for exercise of that discretion established in Yarbough. Contrary to defendant's

claim, the judge provided a statement of reasons addressing those guidelines. The Yarbough factors are:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims; [and]
>
> (e) the convictions for which the sentences are to be imposed are numerous . . . .
>
> [State v. Zuber, 227 N.J. 422, 449 (2017) (listing the Yarbough guidelines).]

At sentencing, the judge found that these two crimes deserved more punishment than one and noted that there should be no free crimes. He considered the separateness of aggravated manslaughter and the disturbing of human remains and concluded these separate crimes were "predominantly independent of each

another." They clearly were. Defendant killed Harper by shooting him twice. Subsequently, he buried Harper's body in a wooded area of his property and covered that site with cement. Later, he dug up the cement, dismembered the body and moved it in trash bags to a remote site in the woods. In addition, the judge found that defendant's disturbance of Harper's remains was motivated by a purpose independent of the shooting — avoiding detection and responsibility for killing Harper. The judge further found these were separate acts of violence, committed with different weapons, at different times and in different places. All of those determinations were supported by the record.

Although the judge did not address the factor on multiple victims, Harper was the victim of the homicide and disturbing human remains is a crime against public order and human sensibilities. This Yarbough factor had no apparent relevance here. Even if the judge erred by not saying that, the omission is of no import on these facts, because there is no reasonable interpretation of the multiple-victim factor that could reasonably be viewed as favoring concurrent sentences here.

Similarly, the judge did not expressly address the factor referencing the number of crimes for which defendant was being sentenced. That is explained by the fact that the judge was

sentencing defendant for only two crimes; the State's agreement to dismiss the six counts charging other crimes made this factor irrelevant.

Having considered defendant's arguments in light of the judge's findings and statement of reasons, we have concluded that they have insufficient merit to warrant any additional discussion in a written opinion. R. 2:11-3(e)(2). The judge's findings on and balancing of the aggravating and mitigating factors are supported by adequate evidence in the record, and the sentence is neither inconsistent with sentencing provisions of the Code of Criminal Justice nor shocking to the judicial conscience. See State v. Bieniek, 200 N.J. 601, 608 (2010); State v. Cassady, 198 N.J. 165, 180-81 (2009).

Affirmed.