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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-0666-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD KILPATRICK, a/k/a DONALD
ATKINS and RAY KILPATRICK,

Defendant-Appellant.

Submitted May 1, 2018 - Decided May 16, 2018

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County, Indictment No.
14-08-0541.

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

Michael H. Robertson, Somerset County
Prosecutor, attorney for respondent (Paul H.
Heinzl, Assistant Prosecutor, of counsel and
on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Donald Kilpatrick was convicted of third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1). Defendant appeals from the denial of his motion to suppress the seized CDS evidence. He also appeals from his conviction, arguing the prosecutor's comments during closing argument deprived him of a fair trial. We affirm.

The following facts were presented during the evidentiary hearing on defendant's motion to suppress evidence. On June 25, 2014, Officer Frederick Fittin of the South Bound Brook Police Department was on patrol and observed a car exit a QuickChek parking lot. Fittin testified that the car had tinted windows, so he followed the car briefly, until it parked in an active crime area.

Fittin parked his patrol car in such a way that it blocked the car with the tinted windows. Defendant, who was driving the car, exited the vehicle. The officer got out of his patrol car and asked defendant for his credentials, including the registration and insurance information for the car. Defendant provided a New Jersey identification card, explaining he did not have his driver's license with him.

With the car door open, defendant looked for the registration and insurance information. Fittin smelled marijuana and alcohol

emanating from the interior of the car. Fittin advised defendant that he detected these odors and called for backup.

Fittin then performed a pat down of defendant because the officer wanted to ensure his safety in case of a potential weapon. When Fittin conducted the pat down, he felt a soft bulge in the front "fifth" pocket of defendant's pants. Fittin asked defendant what was in his pocket, and defendant replied he did not know. Fittin asked Officer Thomas Burgin, who had arrived as back-up, to feel defendant's front pocket. Burgin testified that the bulge in defendant's pants pocket felt like CDS. Defendant gave Fittin permission to remove the object from his pocket, which turned out to be a plastic bag filled with white powder. The substance later tested positive as cocaine.

Fittin advised defendant of his Miranda¹ rights and handcuffed defendant. The officers asked defendant for consent to search the car. Defendant agreed and signed a written consent form for the search of the car. The search uncovered cigars, cigar tobacco, and empty alcoholic beverage containers.

In the motion to suppress the CDS evidence, defendant argued the police did not have reasonable articulable suspicion to believe that a motor vehicle violation occurred or that defendant was

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

armed and dangerous. Consequently, defendant contended the motor vehicle stop and the pat-down search of his person were unconstitutional.

The motion judge denied the motion. The judge found the stop of defendant's car was justified based on the officer's testimony that the car windows were darkly tinted, obstructing the view through the windows. The judge also concluded the officer's search of defendant's person was proper. The judge deemed the officer smelling marijuana in the car's interior created a reasonable suspicion that an offense was being committed sufficient to establish probable cause for defendant's arrest and the warrantless search of defendant's person. The judge also found exigent circumstances justifying the search of defendant's person because the officer had no practical opportunity to secure a warrant without risking the destruction of CDS evidence.

After denial of defendant's motion to suppress, the matter proceeded to trial. The trial testimony of Officers Fittin and Burgin was consistent with their testimony during the suppression hearing. Based on the testimony and evidence presented, the jury found defendant guilty of possession of CDS. The judge sentenced defendant to a four-year term of imprisonment with a one-year period of parole ineligibility.

On appeal, defendant argues:

POINT I

THE DENIAL OF THE MOTION TO SUPPRESS MUST BE REVERSED AS THE STOP OF THE CAR WAS UNLAWFUL UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 7, OF THE NEW JERSEY CONSTITUTION.

POINT II

THE DENIAL OF THE MOTION TO SUPPRESS MUST BE REVERSED AS THE SEARCH OF DEFENDANT'S PERSON WAS UNLAWFUL UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 7, OF THE NEW JERSEY CONSTITUTION.

POINT III

THE SEIZURE OF THE OBJECT FROM DEFENDANT'S POCKET WAS UNLAWFUL BECAUSE IT WAS NOT CLEAR TO THE OFFICER THAT THE OBJECT WAS ILLEGAL CONTRABAND AT THE TIME IT WAS SEIZED.

POINT IV

DEFENDANT'S CONVICTION MUST BE REVERSED BECAUSE OF PROSECUTORIAL MISCONDUCT AS THE PROSECUTOR COMMENTED ON DEFENDANT'S POST-ARREST SILENCE IN HER SUMMATION.

We first consider defendant's arguments related to the denial of his motion to suppress evidence. In reviewing a motion to suppress, we "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. Elders, 192 N.J. 224, 243 (2007) (citation omitted). This is true especially when the findings of the trial court are "substantially influenced by [its] opportunity to hear and see the witnesses and to have the

'feel' of the case." Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). The trial court's legal conclusions are entitled to no special deference, and are reviewed de novo. State v. Gandhi, 201 N.J. 161, 176 (2010).

"A motor vehicular violation, no matter how minor, justifies a stop without any reasonable suspicion that the motorist has committed a crime or other unlawful act." State v. Bernokeits, 423 N.J. Super. 365, 370 (App. Div. 2011). The State does not need to prove that the motor vehicle violation occurred, only that "the police lawfully stopped the car." State v. Heisler, 422 N.J. Super. 399, 413 (App. Div. 2011) (quoting State v. Williamson, 138 N.J. 302, 304 (1994)).

In accordance with N.J.S.A. 39:3-74, a person is prohibited from driving a "vehicle [with tinted windows] . . . as to unduly interfere with the driver's vision to the front and to the sides." Tinted windows obstructing vision are a basis for a lawful stop. State v. Cohen, 347 N.J. Super. 375, 378-81 (App. Div. 2002).

According to Officer Fittin's testimony at the suppression hearing, the windows on defendant's car were "all tinted, driver's side, passenger's side, front and rear." As a result, the officer was unable to see defendant in the driver's seat despite the officer's close proximity to defendant's vehicle. Defendant

failed to proffer any testimony during the suppression hearing with respect to the tint on the car windows.

Defendant argues that the officer lacked reasonable suspicion necessary to stop his vehicle. We agree with the finding of the motion judge that the motor vehicle stop was proper based on the officer's reasonable belief that the car had unlawfully tinted windows. Moreover, the judge's finding was based on Officer Fittin's uncontroverted testimony during the suppression hearing.

Having concluded that the stop of defendant's car was constitutional, we next examine whether the officers' search of defendant's person was illegal such that the CDS evidence should have been suppressed.

The motion judge deemed the search of defendant's person was not a search for weapons because the officer had no reasonable belief that defendant was armed and dangerous. Rather, the judge determined the search of defendant's person was based on the officer smelling marijuana and believing that defendant possessed drugs on his person.

The judge concluded that exigent circumstances existed to support a warrantless search of defendant's person based on the possible destruction of drug evidence. The judge found

[e]xigent circumstances justifying the warrantless search were present because of the destructible nature of [drug] evidence. It

is clear that [drug] evidence could have been consumed, hidden, or destroyed by the time a search warrant was issued. Given . . . the impracticality of obtaining a search warrant in this situation, the warrantless search of [d]efendant's person comported with the requirements of the Fourth Amendment.

"New Jersey courts have [long] recognized that the smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Walker, 213 N.J. 281, 290 (2013) (alteration in original) (quoting State v. Nishina, 175 N.J. 502, 515-16 (2003)). The odor of marijuana gives rise to probable cause to conduct a warrantless search of the persons in the immediate area from where the smell emanated. State v. Myers, 442 N.J. Super. 287, 297 (App. Div. 2015). Once an officer smells burnt marijuana emanating from a vehicle, the officer has probable cause to arrest the driver, as well as to search the driver incident to arrest. State v. Judge, 275 N.J. Super. 194, 202-03 (App. Div. 1994).

In this case, the officer stopped defendant's car in "an active crime area." When defendant opened the car door to look for the registration and insurance documents, the officer "detected the odor of marijuana." Based on the smell of marijuana,

as well as the time and location of the motor vehicle stop,² it was objectively reasonable for Fittin to conduct a search of defendant's person.

Upon conducting the search, based on his years of experience and training as a police officer, Fittin held a reasonable belief that the soft bulge in defendant's pants pocket was drugs. More importantly, defendant, after denying knowledge as to the item in his pocket, gave permission to the officer to remove the item from his person. On this record, we reject defendant's argument that the officer lacked sufficient information, under the totality of the circumstances, to identify the object in defendant's pocket as probable contraband.

We discern no error in the motion judge's determination that the officer "had no practical opportunity to secure a warrant once faced with an immediate and well-grounded suspicion that defendant illegally possessed marijuana in the officer's presence." Nishina, 175 N.J. at 517. The officer had probable cause to arrest and search defendant based on the smell of burnt marijuana emanating from the car and the exigent circumstances involving the potential destruction of drug evidence. Based on the credible

² The time of the stop was 2:00 a.m. and the location of the stop was in a known drug area where the officer had made multiple arrests previously.

evidence in the record, the drugs found in defendant's pocket were the product of a lawful search, justifying denial of defendant's motion to suppress.

We next consider whether the assistant prosecutor's comments during summation deprived defendant of his right to a fair trial. All persons accused of crimes are guaranteed the right to a fair trial. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. When a prosecutor engages in improper conduct during trial, such behavior can erode a defendant's right to a fair trial. State v. Wakefield, 190 N.J. 397, 446 (2007). To justify a reversal based on prosecutorial misconduct, the prosecutor's conduct must "substantially prejudice the defendant's fundamental right to have a jury fairly evaluate the merits of his [or her] defense." State v. Roach, 146 N.J. 208, 219 (1996) (quoting State v. Bueanis, 26 N.J. 45, 56 (1958)).

We review the import of a prosecutor's remarks during summation in their entirety. State v. Jackson, 211 N.J. 394, 409 (2012). We also consider whether defense counsel made a timely objection to such remarks, whether the remarks were withdrawn, and whether the court instructed the jury regarding the remarks. Ibid.

In her summation, defense counsel suggested that the police planted the drugs on defendant's person during the motor vehicle stop. The assistant prosecutor responded to defense counsel's

suggestion, arguing in summation that defendant would not have remained silent and would have said something if the officers had planted drug evidence.

Defense counsel objected to the assistant prosecutor's summation, arguing that the statement amounted to improper burden shifting and impermissible argument. Although the trial judge did "not believe that [the] comment is of a type which impairs the defendant's Fifth Amendment privilege," the judge agreed to "instruct the jury that the defendant does not have to prove that the cocaine was planted on him." The trial judge also explained that "in an exercise of caution, the jury should be told, reminded that the defendant need not prove that he is innocent."

The judge invited defense counsel to draft the language for a curative instruction on the issue. Based on defense counsel's suggested curative instruction, the judge instructed the jury:

I wanted to tell you that the State has argued in its summation that during the course of that video that you – and audio that you heard but didn't see, that when the officer pulled the alleged cocaine from the defendant's jeans pocket, the defendant would have been expected to say something to the effect, whoa, what are you doing? What are you trying to pull here? And then the officer says, what are you saying? We planted this? And it was suggested that if the defendant felt the officer was trying to plant something on him he would have said something to that effect.

Now, I remind you that the defendant, Mr. Kilpatrick, has no obligation to prove his innocence. The State retains the burden of proof. The defendant retains the presumption of innocence. And that remains unless and until you find that the State has met its burden to prove the charge beyond a reasonable doubt.

So, therefore, you must consider all of the evidence presented in reaching your verdict But any reference to what the defendant might have been expected to say may not be used by you or considered as evidence of his guilt because a failure of a defendant to produce evidence or to say anything at that time or under those circumstances is not evidence of his guilt because he has no such burden.

On appeal, defendant argues his conviction must be reversed because the assistant prosecutor impermissibly commented on his post-arrest silence. Defendant also claims that the assistant prosecutor's statement shifted the burden of proof, resulting in an unfair trial.

We reject defendant's arguments on this point. The trial judge responded to defense counsel's objection by incorporating her proposed language into the curative instruction read to the jury. Even if the assistant prosecutor's comments were improper, they were not "so egregious that a prompt and proper instruction would not ameliorate their prejudicial effect." State v. Cooke, 345 N.J. Super. 480, 486 (App. Div. 2001). We find that the trial judge took swift and appropriate action in response to defense

counsel's objection such that defendant was not deprived of a fair trial. We have considered defendant's pro se appellate brief and conclude it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION