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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-0116-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ARTHUR L. HOYLE, a/k/a
SKINNYMAN HOYLE, and ARTHUR
HOYLE,

Defendant-Appellant.

Submitted November 28, 2017 – Decided January 18, 2018

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey,
Law Division, Cape May County, Indictment No.
08-07-0526.

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

Robert W. Johnson, Acting Cape May County
Prosecutor, attorney for respondent (Gretchen
A. Pickering, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant, who was charged with multiple drug offenses, filed numerous pretrial motions, including a motion to suppress evidence obtained from the use of a global positioning system (GPS) tracker and a motion to recuse the trial court judge. After the court denied the motion to suppress and the motion to recuse, defendant pled guilty to first-degree possession with intent to distribute a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(1).¹ In accordance with defendant's plea agreement, the trial court sentenced him to fourteen years imprisonment, with seven years of parole ineligibility.

Defendant then filed this appeal. He presents the following arguments for consideration:

POINT I

THE INITIAL GPS SEARCH WARRANT AFFIDAVIT DID NOT PROVIDE PROBABLE CAUSE TO BELIEVE THAT THE LAND ROVER WAS INVOLVED IN DRUG DISTRIBUTION.

POINT II

THE COURT ERRED IN FAILING TO FOLLOW THE DENIKE² STANDARD IN DEFENDANT'S MOTION FOR A RECUSAL.

We reject these arguments and affirm.

¹ Defendant's plea agreement preserved his right to appeal the orders denying his pretrial motions.

² DeNike v. Cupo, 196 N.J. 502 (2008).

Defendant first argues the search warrant affidavit failed to provide sufficient evidence linking him to the vehicle in which the GPS tracker was placed and to any narcotics distribution. As a result, defendant contends the State failed to establish probable cause for the issuance of a valid search warrant.

On December 28, 2007, a Superior Court judge issued a warrant authorizing the installation of a GPS tracker in a Land Rover utilized by defendant. Detective Robert P. Harkins, who was assigned to the Intelligence Unit of the Narcotics Task Force within the Cape May County Prosecutor's Office, provided the affidavit supporting the warrant application. Because a judge reviewing an affidavit for probable cause is limited to the information contained within the four corners of the affidavit, see State v. Wilson, 178 N.J. 7, 14 (2003), we begin our review with a summary of those facts.

In his affidavit, Detective Harkins set forth his extensive training and sixteen years of experience in investigative procedures regarding criminal street gangs, CDS distribution, and terrorism. He previously worked in conjunction with several law enforcement agencies, including the FBI, DEA, and New Jersey State Police, conducting surveillance of suspected criminals and participating in the execution of search warrants, resulting in

the arrest and conviction of suspected criminals. Through this knowledge and experience, he became familiar with the methods of installing and using a GPS tracking device.

According to the affidavit, on September 4, 2007, police in Henderson, North Carolina stopped a black Chevrolet Caprice driven by defendant on Interstate Route 85. Defendant produced a temporary registration that identified International Motorsports as the vehicle's owner, but the document did not identify the specific make, model, or vehicle identification number of the car. Defendant failed to produce any valid paperwork for the car and his New Jersey driver's license was suspended. Police smelled marijuana and found rolled marijuana blunts and \$8442 in cash inside the car. Police arrested defendant, charging him with possession with the intent to distribute marijuana.

On November 12, 2007, the New Jersey State police arrested defendant on the Garden State Parkway, charging him with eluding and possession of CDS. At the time, defendant was driving the Land Rover. Inside the car, police found a boarding pass from a November 2, 2007 flight from Atlanta to Philadelphia, a receipt for two checked bags, and a receipt for a box of "clothing" shipped from New Jersey to Georgia on July 19, 2007.

On November 16, 2007, Middle Township police received information from a confidential informant that defendant planned

to travel to northern New Jersey or New York to pick up a large quantity of narcotics. Police began surveillance along the Garden State Parkway and attempted to stop a Lincoln LS associated with defendant. The driver of the vehicle eluded police, who later found the car crashed, with cocaine and marijuana inside. Police were unable to identify defendant as the driver; however, the car was registered to defendant's ex-girlfriend, who told police she did not know who took her car, but she "wouldn't put it past" defendant, because he had taken the car before without permission.

On December 1, 2007, Middle Township police observed defendant driving the Land Rover. Further investigation revealed the Land Rover was registered in Georgia to defendant's mother.

During the week of December 3, 2007, Middle Township police received information from a "concerned citizen" that defendant was involved in distributing firearms to juveniles. The informant stated defendant was known as a high-ranking member of the Bloods street gang.

Defendant's criminal history records, at the time of the warrant request, included three convictions for drug possession, along with convictions for aggravated assault with a weapon, terroristic threats, resisting arrest and hindering apprehension. The New Jersey Department of Corrections and New Jersey State Police Intelligence Section for security threat group members

listed defendant as a member of the Bloods street gang. Criminal intelligence suggested defendant holds a supervisory position in the gang. The New Jersey Criminal History detail record indicated defendant had several gang-related tattoos.

Based on his training and experience, Detective Harkins believed a GPS tracker installed in the Land Rover defendant used would allow law enforcement to determine defendant's trends and habits, aid in physical surveillance operations, and help identify other individuals and locations involved in drug distribution.

Based on Detective Harkins's affidavit, a Superior Court judge authorized the GPS tracker's installation in the Land Rover for sixty days. The judge found the affidavit provided probable cause that a GPS tracking device installed in the Land Rover utilized by defendant would provide evidence of drug crimes involving defendant and others. Police installed the GPS, which provided information that led to evidence used against defendant.

On February 14, 2012, Judge Raymond Batten heard oral argument regarding defendant's motion to suppress the evidence resulting from the GPS device installed in the Land Rover. Judge Batten described the appropriate standard for probable cause and recognized the issuing judge's finding of probable cause should receive substantial deference. He acknowledged the requirement

of considering the totality of the circumstances, and the affidavit must provide contemporary information.

Judge Batten proceeded to review all of the information in the affidavit, including: the confidential informants' statements, police interactions with defendant, defendant's criminal history, the connection between defendant and the Land Rover, and defendant's gang affiliation. The judge denied the suppression motion, concluding the record established probable cause, as he was "not able[,] on this record[,] to find either fault or difficulty or any level of intellectual uncertainty[.]"

Under the Constitutions of the United States and New Jersey, individuals are protected from unreasonable searches and seizures, and no warrant shall issue except upon probable cause. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Unless a search falls within one of the recognized exceptions to the warrant requirement, the police must first obtain a warrant from a neutral judicial officer as a prerequisite to a search. State v. Sullivan, 169 N.J. 204, 210 (2001) (citing State v. Cooke, 163 N.J. 657, 664 (2000)). "Before issuing a warrant, the judge must be satisfied that there is probable cause to believe that a crime has been committed, or is being committed, at a specific location or that evidence of a crime is at the place sought to be searched." Ibid. (citing State v. Laws, 50 N.J. 159, 173 (1967)). The installation of a GPS

device in a vehicle constitutes a search under the Fourth Amendment of the U.S. Constitution. United States v. Jones, 565 U.S. 400 (2012).

The concept of probable cause "eludes precise definition." Sullivan, 169 N.J. at 210 (quoting Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000)). Courts generally accept it to mean "less than legal evidence necessary to convict though more than mere naked suspicion." Id. at 210-11 (quoting State v. Mark, 46 N.J. 262, 271 (1966)). Probable cause is "consistently characterized . . . as a common-sense, practical standard for determining the validity of a search warrant." State v. Novembrino, 105 N.J. 95, 120 (1987). It is met when police have "a 'well-grounded' suspicion that a crime has been or is being committed." Sullivan, 169 N.J. at 211 (quoting State v. Waltz, 61 N.J. 83, 87 (1972)).

In identifying the competing policy concerns behind the probable cause requirement, our Supreme Court explained:

Probable cause is a flexible, nontechnical concept. It includes a conscious balancing of the governmental need for enforcement of the criminal law against the citizens' constitutionally protected right of privacy. It must be regarded as representing an effort to accommodate those often competing interests so as to serve them both in a practical fashion without unduly hampering the one or unreasonably impairing the significant content of the other.

[State v. Kasabucki, 52 N.J. 110, 116 (1968).]

The United States Supreme Court similarly described probable cause as a "practical, nontechnical conception." Illinois v. Gates, 462 U.S. 213, 231 (1983) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)). Probable cause requires more than mere suspicion; it requires a showing of a "fair probability" that criminal activity is taking place. State v. Demeter, 124 N.J. 374, 380-81 (1991) (quoting Gates, 462 U.S. at 238).

Courts must base a probable cause determination on the totality of the circumstances and consider the probabilities. State v. Jones, 179 N.J. 377, 389 (2004) (citing Schneider v. Simonini, 163 N.J. 336, 361 (2000)). The court must also apply a qualitative analysis to the unique facts and circumstances of any given case. State v. Keyes, 184 N.J. 541, 556 (2005) (citing Jones, 179 N.J. at 390). The analysis comes down to a "practical, common-sense decision." Jones, 179 N.J. at 390 (quoting State v. Smith, 155 N.J. 83, 93 (1998)). "[W]hether or not probable cause exists 'involves no more than a value judgment upon a factual complex rather than an evident application of a precise rule of law, and indeed a value judgment which inevitably reflects the seasoning and experience of the one who judges.'" Schneider, 163

N.J. at 362 (quoting State v. Funicello, 60 N.J. 60, 72-73 (1972) (Weintraub, C.J., concurring)).

For these reasons, a reviewing judge "should pay substantial deference" to the discretionary determination of the issuing judge. Kasabucki, 52 N.J. at 117. Review of a warrant's adequacy "is guided by the flexible nature of probable cause and by the deference shown to issuing courts that apply that doctrine." Sullivan, 169 N.J. at 217. "[W]arrant applications 'should be read sensibly rather than hypercritically and should be deemed legally sufficient so long as they contain[] factual assertions which would lead a prudent [person] to believe that a crime [has] been committed and that evidence . . . of the crime [is] at the place sought to be searched.'" Ibid. (quoting Laws, 50 N.J. at 173 (alteration in original)).

"[W]hen the adequacy of the facts offered to show probable cause is challenged after a search made pursuant to a warrant, and their adequacy appears to be marginal, the doubt should ordinarily be resolved by sustaining the search." Jones, 179 N.J. at 388-89 (quoting Kasabucki, 52 N.J. at 116). It is therefore well settled that a search executed pursuant to a warrant is presumed valid, and the defendant bears the burden of proving lack of probable cause in the warrant application. Sullivan, 169 N.J. at 211 (citing State v. Valencia, 93 N.J. 126, 133 (1983)).

Applying these principles, we agree with Judge Batten's assessment that the issuing judge committed no error in finding probable cause. The affidavit contains multiple sources identifying defendant as a high-ranking member of the Bloods street gang, an extensive criminal history including three drug-possession convictions, and several police observations of drug-related activity. In the totality of the circumstances, these facts presented more than a "fair probability" that criminal activity was taking place. See Demeter, 124 N.J. at 380-81. Furthermore, there was probable cause that the Land Rover, in particular, was involved in the criminal activity. The affidavit presented three times when police observed defendant driving the Land Rover; one of those times, police arrested defendant for possession of CDS. Defendant's suppression motion was properly denied.

II

Defendant next argues that Judge Batten erred in failing to recuse himself. On April 14, 2010, Judge Kyran Conner recused himself from defendant's case after defendant's then counsel filed an unrelated federal case naming the judge as a defendant. On June 8, 2010, defendant argued a motion to change venue from Cape May County to Atlantic County, and to disqualify Judge Batten "because of the situation with Judge Conner." Assignment Judge

Valerie Armstrong denied this motion reasoning the conflict with Judge Conner did not extend to all of Cape May County or specifically to Judge Batten. She further noted that Judge Batten retained the discretion to recuse himself, if he should deem it necessary. Two days later, after hearing oral argument, Judge Batten concluded no basis existed for him to recuse himself from defendant's case, finding no conflict or appearance of conflict.

On November 4, 2011, the Sheriff's Department cleared the courtroom of anyone other than attorneys due to a security risk. Judge Batten received information that defendant "has undertaken efforts to . . . contact individuals outside the jail to somehow jeopardize [Judge Batten's] safety." Defendant denied making any threat. Defendant then filed a motion to disqualify Judge Batten and change venue because of this incident. On January 13, 2012, Judge Batten denied the motion, reasoning he received similar communications in the past and the sheriff simply followed protocol in clearing the courtroom. The judge found no circumstances that would "compel or even justify recusal," and stated the incident would not affect his judgment in any way.³

³ Judge Batten eventually did recuse himself, in spring 2012, after defendant filed a federal lawsuit against him.

We have considered defendant's arguments regarding the judge's denial of his recusal motion in light of the record and applicable legal principles and conclude they lack sufficient merit to warrant extended discussion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons expressed by Judge Batten in his oral opinion rendered on January 13, 2012. We add the following comments.

Rule 1:12-1(g) provides, "The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter, . . . when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." Furthermore, pursuant to Rule 1:18, all judges in New Jersey must abide by the Code of Judicial Conduct. Canon 3.17(B) of the Code of Judicial Conduct provides: "Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned," and provides a non-exclusive list of examples. Code of Judicial Conduct, Pressler & Verniero, Current N.J. Court Rules, Appendix to Part 1 at 534 (2018). In short, "[o]ur rules . . . are designed to address actual conflicts and bias as well as the appearance of impropriety." State v. McCabe, 201 N.J. 34, 43 (2010). The standard in determining whether recusal is appropriate asks: "Would a reasonable, fully

informed person have doubts about the judge's impartiality?" DeNike, 196 N.J. at 517.

Rule 1:12-2 permits a party to file a motion seeking to disqualify the judge presiding over the case. The decision to grant or deny the motion rests entirely within the "sound discretion" of the trial judge. Chandok v. Chandok, 406 N.J. Super. 595, 603, (App. Div. 2009) (quoting Panitch v. Pantich, 339 N.J. Super. 63, 66 (App. Div. 2001)). However, "[w]e review de novo whether the proper legal standard was applied." State v. McCabe, 201 N.J. 34, 45 (2010).

In cases where the defendant has allegedly threatened the judge, recusal is not always required. State v. Dalal, 221 N.J. 601, 609 (2015). "[W]hen there is any evidence that a defendant has conveyed a threat to prompt the recusal of a judge or somehow manipulate the proceedings, recusal is not required." Id. at 608. In deciding whether recusal is appropriate, the court should consider the following factors:

the nature and context of the threat; whether there is any evidence that the threat was designed, in whole or part, to manipulate the system and/or force a recusal; whether the threat was meant to be communicated to the judge or was delivered in connection with a court proceeding relating to the defendant's case; whether evidence of the threat will be presented or referred to at trial; and whether the judge presiding over the case is the object of the threat. . . .

The timing of a threat matters as well. For example, a defendant's outburst in the middle of a trial, with the presentation of evidence to a jury underway, might reasonably be seen as an attempt to thwart the orderly administration of justice and would not necessarily call for recusal.

[Id. at 608-09.]

The timing and circumstances of the threats here suggest an intention to manipulate the proceedings. Defendant previously succeeded in having Judge Conner recused after defense counsel filed a federal case naming the judge as a defendant. Defendant then moved for Judge Batten's recusal due to his alleged relationship with Judge Conner. When that effort failed, Judge Batten received a threat, arguably a second attempt to have him recused, although defendant denied making the threat. The threat came after Judge Batten had heard and denied three pretrial motions filed by defendant, with six more pretrial motions pending. Finally, when that effort failed as well, defendant resorted to the initial method of filing a federal suit against the judge, which ultimately caused Judge Batten to recuse himself.

In denying defendant's motion for recusal, Judge Batten followed the DeNike standard. Also, although the Supreme Court decided Dalal after Judge Batten denied the recusal motion, his reasoning foreshadowed many of the factors from Dalal. See Dalal,

221 N.J. at 608-09. First and foremost is the inference that defendant may have initiated the threat to force a recusal. In addition, Judge Batten noted it is not unusual as a criminal court judge to receive threats. Judge Batten emphasized that the threat and subsequent clearing of the courtroom had no impact on the motions he decided that day. He also reasoned granting recusal would only encourage other threats against judges in order to force recusal, stating that granting recusal here "would affectively render [defendant] a self-fulfilling prophet in terms of his expression of discontent." We conclude Judge Batten made a well-reasoned decision and did not abuse his discretion in denying defendant's motion for recusal.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION