SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5772-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VASILIO KOUTSOGIANNIS, a/k/a
VASILIO KOUTSGIANNIS,

Defendant-Appellant.

Submitted May 10, 2017 – Decided June 8, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 13-07-1902.

Joseph E. Krakora, Public Defender, attorney for appellant (David A. Gies, Designated Counsel, on the briefs).

Joseph D. Coronato, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; William Kyle Meighan, Senior Assistant Prosecutor, on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

In this appeal, defendant Vasilio Koutsogiannis challenges the denial of his motion to suppress, as unconstitutional, his arrest, his custodial statement, and evidence seized from his parents' home where he was temporarily residing. We affirm, substantially for the reasons expressed in Judge Francis R. Hodgson, Jr.'s thorough written opinion of September 24, 2014.

I.

On March 2, 2013, T.M.[1] called 9-1-1 to report he was robbed at gunpoint. Sergeant Dennis Jarin of the Ocean Township Police Department (OTPD) responded to the scene at approximately 5:42 p.m. T.M. told Jarin the robbery occurred while he was walking and a passing car stopped and asked him for directions. T.M. reported that $500 and a butane lighter were taken from him at gunpoint by the vehicle's two occupants. T.M. supplied Jarin with a description and license plate number of the vehicle. Investigation revealed the car was registered to defendant's sister, Katerina Koutsogiannis (Katerina),[2] who resided on Ross

[1] We use initials for the victim to protect his privacy interests.

[2] Because defendant, his co-defendant Katerina, and other family members who testified at the suppression hearing share a common surname, we refer to them by their first names in this opinion for clarity and ease of reference.

Court in Manahawkin. The description of the vehicle was broadcast to surrounding police agencies in an attempt to locate it.

T.M. was transported to OTPD headquarters where he was further interviewed by Sergeant Michael Rogalski. T.M. initially reported that the female passenger reached out of the car with a rope, tied him around the neck, and dragged him into the car. The male driver then shoved a handgun in his face, and the two stole $500 from him before driving off.

Under further questioning by Rogalski, T.M. changed his story and admitted the robbery occurred during his sale of thirty-seven bags of heroin to the two suspects. T.M. now stated he entered the vehicle and met with a male driver with a goatee known as "Vic" and a woman who sat in the back seat. The three began discussing the drug transaction when suddenly the woman wrapped something around his neck and the driver stuck a handgun in his left cheek and demanded he empty his pockets. The pair allowed T.M. to leave after he placed the heroin and his money on the floor of the vehicle. T.M. explained that he called the police because he feared for his safety and that of his family. During this recorded interview, Rogalski noted redness to T.M.'s neck and a mark on his left cheek, consistent with T.M.'s version of events.

A short time later, officers from the Stafford Township Police Department (STPD) located the subject vehicle on Kristine Avenue[3] in Manahawkin, one block east of the Ross Court address that appeared on Katerina's registration. At around 6:15 p.m., STPD Patrolman Robert Conforti, accompanied by his K-9 dog who was trained to track the freshest odor, followed the fresh scent to the Ross Court address to which the car was registered. Believing the car's occupants were involved in the armed robbery and were presently in the Ross Court home, Conforti and other officers took positions around the outside.

STPD Lieutenant Herman Pharo, who was in charge of the regional S.W.A.T. unit, was called and responded to the scene. Pharo believed the home was occupied based on reports from other officers that they observed movement and lights being turned on and off inside. Pharo called the house phone and, although he heard it ringing, no one answered. The phone was eventually answered by Frank Koutsogiannis (Frank), the father of defendant and Katerina. Frank owned the Ross Court home, and Pharo knew Frank because he owned a local restaurant. Frank told Pharo he was in Florida and his phone calls were being forwarded to him there. Frank advised Pharo that defendant was staying in the

[3] Kristine Avenue alternately appears as Christine Avenue in the record.

house, and that the only other person who had access to it was Katerina. Pharo informed Frank that defendant and Katerina were suspects in an armed robbery. According to Pharo, Frank then gave permission for police to enter the home, and indicated he would send his older daughter Sophia with a key.

Sophia arrived about fifteen minutes later. She testified at the hearing: "My father called me, he was in Florida. He said to go to . . . my parents' house, to let the police in, because they were looking for [defendant and Katerina]." Although Sophia claimed she had a key, she was met by Pharo who kept her away from the house and, consequently, she did not use the key to enter.

The ensuing events are recounted in Judge Hodgson's written opinion as follows:

> Pharo continued his attempts to make contact with the occupants of the house. He walked to the front door and knocked and identified himself as police and called out to occupants with no response. Pharo walked around the back of the house and then toward the front again and knocked and called out as he proceeded [but] no one answered. As he continued his walk around the house the garage door went up. As the officers began to enter the garage, the door started to close. The entering officers triggered the infrared safety mechanism that stops the door from closing when it is blocked and the door reversed and continued to open. The officers entered the garage and partially opened the interior garage door leading from the garage into the house. Officers called out for the occupants and identified themselves as police,

> at this point not yet crossing the threshold of this interior garage door. [Defendant] came from inside the house to the interior garage door with his hands up, presenting himself to the officers, and was taken into custody. Officers then entered the house through the door from the attached garage and continued to call out. [Katerina] was located on the first floor at the top of the stairway leading to the basement walking toward the officers with her hands up. She complied with police orders to come to them. She was then taken into custody without incident. Both [Katerina] and [defendant] were brought outside, handcuffed, and taken away in police cars. The police swept the house for other occupants and then secured the residence while they sought a search warrant. Sophia was permitted into the house and told to wait until the officers returned with a search warrant. Police reported securing the residence at about 8:03 p.m.

Defendant and Katerina were taken to police headquarters where they were interviewed separately. Rogalski first read Katerina her Miranda[4] rights and presented her with the OTPD standard rights form, which she signed. Katerina initially claimed that defendant received a phone call from a friend to pick up someone named Joey. When "Joey" entered the vehicle he appeared beat up and stated someone had just tried to rob him. "Joey" then "pull[ed] out a bunch of dope. Blue bags of heroin." Upon seeing the drugs, Katerina and her brother ordered "Joey" out of the car.

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

Katerina's initial version of events changed as her questioning progressed until eventually it coincided more closely with that of T.M. She revealed that recently she had again been using heroin. She stated her brother took her along for a ride when she told him she could not lend him any money. They then went to pick up "Joey" and, when he entered the car, defendant pulled out a gun, pushed it into "Joey's" neck, and announced it was a robbery. After a break in the questioning during which police spoke to defendant, Katerina admitted she used a scarf to hold T.M. by the neck from the back seat of the car. She further admitted that, upon arriving back at her parents' house, she and defendant concocted her initial version that the victim entered the car after having already been beaten. Katerina stated that heroin, but no cash, was taken from the victim. She also said defendant took the gun from the car and stashed it somewhere in the garage of the home.

Defendant was interviewed next. He denied the robbery and gun possession allegations after being read his Miranda rights. Defendant told police, as Katerina initially did, that "Joey" appeared roughed up when he entered the car and defendant ordered him to leave after "Joey" "pull[ed] out about I don't know how many bags [] of pot [and] maybe [thirty], [forty] bags of heroin." When informed by police that Katerina stated otherwise, defendant

claimed his sister was in "cohoots" with T.M., and would say anything to avoid blame. Defendant advised that Katerina parked the car on Kristine Drive because she was not allowed in her parents' house. Defendant further stated he heard the police knocking and that he cooperated with them by opening the garage door and lying down. Rogalski testified that later, as Katerina was brought into the patrol room where defendant was being held in a cell, defendant told her, "I can't believe you ratted out your own brother."

Sophia was allowed to remain in the kitchen and bathroom of the residence while police obtained a warrant to search the home and car. While using the bathroom, Sophia noticed the cabinet was not closing properly. She attempted to close it and, in doing so, found empty heroin packets and a needle, which she turned over to the police. Following issuance of the search warrant, police recovered a multicolored scarf from the car, and heroin and a handgun from the garage of the home.

In July 2013, while T.M. was incarcerated, he recanted his prior version of events. Instead, T.M. told a defense investigator he was not the victim of a robbery, there was no gun, and no scarf had been placed around his neck.

Later that month, defendant and Katerina were jointly charged in Ocean County Indictment No. 13-07-1902 with first-degree

robbery, N.J.S.A. 2C:15-1 (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b (count three); and third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10a(1) (count five). Defendant was charged separately with fourth-degree aggravated assault, N.J.S.A. 2C:12-1b(4) (count four); and second-degree possession of a firearm by a convicted person, N.J.S.A. 2C:39-7b (count six). Katerina was separately charged in count seven with second-degree possession of a firearm by a convicted person, N.J.S.A. 2C:39-7b.

Defendant and Katerina moved to suppress their arrests, their custodial statements, and the seized evidence. The trial court denied the motions on September 22, 2014. On February 6, 2015, pursuant to a negotiated plea agreement, defendant pled guilty to an amended charge of second-degree robbery, and the State agreed to dismiss the remaining charges in Indictment No. 13-07-1902. Defendant also reserved the right to appeal the denial of his suppression motion and certain other designated legal issues.[5]

[5] Defendant also pled guilty to an unrelated third-degree possession of CDS charge under Indictment No. 13-06-1400, for which he received a concurrent four-year prison sentence.

On May 15, 2015, defendant filed a pro se motion to withdraw his plea, claiming he was not guilty of the charges in the indictment, and that his plea was coerced and not knowingly and intelligently entered. Defendant subsequently withdrew the motion and proceeded to sentencing on July 31, 2015. The court imposed a five-year prison term with an eighty-five-percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. This appeal followed.

II.

In his counseled brief, defendant raises the following issues for our consideration:

> POINT ONE
>
> [] DEFENDANT'S WARRANTLESS ARREST WAS UNCONSTITUTIONAL WHERE THE POLICE OFFICERS ENTERED HIS HOME WITHOUT CONSENT OR THE PRESENCE OF EXIGENT CIRCUMSTANCES.
>
> POINT TWO
>
> SOPHIA'S CONDUCT WHICH WAS CONTROLLED BY THE POLICE OFFICERS WHO ALLOWED HER TO ENTER THE HOME AFTER IT WAS SECURED AMOUNTED TO JOINT PARTICIPATION SUFFICIENT TO BRING THE PRIVATE PARTY'S SEIZURE OF THE EMPTY WAX FOLDS WITHIN THE PURVIEW OF THE EXCLUSIONARY RULE.
>
> POINT THREE
>
> THE FACTS AND CIRCUMSTANCES TO SUPPORT A WELL-GROUNDED SUSPICION THAT A CRIME OCCURRED IN ORDER TO ISSUE A SEARCH WARRANT OF [] DEFENDANT'S HOME IS ABSENT WHERE THE POLICE OFFICER RELIED ON INFORMATION TOLD TO HIM BY

ANOTHER OFFICER WHICH RESTED ON FACTS RELATED BY A KNOWN UNRELIABLE SOURCE WHO LATER RECANTED.

POINT FOUR

LACKING THE EXISTENCE OF A WELL-GROUNDED SUSPICION THAT [] DEFENDANT WAS KATERINA'S PARTNER IN THE ALLEGED ROBBERY, [] DEFENDANT'S CUSTODIAL STATEMENT SHOULD BE SUPPRESSED WHERE IT WAS OBTAINED AFTER AN ILLEGAL ARREST.

POINT FIVE

KATERINA'S CUSTODIAL STATEMENTS SHOULD BE SUPPRESSED WHERE HER RESPONSES SHOW THAT HER SUBMISSION TO THE INTERROGATION WAS NOT VOLUNTARY.

The following additional points are raised in defendant's pro se supplemental brief:

POINT ONE

[THE] COURT ERRED IN FINDING SUFFICIENT PROBABLE CAUSE EXISTED TO JUSTIFY THE WAR[R]ANTLESS [ARREST] OF DEFENDANT AND CODEFENDANT AT [THE] SUPPRESSION HEARING.

POINT TWO

NO VALID EXCEPTIONS TO THE WARRANT REQUIREMENT EXISTED TO JUSTIFY THE ENTRY INTO [DEFENDANT'S] HOME [] OR HIS SUBSEQUENT ARREST.

POINT THREE

STATEMENTS OBTAINED BY [THE] O.T.P.D. WERE THE PRODUCT OF AN UNLAWFUL ARREST AND JUDGE HODGSON ERRED IN NOT SUPPRESSING THEM.

POINT FOUR

THE PROTECTIVE SWEEP OF [DEFENDANT'S] HOME WAS UNLAWFUL UNDER THE [FOURTH] AMENDMENT [TO THE UNITED STATES CONSTITUTION] AND JUDGE HODGSON ERRED IN FINDING IT TO BE REASONABLE.

POINT FIVE

THE STATE[']S CONDUCT IN INSTIGATING FALSE AND FRAUDULENT AND BELATED POLICE REPORTS AND TESTIMONY AT [THE] SUPPRESSION HEARING VIOLATED [DEFENDANT'S FOURTEENTH] AMENDMENT DUE PROCESS RIGHTS AND PREJUDICED THE PROCEEDINGS. JUDGE HODGSON ERRED IN ADMITTING THEM.

POINT SIX

[DEFENDANT'S] GUILTY PLEA IS INVALID AND MUST BE VACATED.

POINT SEVEN

VINDICTIVE, MALICIOUS, AND SELECTIVE PROSECUTION [] PREJUDICED DEFENDANT[']S JUDICIAL PROCEEDINGS AND SUBSEQUENT PLEA AGREEMENT.

POINT EIGHT

[THE] PROSECUTOR FAILED TO PRESENT EXCULPATORY EVIDENCE TO [THE] GRAND JURY [] NEGAT[ING] DEFENDANT[']S GUILT THUS REQUIRING DISMISSAL OF IND. NO: 13-07-1902.

We consolidate defendant's arguments in the discussion that follows.

III.

A.

We first address defendant's contention that the police lacked probable cause to arrest him. In his written opinion, Judge Hodgson began by noting that the "threshold issue to be addressed [] is whether the police had probable cause to arrest defendant[]." The judge found probable cause for the arrest, reasoning:

> In the instant case, at the time of their entry into the residence at Ross Court, police were acting on a report from an identified citizen who reported being robbed at gunpoint first by making a call to 9-1-1 and then providing statements to [O]fficer Jarin, the responding officer[,] and [D]etective Rogalski. The responding Stafford officers were entitled to rely on the underlying police work of other officers who were investigating the crime; information possessed by the 9-1-1 dispatcher as well as [O]fficers Jarin and Rogalski is properly imputed to the responding officers. See United States v. Robinson, 535 F.2d 1298, 1299 (9th Cir. 1976); United States v. Hensley, 469 U.S. 221, 230-31[, 105 S. Ct. 675, 681-82, 83 L. Ed. 2d 604, 613-14] (1985); Whiteley v. Warden of Wyo. State Penitentiary, 401 U.S. 560, 568[, 91 S. Ct. 1031, 1037, 28 L. Ed. 2d 306, 313] (1971). See also, State v. Crawley, 187 N.J. 440, 457, cert. denied, 549 U.S. 1078[, 127 S. Ct. 740, 166 L. Ed. 2d 563] (2006); State v. Williams, 404 N.J. Super. 147, 170-71 (App. Div. 2008). . . . [T.M.] was able to identify the suspects by providing: the make and license plate number of the car; a description of the occupants; and a detailed description of the gun. Corroborating his report to police, [T.M.] had injuries consistent with his statement: red marks on his cheek and neck. In addition, police located the car on an adjacent street to the Koutsogiannis

> residence and were able to track the occupants to the house. The fact that the subject car was parked on an adjacent street to the address of the registered owner, and that a K-9 tracked to that residence raises additional support for the proposition that criminal activity was afoot. This apparent attempt at disguising their location and whereabouts demonstrates a consciousness of guilt and supports the conclusion that the occupants were involved in criminal activity and attempting to thwart law enforcement. This suspicion is bolstered by the fact that although movement was detected in the residence, no one answered the phone calls by [Lt.] Pharo or the officers knocking on the front door. Finally, the identification was corroborated by Frank identifying the occupants as [defendant] and Katerina, matching the description given by [T.M.]. Based on the foregoing, I am satisfied that under the totality of the circumstances, the information provided by the [victim] together with the information learned by police through their investigation was clearly sufficient to establish probable cause to believe that [defendant] and Katerina had robbed T.M. at gun point and were located in the residence at Ross Court.

Defendant disagrees and asserts that the police did not have probable cause to arrest him. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." State v. Novembrino, 105 N.J. 95, 106 (1987) (quoting Henry v. United States, 361 U.S. 98, 100-02, 80 S. Ct. 168, 170-71, 4 L. Ed. 2d 134, 137-38 (1959)). Furthermore, "[w]hen determining whether probable cause exists, courts must consider the totality of the

circumstances[.]" Schneider v. Simonini, 163 N.J. 336, 361 (2000) (citing Illinois v. Gates, 462 U.S. 213, 230-31, 238, 103 S. Ct. 2317, 2328, 2332, 76 L. Ed. 2d 527, 543-44 (1983); Novembrino, supra, 105 N.J. at 122), cert. denied, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001).

Our Supreme Court has noted that an ordinary citizen reporting crime to the police is not viewed with suspicion. See State v. Amelio, 197 N.J. 207, 212 (2008), cert. denied, 556 U.S. 1237, 129 S. Ct. 2402, 173 L. Ed. 2d 1297 (2009). "There is an assumption grounded in common experience that such a person is motivated by factors that are consistent with law enforcement goals." State v. Davis, 104 N.J. 490, 506 (1986).

Here, the police received a report from an identified citizen, T.M., regarding criminal activity at a specific location. The information T.M. provided was immediately corroborated by Sgt. Rogalski's observation of marks on T.M.'s face and neck that were consistent with T.M.'s report that he was the victim of an armed robbery. T.M. provided a description of the male and female suspects and the vehicle involved, including its license plate number. Viewing the totality of the circumstances, we agree with Judge Hodgson that the information provided by T.M., along with that developed through further police investigation, was sufficient to establish probable cause to believe that defendant

and Katerina robbed T.M. at gun point and were located in the Ross Court residence.

B.

Defendant argues that the warrantless entry of the residence by police was unlawful. In addressing this issue, Judge Hodgson observed that, while there was probable cause to arrest defendant, "it is well settled that police could not lawfully enter the residence without either an arrest or a search warrant or, alternatively, a recognized exception to the warrant requirement of the Fourth Amendment and our State Constitution, such as consent." After reviewing the testimony and relevant case law, the judge found "the police entry into the Ross Court residence to arrest the defendants was lawful because [defendant] consented to the entry." He elaborated:

> It is noteworthy that [defendant's] initial statement to Rogalski is quite different from his testimony at the hearing. [Defendant] testified during the suppression hearing that he did not know the police were present. He stated that he heard a boom when police kicked in the door and he came out of the bathroom where he was confronted by police who put a gun in his face and forced him to lie face down on the floor where he was handcuffed. This testimony differs not only from the version of the officers who testified during the hearing, but also differs significantly in key aspects from [defendant's] own statement initially provided to Rogalski on March 2, [2013], within hours of the event. During his initial statement[,] [defendant]

> stated that he knew police were present and he opened the garage door and [laid] down in the hallway in order to be cooperative. This initial statement by [defendant] to Rogalski not only explains the opening of the garage door, but is consistent with the testimony of police: [Lt.] Pharo and [O]fficer Conforti testified that police walked around the house, knocking on the door and identifying themselves while calling to the occupants to make their presence known, and that the garage opened and [defendant] came to the threshold of the interior garage door with his hands up and was then taken into custody. With regard to the circumstances of the police entry into the residence, I find [defendant's] initial version given during his taped statement to Rogalski to be the more credible version: it was given close in time to the event, before he had any opportunity to reflect and fabricate; and is also corroborated by the police testimony. Accordingly, I find that [defendant] consented to the police entry, that [defendant] heard police and opened the garage door and came to the threshold of the interior garage door with his hands up surrendering to police and that he intended to let the police into the residence.

In reviewing a motion to suppress, an appellate court defers to the trial court's factual and credibility findings, "so long as those findings are supported by sufficient credible evidence in the record." State v. Handy, 206 N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). Deference is afforded "because the 'findings of the trial judge . . . are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing

court cannot enjoy.'" State v. Reece, 222 N.J. 154, 166 (2015) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). "An appellate court should disregard those findings only when a trial court's findings of fact are clearly mistaken." State v. Hubbard, 222 N.J. 249, 262 (2015). The legal conclusions of a trial court are reviewed de novo. Id. at 263. We must focus on "whether the motion to suppress was properly decided based on the evidence presented at that time." State v. Gibson, 318 N.J. Super. 1, 9 (App. Div. 1999) (quoting State v. Jordan, 115 N.J. Super. 73, 76 (App. Div.), cert. denied, 59 N.J. 293 (1971)).

Here, it is undisputed that the police walked around the house, knocked on the door, and otherwise made their presence known to the home's occupants. It is further undisputed that neither the police nor Sophia activated the garage door opener. We discern no error in the motion judge accepting as credible defendant's initial recorded statement in which he indicated he heard the police knock and responded by opening the garage door. He then cooperated with the police entry into the home to effectuate his arrest. On these facts, we find no basis to disturb Judge Hodgson's well-reasoned determination that defendant was validly arrested. "The Constitution protects against unreasonable searches and seizures and against coerced waivers of constitutional rights. It does not disallow voluntary cooperation

with the police." State v. Domicz, 188 N.J. 285, 308-09 (2006). Moreover, as the judge correctly recognized, this motion turned, at least in part, on a credibility question. The judge found defendant's testimony at the suppression hearing incredible and, although not explicitly stating so, found the police testimony credible.

The judge additionally found the police entry into the home was valid because Frank, its owner, "knowingly consented and agreed to allow the entry and even sent his daughter Sophia to assist." Certainly, factual support for this conclusion is found in Sophia's unequivocal testimony that Frank said he gave the police permission to enter the home and asked her to let the police in. Indeed, in the context of the search of a home, both the United States Supreme Court and our Supreme Court have recognized that a third party can validly consent to a search in certain circumstances. United States v. Matlock, 415 U.S. 164, 170-71, 94 S. Ct. 988, 992-93, 39 L. Ed. 2d 242, 249-50 (1974); State v. Cushing, 226 N.J. 187, 199 (2016). "The third party's ability to consent to such a search rests on his or her 'joint occupation' of and 'common authority' over the premises." Cushing, supra, 226 N.J. at 199 (quoting Fernandez v. California, ___ U.S. ___, ___, 134 S. Ct. 1126, 1132-33, 188 L. Ed. 2d 25, 32-33 (2014)). Moreover, depending on the circumstances, the law enforcement officer may rely on the apparent

authority of a person to consent to a search. Illinois v. Rodriquez, 497 U.S. 177, 185-89, 110 S. Ct. 2793, 2800-02, 111 L. Ed. 2d 148, 159-61 (1990).

We note, however, again in the context of a search under the consent exception to the warrant requirement, that the State must prove "the consent was voluntary and that the consenting party understood his or her right to refuse consent." State v. Maristany, 133 N.J. 299, 305 (1993). The State must prove voluntariness by "clear and positive testimony." State v. Chapman, 332 N.J. Super. 452, 466 (App. Div. 2000) (quoting State v. King, 44 N.J. 346, 352 (1965)). Furthermore, the State must show that the individual giving consent "knew that he or she 'had a choice in the matter.'" State v. Carty, 170 N.J. 632, 639 (quoting State v. Johnson, 68 N.J. 349, 354 (1975)), modified by 174 N.J. 351 (2002).

Guided by these criteria, we have no doubt that Frank gave permission to the police to enter his home, and dispatched Sophia to assist them. Notwithstanding, because the record does not reflect that Frank was informed of his right to refuse consent, or otherwise knew he had a choice in the matter, we are constrained to find his consent was not voluntary. We do not deem this finding fatal to the validity of defendant's arrest however, because ultimately the police did not avail themselves of Frank's consent

or Sophia's assistance to enter the home. Rather, as we have noted, they lawfully relied on defendant's own conduct and actions in opening the garage door so the police could enter the home to effectuate his arrest.

C.

We next address defendant's contention that his statement, along with all evidence seized, must be suppressed as products of the unlawful police entry into the home. In rejecting this argument, we adopt Judge Hodgson's well-reasoned analysis:

> Having found . . . probable cause [existed] to arrest defendants and that the entry into the residence was consensual and therefore lawful, the evidence recovered pursuant to the search warrants and statements obtained are not "poisoned fruit" and are therefore admissible. However, [assuming] arguendo, even if the entry were found to be unlawful, the statements would be admissible since courts have generally declined to apply the exclusionary rule to statements obtained where probable cause existed prior to the unlawful conduct. New York v. Harris, 495 U.S. 14, 17-19[, 110 S. Ct. 1640, 1642-44, 109 L. Ed. 2d 13, 20-22] (1990) (the Supreme Court addressed a case in which the police illegally entered defendant's home in order to effect his arrest for which they had probable cause. . . . [T]he arrest was otherwise legal, although the entry into the house without a search warrant violated Payton.[6] In Harris, the Court declined to suppress defendant's confession). See also, State v. Bell, 388 N.J. Super. 629, 637 (App.

[6] Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

Div. 2006) (the [C]ourt cited Harris and "decline[d] to apply the exclusionary rule in this context because the rule in Payton was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime."). In this case, and as explained in Harris, "the statement[s], while the product of an arrest and being in custody, [were] not the fruit of the fact that the arrest was made in the house rather than someplace else." [Harris, supra], 495 U.S. [at] 20 [].

In the instant case, probable cause to arrest defendants was established by the statements of the victim [T.M.], and exists independently of the entry. [] Similarly, because the probable cause supporting the search warrant does not rely on any illegally obtained evidence, the recovery of the gun and drugs would also not be considered poisoned fruit and not subject to suppression. In addition, it is not necessary to assess the subject searches under the attenuation doctrine since the probable cause is established in the warrants without reference to any illegally obtained evidence. As the Supreme Court in Harris explained, "[the] attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal government activity.'" [Harris, supra], 495 U.S. at 19[, 110 S. Ct. at 1642-43, 109 L. Ed. 2d at 21] (citing United States v. Crews, [445 U.S. 463], 471 [, 100 S. Ct. 1244, 1250, 63 L. Ed. 2d 537, 546 (1980)]. "[T]he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality[.]"

[Crews, supra, 445 U.S. at 475, 100 S. Ct. at 1252, 63 L. Ed. 2d at 548].

. . . .

In this case[,] the probable cause supporting the search warrants is established by the statements of [T.M.] and [Katerina], which are not the product of any illegal government activity. [] For the foregoing reasons, even were the entry of the residence at Ross Court to be found unlawful, the statements from [Katerina] and defendant as well as the items recovered pursuant to the search warrants would not be "poisoned fruit" and subject to the exclusionary rule.

D.

For the first time on appeal, defendant argues that Sophia's joint participation with police brings her conduct within the purview of the exclusionary rule. Specifically, he contends that the empty wax folds and drug paraphernalia Sophia found in the bathroom should be suppressed on this basis. We do not find this argument persuasive.

Defendant cites State v. Scrotsky, 39 N.J. 410 (1963), to support his position. However, we deem defendant's reliance on Scrotsky misplaced. In that case, police brought a landlady to defendant's apartment when he was not home so she could search for articles she claimed were stolen. The Court concluded that the warrantless search was unlawful because the landlady entered the apartment with the officers "and seized the property under color

of their authority and as a participant in a police action." Id. at 415.

In the present case, it was Frank, not the police, who requested that Sophia go to the residence. After police conducted a protective sweep of the home, they allowed Sophia to enter and remain inside while they secured a search warrant. During this period, Sophia was confined to the kitchen and bathroom. Importantly, Sophia testified unequivocally that she was not asked or directed by the police to search for anything. Rather, she inadvertently discovered the items when she used the bathroom and noted the cabinet doors were not shutting properly. She then turned the items over to the police. The police did not search the home, or seize the items Sophia discovered, until a search warrant was obtained. Accordingly, defendant's contention that Sophia was a "joint participant" in the police search of the home lacks record support.

E.

Defendant in his supplemental brief also argues that the protective sweep of the home was unreasonable and violated his Fourth Amendment rights. This argument warrants little discussion.

In Maryland v. Buie, 494 U.S. 325, 334, 110 S.Ct. 1093, 1098, 108 L. Ed. 2d 276, 286 (1990), the United States Supreme Court

authorized a "protective sweep" exception to the warrant requirement for a search conducted in conjunction with an arrest, carefully limiting the search to "spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Our Supreme Court has

> limited the protective sweep of a home to settings in which "(1) police officers are lawfully within the private premises for a legitimate purpose, which may include consent to enter; and (2) the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger." [State v. Davila, 203 N.J. 97, 102 (2010)]. This Court has also imposed strict constraints on the duration and scope of the protective sweep in the residential setting. Ibid.; accord State v. Cope, 224 N.J. 530, 548 (2016).
>
> [State v. Robinson, ___ N.J. ___, ___ (2017) (slip op. at 18-19).]

Here, the police conducted a protective sweep of the home after defendant and Katerina were removed. In sustaining the validity of the protective sweep, Judge Hodgson found "the officers had a reasonable basis to perceive danger after receiving a report from dispatch that a man was just robbed at gunpoint. Therefore, the protective sweep was reasonable to ensure officer safety." "Further, [the] officers were justified in securing the residence pending a search warrant." We agree with these well-reasoned conclusions. Moreover, defendant points to no evidence that was

discovered or seized during the limited protective sweep, which was conducted for the officers' safety while they secured the home pending issuance of the search warrant.

F.

We have considered defendant's other contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant extensive discussion in a written opinion. R. 2:11-3(e)(2). We add only the following comments.

Defendant challenges the admissibility of Katerina's statement on the grounds that she was high on drugs and the police did not re-administer Miranda warnings to her upon resuming her interrogation. However, as the State correctly points out, defendant lacks standing to assert Katerina's rights against self-incrimination. State v. Baum, 199 N.J. 407, 420-26 (2009). In any event, after reviewing the testimony and evidence, Judge Hodgson concluded that "[Katerina] knowingly, intelligently, and voluntarily waived her Miranda rights," and her "will had not been overborne and the requirements of due process had not been violated." Having reviewed the record, we discern no basis to disturb the judge's factual findings and legal conclusions.

Defendant argues in his pro se brief that his guilty plea is invalid and must be vacated. However, defendant withdrew his

motion to vacate his guilty plea, thereby depriving the trial court of the opportunity to decide the issue. Similarly, while defendant now argues that the State failed to present exculpatory evidence to the grand jury (specifically, the fact that T.M. recanted his allegations that a robbery occurred), defendant did not move to dismiss the indictment on this basis. "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). To the extent defendant attributes these or any other errors to the ineffective assistance of counsel, such claims involve allegations and evidence that lie outside the trial record and are thus more appropriately addressed in a post-conviction proceeding. State v. Preciose, 129 N.J. 451, 460 (1992).

Affirmed.