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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-2411-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ISMAEL MOJICA,

Defendant-Appellant.

Submitted February 28, 2018 – Decided March 22, 2018

Before Judges Fuentes and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 16-
02-0579.

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

Gurbir S. Grewal, Attorney General, attorney
for respondent (Lauren Bonfiglio, Deputy
Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant Ismael Mojica appeals from the October 25, 2016
Judgment of Conviction, following his guilty plea under Indictment
16-02-0579 to unlawful possession of a weapon (handgun). He

alleges the trial court erred by denying his earlier motion to suppress evidence of a handgun. We conclude the suppression motion should have been granted. We reverse the order denying suppression and defendant's conviction under Indictment 16-02-0579.

In 2016, defendant was indicted for second-degree unlawful possession of a weapon (handgun), N.J.S.A. 2C:39-5(b) (Count One); and fourth-degree possession of hollow point bullets, N.J.S.A. 2C:39-3(f) (Count Two). Following denial of his motion to suppress the handgun, defendant pled guilty to Count One. Count Two was dismissed.¹ Defendant was sentenced to a five-year term of imprisonment with a forty-two month period of parole ineligibility.

We gather the following facts from the record developed at the suppression motion.

On October 15, 2015 at about eight p.m., Detective Adolpho Furtado of the Newark Police Department received an anonymous "Crime Stopper" hotline tip that a man near a liquor store at the intersection of Hartford and Norfolk in Newark was in possession

¹ On the same day, defendant also pled guilty to charges in three unrelated indictments, 15-10-2280, 15-12-2972 and 16-04-1136. He was sentenced to three-year terms on each indictment to run concurrently with the unlawful weapons offense. Another indictment, 16-02-0528, was dismissed. Our decision here on the unlawful weapons offense does not affect his plea on the other unrelated indictments.

of a handgun. The person was described as a black male, "wearing gray sweat pants with a white and grey hoodie." Crime Stopper hotline tips are not recorded. Detective Furtado relayed the tip to a sergeant who was on patrol in the area.

According to the testimony of Detective Turon Hinnant, also of the Newark Police Department, Detective Villette was conducting surveillance on the location. There were between five and eight males standing in front of a building at Norfolk Street. A number of officers in vehicles approached the individuals who were outside. Those individuals were told to "put their hands out and lay down on the ground."

Hinnant testified that Villette observed a person, who fit the general description, leaving the liquor store, walk over to and enter a white Buick that was parked outside the Norfolk Street property. Along with another detective, Detective Hinnant approached the driver's side window of the white car parked near the building and observed defendant "looking over his right shoulder towards the sidewalk where the other detectives were engaging with the five to eight males." He testified that while defendant was "fixated on what they were doing, [defendant] put an object into his right coat pocket." Hinnant demonstrated this by making a motion toward his waistband area. Hinnant "believed [defendant] was trying to conceal a weapon." He opened the car

door, to defendant's surprise, and grabbed "towards the right pocket." Hinnant felt a metal object that he believed was a gun. He held onto the object, and asked defendant to step out of the car. Once outside, Hinnant reached inside defendant's pocket and found a handgun that was loaded with hollow point bullets. Defendant was arrested. He was wearing a "[b]lack coat, white shirt, grey sweat pants."

Defendant testified that he stopped at a grocery store, not a liquor store, where he purchased "snacks and soda." He parked on the street. When he got back into his car, he was speaking with a friend who was a passenger. Then "[c]ars surrounded the area" and he was not able to move out. He testified an officer approached the car and told him to "step out." Defendant opened the door and did so. He denied that the officer reached in the car. The officers searched him.

The trial judge denied defendant's motion to suppress, finding the facts were not in dispute. Although the parties agreed an anonymous tip alone could not support a warrantless search, the court found the State had "overcome the hurdle in providing additional information as it relates to the tip, including the hour of the day, a location, the clothing, the car, and the activity." The court found defendant's "action" of "making contact with a pocket" gave the officer "pause for his protection at that

point" and "justifie[d] the officer at least searching that area for his protection."

On appeal, defendant raises the issue that

LAW ENFORCEMENT CONDUCTED A SEIZURE AND SEARCH OF MR. MOJICA WITHOUT REASONABLE SUSPICION THAT HE WAS ARMED AND, THEREFORE, THE FRUITS OF THE SUBSEQUENT SEARCH MUST BE SUPPRESSED. U.S. CONST. AMENDS IV AND XIV; N.J. CONST. ART. I, PAR. 7.

Our review of the denial of a suppression motion is limited. State v. Handy, 206 N.J. 39, 44 (2011). "When reviewing a trial court's decision to grant or deny a suppression motion, [we] 'must defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record.'" State v. Dunbar, 229 N.J. 521, 538 (2017) (quoting State v. Hubbard, 222 N.J. 249, 262 (2015)). "We will set aside a trial court's findings of fact only when such findings 'are clearly mistaken.'" Ibid. (quoting Hubbard, 222 N.J. at 262). "We accord no deference, however, to a trial court's interpretation of law, which we review de novo." Ibid. (quoting State v. Hathaway, 222 N.J. 453, 467 (2015)).

Our legal analysis will be guided by the motion judge's factual findings. However, whether the police had a reasonable, articulable basis to detain and search defendant is a legal question, not a factual one, to which we owe no deference.

Both the Federal and State constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. An investigatory stop, sometimes referred to as a Terry² stop, implicates constitutional requirements and must be based on "specific and articulable facts which, taken together with rational inferences from those facts" provide a "reasonable suspicion of criminal activity." State v. Elders, 192 N.J. 224, 247 (2007) (quoting State v. Rodriguez, 172 N.J. 117, 126 (2002)). "Because an investigative detention is a temporary seizure that restricts a person's movement, it must be based on an officer's 'reasonable and particularized suspicion . . . that an individual has just engaged in, or was about to engage in, criminal activity.'" State v. Rosario, 229 N.J. 263, 272 (2017) (quoting State v. Stovall, 170 N.J. 346, 356 (2002)). The officer's "articulable reasons" or "particularized suspicion" is based on the officer's assessment of the totality of the circumstances. State v. Davis, 104 N.J. 490, 504 (1986).

Here, the stop was based, in part, on information relayed to the police by an anonymous tip. "In determining the reliability of a tip, a court must consider an informant's 'veracity,' 'reliability,' and 'basis of knowledge.'" Stovall, 170 N.J. at

² Terry v. Ohio, 392 U.S. 1 (1968).

362 (quoting Alabama v. White, 496 U.S. 325, 328-29 (1990)). To determine the informant's "basis of knowledge", "the nature and details revealed in the tip may imply" that the knowledge of the criminal activity comes from a "trustworthy source." Stovall, 170 N.J. at 362. "In determining whether reasonable suspicion exists, a court must consider 'the totality of the circumstances- the whole picture.'" Id. at 361 (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). The reliability of the tip is part of the totality of the circumstances analysis. Id. at 361-62. Generally, an anonymous tip is not sufficient alone to justify a stop because it lacks, veracity, reliability and a basis of knowledge. State v. Matthews, 398 N.J. Super. 551, 559 (App. Div. 2008).

The State contends the Crime Stopper's tip was verified because a person matching the description was found at the location indicated. Those facts verified a portion of the information, but did not verify the assertion of illegality. For that, the State contends that it was nighttime, defendant was "fixated" on the police activity and defendant made a furtive gesture by moving something to his pocket.

These combination of factors do not provide a reasonable articulable basis for the stop and seizure. In Florida v. J.L., 529 U.S. 266 (2000), the police received an anonymous tip that a person at a specific location and dressed in a plaid shirt had a

gun. The police saw a person matching the description at the location, but did not "see a firearm, and J.L. made no threatening or otherwise unusual movements." Id. at 268. The police told J.L. to put up his hands and frisked him, finding a gun. The Supreme Court found there were not reasonable grounds to stop and frisk J.L. because the anonymous tip, without more, was not "reliable in its assertion of illegality." Id. at 272.

Our courts have held that an anonymous tip without more "is rarely sufficient to establish a reasonable articulable suspicion of criminal activity." Rodriguez, 172 N.J. at 127 (citing Alabama, 496 U.S. at 329.). "To justify action based on an anonymous tip, the police in the typical case must verify that the tip is reliable by some independent corroborative effort." Id. at 127 (citing Alabama, 496 U.S. at 329-30). In Rodriguez, the Court found "that the officers lacked a sufficient basis to detain defendant" where the stop was "based solely on information furnished by an anonymous informant who provided no explanation or basis of knowledge for that information." Id. at 132-33.

In State v. Privott, 203 N.J. 16, 28-30 (2010), the Court upheld an investigatory stop and frisk based on an anonymous tip combined with the officer's knowledge about the defendant from a prior narcotics arrest. This included the officer's awareness that "defendant was associated with violent gangs that were

responsible for recent shootings in the area," defendant appeared to be nervous, tried to walk away and then "made a movement of his hand to his waistband." Id. at 28-29.

By contrast, in State v. Richards, 351 N.J. Super. 289, 308 (App. Div. 2002), the arrest was made in an area that was not a high crime or high drug area, the defendant made no furtive movements, did not act nervously, was using a pay phone, was not known to the police and when stopped, simply stood "quiet in the face of police presence." Id. at 306. In this light, we held that the circumstances "did not establish a reasonable suspicion that defendant was armed and dangerous justifying the Terry stop." Id. at 308. See also Matthews, 398 N.J. Super. at 559 (invalidating search based solely on unidentified anonymous tip).

Here, there was nothing unusual about leaving a store at eight o'clock at night, observing police activity occurring right outside one's car, and then reaching into one's pocket while seated in the car. The officers did not testify that they knew defendant, or that this was a high crime area. Defendant had not committed a motor vehicle violation. He did not attempt to flee. The police did not testify that he was acting nervously or suspiciously. He was at best "fixated" on the nearby police activity and then made a singular movement of his hand to his pocket. "[A]n officer's safety concerns based on [these ostensibly] asserted 'furtive'

movements by defendant cannot provide reasonable and articulable suspicion to support a detention in the first instance." Rosario, 229 N.J. at 277. On this record, the totality of the circumstances lacked an objectively reasonable articulable basis for the investigatory stop of defendant and seizure of the weapon.

We are constrained to reverse the order denying suppression of the evidence of the handgun under Indictment 16-02-0579. We remand the case for further proceeding under that indictment. Our decision does not affect defendant's guilty pleas or sentencing under indictments 15-10-2280, 15-12-2972 or 16-04-1136.

Reversed and remanded.

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



CLERK OF THE APPELLATE DIVISION