

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
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-1795-16T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

RICHARD SMITH,

Defendant-Respondent.

---

Submitted November 27, 2017 – Decided January 29, 2018

Before Judges Ostrer and Whipple.

On appeal from an interlocutory order of  
Superior Court of New Jersey, Law Division,  
Camden County, Indictment No. 16-02-0485.

Mary Eva Colalillo, Camden County Prosecutor,  
attorney for appellant (Lee Brownstein,  
Assistant Prosecutor, of counsel and on the  
brief).

Megan J. Davies, attorney for respondent.

PER CURIAM

The State appeals by leave granted from a November 18, 2016  
order of the trial court granting defendant's motion to suppress  
evidence. We affirm.

I.

We discern the following facts from the record on appeal. In May 2015, the Cherry Hill Police Department received a tip from a confidential informant (CI) that a person was distributing large quantities of cocaine in the area. This CI had provided credible information which led to arrests in the past. The CI reported knowing the drug trafficker as "Jay" and described him as a Hispanic male, approximately 5'7" and 180 pounds, with short dark hair and a dark mustache.

Using this description, Cherry Hill Detective Sergeant Schuenemann and Detective Sergio Velazquez conducted searches of social media and law enforcement databases and located Joshua Sanchez. The CI subsequently identified Sanchez as Jay in a photograph.

In June 2015, the police set up a meeting to have an undercover officer purchase a half ounce of cocaine from Sanchez. Schuenemann, acting as an undercover officer, confirmed the CI's assertion that Jay was Sanchez, and successfully purchased a half ounce of cocaine from him. During this transaction, a second Hispanic male, who was never identified to the police, was present with Sanchez.

Again, in August 2015, two more undercover drug purchases transpired between Schuenemann and Sanchez in which Schuenemann

purchased multiple ounces of cocaine. At one of these transactions, a different unidentified Hispanic male was present.

In October 2015, Schuenemann purchased two more ounces of cocaine from Sanchez. An unidentified black male was present during this transaction.

On November 24, 2015, the police obtained an arrest warrant for Sanchez. The police did not identify any of the individuals present with Sanchez at the various undercover drug purchases. At approximately 7:20 p.m. on November 24, 2015, the police traveled to meet Sanchez in a shopping mall parking lot for an undercover drug purchase, set up for the purpose of apprehending him on the warrant.

Upon arriving, the police observed Sanchez's SUV circling, and Sanchez and a black male, then unknown to the police but later identified as defendant, exited the vehicle. The police takedown teams<sup>1</sup> converged on the vehicle, and both males began to run but were subsequently apprehended and placed under arrest. Upon his arrest, the police searched defendant and found him to be in possession of approximately two ounces of cocaine.

---

<sup>1</sup> The testifying officer at the motion hearing did not witness the takedown, and did not testify as to whether the takedown team ordered the men to stop or whether the police clearly and unambiguously identified themselves as law enforcement prior to the takedown.

A Camden County Grand Jury returned an indictment against defendant and Sanchez. Defendant was indicted for third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1), and second-degree possession of a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2).

Defendant moved to suppress the cocaine found in his possession. On November 18, 2016, the trial court granted defendant's motion after hearing arguments and determining, under the totality of the circumstances, the police did not have probable cause to arrest defendant. He was subject to a de facto arrest, rather than an investigative stop, pursuant to Terry v. Ohio, 392 U.S. 1 (1968), and therefore probable cause was necessary to search him.

This appeal followed. On appeal, the State asserts the trial judge erred in finding no probable cause to arrest or search defendant.

## II.

We review the grant or denial of a motion to suppress with deference to the factual findings of the trial court if those findings are supported by sufficient evidence in the record. State v. Hubbard, 222 N.J. 249, 262 (2015). We should be deferential to a trial judge's factual findings which "are often influenced

by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999) (citations omitted). We disregard those findings only when a trial court's findings of fact are clearly mistaken. Hubbard, 222 N.J. at 262.

Both the United States and New Jersey Constitutions protect individuals against unreasonable searches and seizures. U.S. Const., amend IV; N.J. Const., art. I, ¶ 7. "Warrantless seizures and searches are presumptively invalid as contrary to the United States and the New Jersey Constitutions." State v. Pineiro, 181 N.J. 13, 19 (2004) (citation omitted). To overcome this presumption, the State must show the search falls within one of the well-recognized exceptions to the warrant requirement. State v. Maryland, 167 N.J. 471, 482 (2001) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)); see State v. Hill, 115 N.J. 169, 173-74 (1989). The State bears the burden to demonstrate by a preponderance of evidence that such a search and seizure is legal. State v. Valencia, 93 N.J. 126, 133 (1983).

One of these exceptions involves searches incident to a lawful arrest, established in Chimel v. California, 395 U.S. 752 (1969), and first applied by the New Jersey Supreme Court in State v. Welsh, 84 N.J. 346 (1980). This exception is "invocable to ensure police safety or to avoid the destruction of evidence." State v.

Eckel, 185 N.J. 523, 539 (2006) (citations omitted). However, this exception "requires that there be probable cause to arrest." State v. Dangerfield, 171 N.J. 446, 456 (2002).

"Probable cause exists if at the time of the police action there is 'a well-grounded suspicion that a crime has been or is being committed.'" State v. Sullivan, 169 N.J. 204, 211 (2001) (quoting State v. Waltz, 61 N.J. 83, 87 (1972)); State v. Moore, 181 N.J. 40, 45 (2004). Courts should utilize the totality of the circumstances test to make "a practical, common sense determination whether, given all of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" Moore, 181 N.J. at 46 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

The State argues defendant was likely privy to the details of a call placed by the police to Sanchez before the arrest, and together with the fact that Sanchez had utilized accomplices for drug transactions with the police in the past, the totality of the circumstances gave the police probable cause. We disagree.

Probable cause must be "particularized with respect to that individual or vehicle." State v. Dolly, 255 N.J. Super. 278, 283 (App. Div. 1991) (citation omitted). Defendant was never identified as a previous accomplice of Sanchez, and he was not known to the police. "[M]ere propinquity to others independently

suspected of criminal activity does not, without more, give rise to probable cause' to search a person." Ibid. (quoting Ybarra v. Illinois, 444 U.S. 85, 90 (1979)). The execution of an arrest warrant does not "confer broad authority on the police to subject those in the vicinity to the indignity of searches because they happen to be there." State v. Rivera, 276 N.J. Super. 346, 351 (App. Div. 1994) (citation omitted); see Dolly, 255 N.J. Super. at 283.

In Michigan v. Summers, the United States Supreme Court found that

some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity.

[452 U.S. 692, 699 (1981).]

Summers involved the execution of a valid search warrant by the police. Id. at 693. When the police arrived at the target premises, they detained the defendant homeowner while they searched it. Ibid. When the police found narcotics in the house, they arrested the defendant and searched him, finding narcotics on his person. Ibid. The Court considered whether it was reasonable for the police to detain the defendant prior to the

completion of the search. Id. at 694. After reasoning that a neutral and detached magistrate had found sufficient probable cause that "an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." Id. at 705. As such, it was lawful for the police to detain him prior to the search. Ibid.

Summers, however, is distinguishable from this case. At issue here is not whether it was lawful to detain and search defendant because the police had a warrant to search the car, but rather whether it was lawful for the police to forcibly arrest him and search him, when they had an arrest warrant naming only Sanchez. Because defendant was present when the police executed the arrest warrant on Sanchez and both defendant and Sanchez attempted to flee when the police converged, the police arrested defendant and searched him. The court suppressed the evidence uncovered as a result of that search, finding the police did not have probable cause to arrest defendant under the totality of the circumstances.

Other courts have upheld warrantless arrests so long as the police have sufficient probable cause that they could have obtained an arrest warrant. See e.g., United States v. Watson, 423 U.S. 411, 417 (1976) (citing Abel v. United States, 362 U.S. 217, 232



(1960); Ker v. California, 374 U.S. 23, 34-35 (1963); Draper v. United States, 358 U.S. 307 (1959)); People v. Fein, 484 P.2d 583, 589 (Cal. 1971); State v. Love, 598 P.2d 976, 978 (Ariz. 1979); People v. Hoinville, 553 P.2d 777, 781 (Colo. 1976). It is also true, when effectuating a lawful arrest, the police are authorized to use reasonable force. See e.g., Graham v. Connor, 490 U.S. 386, 396 (1989); State v. Simms, 369 N.J. Super. 466, 472 (App. Div. 2004). Furthermore, once a lawful arrest has been performed, the police may search the arrestee and the area within the control of the arrestee. United States v. Robinson, 414 U.S. 218, 224 (1973); State v. Dangerfield, 171 N.J. 446, 461 (2002).

Here, however, there was no probable cause to arrest defendant. Nor does the fact that defendant ran from the police create probable cause, because the judge found no evidence that an unlawful flight occurred. We discern no abuse of the court's discretion in this determination.


Our Supreme Court has held "a person has no constitutional right to flee from an investigatory stop." State v. Williams, 192 N.J. 1, 11 (2007). An individual "must obey the officer's order to stop and may not take flight" when the officer is "acting in good faith and under color of his authority." Id. at 12; State v. Crawley, 187 N.J. 440, 451-52 (2006).

Here, the police neither ordered defendant to stop or clearly and unambiguously identified themselves as law enforcement prior to the takedown. Instead, "[defendant and Sanchez] exited their vehicle and began running once unmarked police vehicles converged on their location. It was not until officers exited their vehicles wearing police identifiers that the [defendant and Sanchez] could have definitively known they were being chased by law enforcement." It cannot be said defendant failed to obey an officer's order acting under color of his authority, making his flight unlawful.

As a result, the trial judge's findings that the police did not have sufficient probable cause to arrest and search defendant, based on his mere presence at the scene or his flight from the police, are entitled to this court's deference as they are supported by sufficient evidence. We discern no error in granting defendant's motion to suppress the evidence obtained as a result of the unlawful arrest and search.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION