SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0468-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JONATHAN L. RADCLIFFE BIVINS
a/k/a JONATHAN L. RADCLIFFEBIVINS,

Defendant-Appellant.

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Submitted January 9, 2018 – Decided April 12, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Indictment Nos. 15-04-0863 and 15-06-1236.

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

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

PER CURIAM

Defendant Jonathan L. Radcliffe Bivins appeals from an order denying his motion to suppress evidence, contending:

> POINT I
>
> SINCE THE POLICE OFFICER REALIZED THAT THE DRIVER WAS NOT THE OWNER OF THE VEHICLE PRIOR TO SMELLING MARIJUANA, THERE WAS NO BASIS FOR A FIELD INQUIRY FOR [BIVINS'] DRIVER'S LICENSE, AND THE DRUGS SUBSEQUENTLY FOUND IN THE CAR SHOULD HAVE BEEN SUPPRESSED.

When reviewing a motion to suppress, we "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). "To the extent that the trial court's determination rests upon a legal conclusion, we conduct a de novo, plenary review." Ibid. Applying that standard of review, we affirm.

The motion judge's findings were derived from testimony she heard at an evidentiary hearing from two Toms River police officers, one of whom randomly entered the license plate of the vehicle defendant was operating in a police computer when it passed his stationary, marked patrol vehicle on the shoulder of Route 70. The "DMV database" revealed the registered owner of the vehicle — a white male — had a suspended driver's license. The officer was unable to see the driver of the vehicle because of the traffic

volume, the vehicle's speed at which it passed his patrol car — approximately forty to fifty miles per hour — and the delay between entry of the license plate and the display of the license information on the computer screen.[1]

The officer pursued the vehicle, pulled up behind it, and conducted a motor vehicle stop. See State v. Pitcher, 379 N.J. Super. 308, 314-15 (App. Div. 2005) (recognizing New Jersey Supreme Court precedent upholding motor vehicle stops based on random license plate checks that revealed a driver's license is suspended). The officer approached the vehicle after defendant had pulled into a Wawa lot.

The judge's finding — critical to the determination of this case — was based on the officer's testimony

> that, and the [c]ourt finds that his testimony was credible, . . . he walked up to the car and at this juncture is when he indicated that he had a strong smell of burnt marijuana . . . . And then it was when he observed the driver and at that point the physical description did not match the registered owner's driver. . . . At this point because of the indication that he had smelled the marijuana he continued his investigation.

Notwithstanding defendant's contention that the officer's report indicated that he did not smell marijuana until after he had asked

[1] The officer testified there was "maybe a three to five second delay."

defendant for his credentials, we accord strong deference to the judge's ability to assess the credibility of the witnesses in light of her "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Locurto, 157 N.J. 463, 471 (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). We do not perceive that the judge's finding was "so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

In light of those findings we need not determine whether the officer's actions after he saw defendant — who is African-American, not the white male described as the unlicensed registered owner — were proper.[2] Nor need we examine the propriety of the officer's request for credentials from defendant.[3] The plain smell of marijuana, as the motion judge found, justified the officer's continued investigation.[4]

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[2] Defendant does not argue that race was the officer's sole motivation in entering the license plate in the computer, thereby rendering the stop illegal. State v. Segars, 172 N.J. 481 (2002).

[3] The State urges State v. Hickman, 335 N.J. Super. 623 (App. Div. 2000), supports the officer's request.

[4] The motion judge, citing State v. Myers, 442 N.J. Super. 287 (App. Div. 2015), also concluded the smell of marijuana gave rise

Defendant does not challenge the balance of police action. When asked to produce his credentials, defendant did not produce a driver's license and gave what the officer discovered was a false name. The officer ascertained defendant was wanted on outstanding warrants and arrested defendant. The officer's testimony and that of the other responding officer — both credited by the judge — proved defendant's vehicle, which was stopped in a busy area of the Wawa lot next to the gas pumps, was moved at defendant's request so his girlfriend could later retrieve it and avoid having the vehicle impounded. When the other officer moved the vehicle, he observed glassine baggies in the open console which he, based on his training and experience, recognized as controlled dangerous substances.[5] The motion judge found all of the necessary factors of the plain-view test were met. State v. Johnson, 171 N.J. 192, 206-07 (2002);[6] since defendant has not challenged that aspect of this search and seizure, we need not review the judge's findings. Robinson, 200 N.J. at 20.

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to probable cause that defendant had committed an offense, and that "contraband might be present." See also State v. Walker, 213 N.J. 281, 290 (2013).

[5] The controlled dangerous substances were later determined to be cocaine and heroin.

[6] In State v. Gonzales, 227 N.J. 77 (2016), our Supreme Court modified the plain view test. This motion predated that case, which was given only prospective application.

Giving deference to the motion judge's findings of fact that were supported by the record, we affirm.