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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0441-17T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

TROY FRIDAY,

Defendant-Respondent.

Argued April 10, 2018 – Decided April 27, 2018

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 16-08-1361.

Monica do Outeiro, Assistant Prosecutor, argued the cause for appellant (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Monica do Outeiro, of counsel and on the brief).

Michael Denny, Assistant Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Michael Denny, of counsel and on the brief).

PER CURIAM

By leave granted, the State appeals from an August 3, 2017 order, granting defendant Troy Friday's suppression motion. We

affirm substantially for the reasons stated by the motion judge in her thirty-three page written opinion. We add these comments.

According to Tinton Falls Detective Wilson, the Ocean County Prosecutor's Office (OCPO) asked the Tinton Falls police department to participate in a drug investigation, centered on two adjacent rooms on the second floor of a Red Roof Inn (motel) in Tinton Falls. The OCPO investigation began on February 10, 2016. According to a search warrant affidavit, which the judge described in her opinion, the investigation included video and photo surveillance.[1]

Wilson testified that on February 12, 2016, the OCPO held a briefing for the Tinton Falls detectives, who were expected to assist in looking for three suspects who were staying at the motel. Wilson testified that during the briefing, the OCPO detectives only said they were looking for two black men and a black female, with no more specific description of the suspects.

[1] We find no abuse of the judge's discretion in considering facts drawn from the search warrant affidavit, which defendant set forth in his pre-hearing brief. The State did not contest those facts in its responding pre-hearing brief, and the judge could reasonably treat the facts as uncontested. As set forth in Rule 3:5-7(c), an evidentiary hearing is required on a suppression motion to resolve material facts that are in dispute. If the State believed that defendant's brief inaccurately described the contents of the affidavit, it should have so stated, or produced the affidavit at the hearing. However, even now, the State does not contest the accuracy of defendant's description of the affidavit.

Wilson claimed that as he was knocking on the door of one of the two adjacent motel rooms, which were on the west end of the second-floor hallway, he saw defendant, a black man, walking toward him from the east end of the hallway. When defendant reached a staircase in the middle of the hallway, he went down those stairs. Wilson thought it was suspicious that defendant chose to walk down the middle stair case after seeing a police officer, but he did not clearly explain why he thought it was suspicious. Wilson claimed he had no idea what the suspects looked like, other than their race.

Wilson followed defendant into the motel parking lot, stopped him, and took his driver's license. Wilson then made defendant wait while he called dispatch and checked the identification with an OCPO detective on the scene. The detective told Wilson to let defendant go because he was not "involved in the investigation." A minute or two later, dispatch called Wilson back and told him there was an outstanding warrant for defendant on an unrelated matter. Wilson called another officer on the scene (the second officer) to stop defendant again.

The second officer testified that he saw Wilson standing behind some bushes and told him to stop, but did not tell him he was under arrest. According to the officer, defendant ran away but somehow reappeared in the same bushes a moment later. The

officer arrested defendant and, according to the officer, he found a gun underneath an air conditioning unit in the bushes.

Defendant moved to suppress the evidence of the gun, asserting that Wilson had conducted an investigatory stop with no reasonable, articulable suspicion that defendant was involved in criminal activity.

The motion judge "found . . . it incredible that during a three-day investigation, . . . the Ocean County Prosecutor's Office would not have . . . told [the Tinton Falls] officers what the suspects looked like." She was skeptical that the OCPO would not have described any "particular attributes, distinguishing marks or features, of these suspects, such as skin tone, tattoos, hair style, dreadlocks, etc." She also reasoned that if the OCPO did not pass on that information, but merely told the local police to be on the lookout for black males, they were in effect authorizing the suspicion-less stop of any black males at the motel.

The judge further noted that, on the morning of February 12, 2106, the OCPO investigators knew that one of the male suspects and the female suspect had already left the motel. She concluded that, based on the conduct of the police, "every black male appearing at the Red Roof Inn or at least who had the misfortune to appear on the second floor of the Red Roof Inn was subject to being stopped by the police."

The judge did not believe Wilson's testimony that he did not pat defendant down for weapons. She also concluded that when Wilson then took defendant's driver's license and required him to wait until Wilson showed the license to an OCPO detective, no reasonable person in defendant's position would have believed that he was free to leave. See State v. Rosario, 229 N.J. 263, 273-74 (2017). The judge concluded that the stop constituted an investigative detention, unsupported by any reasonable and articulable suspicion.

Based in part on State v. Shaw, 213 N.J. 398 (2012), the judge further concluded that the State was not entitled to the benefit of the attenuation doctrine. She stated:

> On the facts of this case, this trial court finds . . . . that the police stop is the type of purposeful or flagrant misconduct that weighs against the [warrant] serving as a determinative intervening circumstance. The police stop of defendant was a random stop of a person based simply on [his] race.

The judge also did not credit portions of the second officer's testimony, including defendant's allegedly running around the building and reappearing in the bushes.

On this appeal, we defer to the trial court's findings so long as they are supported by substantial credible evidence. See State v. S.S., 229 N.J. 360, 379-81 (2017). We must appreciate that the trial court had the opportunity to observe the witnesses

first-hand, to judge their credibility, and to get a feel for what really occurred during this incident. See State v. Elders, 192 N.J. 224, 243-44 (2007); State v. Locurto, 157 N.J. 463, 471 (1999). The motion judge was plainly unconvinced by the police testimony. We find no basis to second-guess her evaluation. In fact, even on a reading of the cold record, there are parts of the testimony that do not seem believable.

The judge's factual conclusion, that defendant was stopped because he was a black man, rather than for any other reason, is supported by substantial credible evidence. See State v. Minitee, 210 N.J. 307, 317 (2012). Based on the facts as the judge found them to be, her legal conclusions are correct.

Given all of the surrounding circumstances, we agree with the judge's conclusion that what occurred here was an investigatory stop, based on race and unsupported by a reasonable, articulable suspicion. See Rosario, 229 N.J. at 277; Shaw, 213 N.J. at 411-12. Given the flagrancy of the violation, the discovery of the warrant was not sufficiently attenuated from the improper stop to justify denying the suppression motion. See Shaw, 213 N.J. at 422. Finally, we infer from the judge's decision that she did not credit the second officer's testimony about defendant's alleged flight after being told to stop.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION