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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3520-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEVON GREENE,

Defendant-Appellant.

Argued January 8, 2018 – Decided January 29, 2018

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
15-01-0020.

Rebecca L. Gindi, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Rebecca L. Gindi, of counsel and on the
briefs).

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

PER CURIAM

Following a December 2015 jury trial, defendant Devon Greene was found guilty of a second-degree "certain persons" weapons offense, N.J.S.A. 2C:39-7(b)(1). The trial court sentenced defendant to a seven-year custodial sentence, with a five-year mandatory parole disqualifier.

On this direct appeal, defendant presents the following issues for our consideration:

POINT I

THE TRIAL COURT ERRED BY DENYING GREENE'S MOTION TO SUPPRESS BECAUSE THE FIELD OF INQUIRY ESCALATED INTO AN INVESTIGATORY DETENTION UNSUPPORTED BY REASONABLE SUSPICION. BECAUSE THE SEIZURE OF THE GUN WAS THE FRUIT OF THE ILLEGAL DETENTION, IT MUST BE SUPPRESSED.

A. The Field of Inquiry Escalated Into An Investigatory Detention Because A Reasonable Person In Greene's Position Would Not Feel Free to Leave After The Police Subjected Him to Accusatory Questions, Obtained His Identification Card, Attempted To Run A Warrant Check, And Called For Back Up.

B. Because The Investigatory Detention Was Not Supported By Reasonable Suspicion, The Gun Must Be Suppressed.

POINT II

GREENE WAS DENIED A FAIR TRIAL BECAUSE THE JURY REPEATEDLY HEARD EVIDENCE THAT HE HAD AN OUTSTANDING ARREST WARRANT, HAD A PREVIOUS CRIMINAL CONVICTION, AND WAS ARRESTED IN THE PRESENCE OF A COMPANION KNOWN TO POLICE FROM PAST "POLICE EXPERIENCE." (Not Raised Below)

POINT III

THE TRIAL COURT ERRED IN IMPOSING A SEVEN-YEAR SENTENCE WITH A FIVE-YEAR PAROLE DISQUALIFIER BECAUSE IT FAILED TO AFFORD PROPER WEIGHT TO AGGRAVATING AND MITIGATING FACTORS.

REPLY POINT I

THE GUN SEIZED WAS THE FRUIT OF AN ILLEGAL DETENTION AND MUST BE SUPPRESSED.

A. This Court Must Decline To Entertain the State's Belatedly Raised Argument That The Outstanding Warrant Attenuated The Taint Of the Illegal Detention Because It Was not Preserved For Appellate Review.

B. The State's Argument that the Outstanding Warrant Purged The Taint of the Illegal Detention Fails Because The Brown Factors Favor Suppression.

Having fully considered these arguments in light of the record and the applicable law, we affirm defendant's conviction and sentence.

I.

On September 11, 2014, at 9:36 p.m., Officer George Samol, a veteran of the Long Branch Police Department, was dispatched to a reported fight between juveniles on Coleman Avenue. When Officer Samol arrived, he did not observe a fight but did see a large crowd of people dispersing from the scene.

About eighteen minutes later, Officer Samol was five blocks east of the alleged fight location, driving on Vanderveer Place. Samol described the location as "[v]ery dark" and a "high-crime

area." That night was very warm and humid. He observed two African-American males, later identified as Brennan Bland and defendant, walking side by side on the south side of the street, away from Coleman Avenue. Bland was shirtless, holding a white t-shirt and carrying a blue jacket. Based on his training and experience, Samol believed that the shirtless male might have been in the alleged fight because his clothing may have been ripped in the altercation.

Officer Samol turned his vehicle around and passed the two men twice. Then, Samol parked his car on the north side of the street in a well-lit area and waited for the men to get closer. While waiting, Samol saw the men separate, with Bland moving to the north side of the street and defendant continuing to walk on the south side. Both men were still walking in the same direction.

Officer Samol recognized Bland as someone who has been through the criminal justice system of Long Branch. Samol had dealt with Bland numerous times, but did not recognize defendant.

Officer Samol got out of his patrol car and asked the men to come to the north side of the street, so he could speak with them. The two men complied.

Officer Samol shined his flashlight on both of men. He did not notice any injuries on defendant, but he did notice that Bland had a swollen lip. Samol also observed that defendant was wearing

a long-sleeved white shirt, sleeveless jean jacket, red pants, and grey sneakers.

Officer Samol asked Bland where he was coming from and how he got the swollen lip. Bland responded that he did not know what Samol was talking about. Samol told him that there had been a "fight call" for Coleman Avenue and asked Bland if he was coming from there. Bland replied that he was coming from Suburban Plaza, which was about hundred yards southwest of Coleman Avenue. Samol then asked Bland where he was going, and Bland replied that he was going to some unspecified "people's house."

Defendant provided Officer Samol with his New York identification card, and in response to Samol's question about his residence, stated that he was still living in New York but was visiting family in Long Branch. Samol tried to check for warrants but his transmission at that point did not go through. Because the two men were wearing "a lot of" clothes, which could have been hiding weapons, before re-transmitting his request for a warrant check, Samol waited for backup from an Officer Chris Walls, who arrived a few minutes later.

Officer Samol noted that while "Bland was a little more nervous[,] " "[m]oving his hands a lot[,] " "[g]oing from street to sidewalk[,] " "[a] little anxious," and "putting his hands in his pockets" despite being told to not do so, defendant was "calm,

quiet[,] " [o]nly spoke when spoken to[,] " and did nothing but answer Samol's questions and wait for him to finish. Minutes later, police headquarters advised Samol that there was an arrest warrant from Seaside Heights for a "Devon Greene," but the date of birth was off one day. Samol was able to confirm defendant's residence with his identification card, and confirm that the photo of Devon Greene from the "New Jersey Master Names Index" matched defendant.

Officer Walls at that point placed defendant under arrest, patted him down briefly, and put him in the rear of Officer Samol's car. The whole encounter – from the moment when the police asked Bland and defendant to come to the north side of the street to the moment when they arrested defendant – took an estimated ten to fifteen minutes.

Officer Samol heard defendant ask Officer Walls to lower the rear windows, which Walls did for both sides of the car. The rear windows have vertical metal bars covering them. Defendant sat in rear behind the passenger seat. Bland did not have any warrants, so the officers told him that he could go.

Both officers walked back to the car. While the officers were speaking, Officer Samol heard scraping but believed that it was the handcuffs on the plastic seats. Samol then heard an object fall onto the other side of the vehicle like a metallic gun hitting

pavement. Both officers walked around the vehicle and found a silver chrome revolver with a white handle located two feet from to the vehicle, directly under the passenger side window. The revolver was seized.

Defendant thereafter was charged with second-degree unlawful possession of a weapon and the previously-noted "certain persons" offense.¹ He moved to suppress the seized revolver, and the trial court conducted an evidentiary hearing on the motion. Officer Samol was the sole witness to testify at the hearing.

After considering the officer's testimony and the oral arguments of counsel, the trial judge denied the suppression motion. The judge detailed his reasons in a nine-page written opinion dated July 29, 2015. In essence, the judge found that the overall police encounter with defendant and Bland was constitutional, and that the officers' actions were justified as a legitimate field inquiry that ripened into a permissible investigatory stop. The judge also found that the police acted properly in arresting defendant after learning that he had an outstanding arrest warrant. The judge additionally ruled that the police had lawfully seized the revolver, once it had been discarded

¹ The State voluntarily dismissed the unlawful possession count before summations at trial.

from the squad car on defendant's side of the vehicle and found on the asphalt.

More specifically, the judge found that Officer Samol had "approached defendant in a non-harassing manner" and asked defendant "basic pedigree questions[.]" The judge found this encounter to be "brief and non-intrusive." The judge also found that Officer Samol had a "reasonable and articulable suspicion" to stop defendant based on the officer's experience, observations, "the nature of the high crime area," and "the lateness of the hour." The judge noted that police officers have no discretion to decline to make arrests of people who have an active warrant out on them.

Notably, the judge found that Officer Samol's testimony was honest, straightforward, and "clear, candid, and convincing." Based on that key credibility finding, in light of the applicable principles of law, the judge upheld the warrantless seizure of the gun and denied the suppression motion.

At the ensuing trial in December 2015 presided over by the same judge, the State moved the revolver into evidence. As we have already noted, the jury found defendant guilty of the "certain persons" offense. In February 2016, the court imposed the aforementioned seven-year custodial sentence, subject to a five-year parole disqualifier. This appeal ensued.

II.

Defendant first argues that the trial court should have suppressed the revolver which had been tossed out of the squad car after he was arrested. We disagree, substantially for the cogent reasons expressed in the trial court's written opinion. We only add a few comments.

Fundamentally, defendant contends that the police lacked sufficient grounds to detain him for the approximately ten to fifteen minute interval that elapsed from the time he was first approached to the time of his arrest. He contends that even if the police were justified in conducting a field inquiry of him and his companion Bland, the police lacked reasonable suspicion of his involvement in criminal activity to justify extending that field inquiry to an investigatory stop. He maintains that he was not free to leave the scene, particularly after the back-up police car arrived, and that his freedom of movement was unconstitutionally restrained. The trial court rejected defendant's claim of illegality, and so do we.

An appellate court's review of a trial judge's factual findings is "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999). We must defer to those factual findings "so long as those findings are supported by sufficient evidence in the record."

State v. Hubbard, 222 N.J. 249, 262 (2015) (internal citations omitted).

To be sure, defendant has a constitutional right to be free from indiscriminate searches and seizures by police without a warrant unless one or more exceptions to the warrant requirement apply. State v. Witt, 223 N.J. 409, 422 (2015) (quoting State v. Frankel, 179 N.J. 586, 598, cert. denied, 543 U.S. 876 (2004)). Those exceptions include a preliminary field inquiry, and, at the next level of intrusiveness, an investigatory stop.

A field inquiry is "the least intrusive encounter," which occurs when a police officer approaches a person and asks if he or she is willing to answer some questions. State v. Pineiro, 181 N.J. 13, 20 (2004) (citation omitted). "A field inquiry is permissible so long as the questions '[are] not harassing, overbearing or accusatory in nature.'" Ibid. (quoting State v. Nishina, 175 N.J. 502, 510 (2003)) (alteration in the original).

By comparison, an investigative or "Terry" stop, which goes beyond a field inquiry, permits a police officer to detain an individual for a brief period, and to pat him down for the officer's safety, if that stop is "based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." State v. Rodriguez, 172 N.J. 117, 126 (2002) (quoting

Terry v. Ohio, 392 U.S. 1, 21 (1968)). Under this well-established standard, an investigatory stop is valid "if the officer has a 'particularized suspicion' based upon an objective observation that the person stopped has been [engaged] or is about to engage in criminal wrongdoing." State v. Davis, 104 N.J. 490, 504 (1986). Notably for this case, reasonable suspicion is not necessary to check someone's criminal history, so long as it does not unreasonably prolong the stop. State v. Sloane, 193 N.J. 423, 436-39 (2006).

Here, the police rightly conducted an initial field inquiry after spotting defendant and Bland on the street, following the report of the recent violent altercation that had occurred only five blocks away. The men were dressed in a manner suggesting that one or both of them may have taken part in the fight, with Bland exhibiting a swollen lip. The police approached the men without using force. They questioned defendant about his residence and what he was doing in the area, but not in an accusatory manner, in contrast to the more pointed queries posed to Bland.

Although defendant was cooperative and duly provided his identification, the police reasonably checked with headquarters to ascertain if either man had any outstanding warrants. That check took a few minutes longer than it normally would take. Even so, the delay was not the fault of the officers on the scene, who

understandably wanted to complete the process before potential combatants from the fight departed.

By the time the warrant check had been completed, there was reasonable and articulable suspicion under Terry to believe that one or both of them had been involved in a crime. We agree with the trial court that the overall encounter did not detain defendant for an unreasonable length of time, given the totality of circumstances presented.

Moreover, as the trial judge correctly reasoned, the police had ample reason to confiscate the revolver once it has been discarded onto the ground from defendant's side of the squad car. The gun essentially had been abandoned, as defendant had relinquished any expectation of privacy in it. State v. Farinich, 179 N.J. Super. 1, 6 (App. Div. 1981) (citing United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973)) (finding abandonment where a defendant, after being approached by the police in an airport, dropped his suitcase and started to run away), aff'd o.b., 89 N.J. 378 (1982); see also State v. Hughes, 296 N.J. Super. 291, 296 (App. Div. 1997) (in which a defendant on a bicycle held to have abandoned a container filled with bags of cocaine, because he threw the container against a curb when he noticed a police car approaching, and then continued to bicycle another fifty feet away).

In addition, the discovery from headquarters of the valid outstanding warrant for defendant's arrest attenuated any presumed illegality emanating from the encounter.² Utah v. Strieff, 579 U.S. ___, 136 S. Ct. 2056, 2062-63 (2016); State v. Shaw, 213 N.J. 398, 418-21 (2012). The evidence of the discarded revolver, which was found after defendant's authorized arrest, was not a "product of 'exploitation'" from an illegal stop. Shaw, 213 N.J. at 414. Any alleged taint from the encounter by that point had dissipated.

In sum, applying the correct scope of appellate review, including affording due deference to the trial court's emphatic credibility findings as to Officer Samol, we uphold the trial court's suppression ruling.

III.

Defendant's next point is that he was denied a fair trial due to prejudice caused by the State's references to his outstanding arrest warrant and Bland's past experience with the police. Because this argument was not raised below, we consider it under a plain error standard of review. State v. Macon, 57 N.J. 325, 337 (1971).

² We recognize the State did not advance an attenuation argument at the suppression hearing, and is arguing the point for the first time on appeal. Nevertheless, we consider the argument because the existing factual record is sufficient to rule on the legal issue. See State v. Scott, 229 N.J. 469, 480 (2017).

As a preliminary matter, defendant concedes the trial court properly sanitized the stipulation that he committed the predicate offense for liability under the "certain persons" weapons statute. He instead argues that his arrest warrant was irrelevant to an offense involving the possession of a weapon. Citing State v. Alvarez, 318 N.J. Super. 137, 148 (App. Div. 1999), he suggests that the mentioning of the warrant to the jurors could have been avoided by the witnesses and the prosecutor simply stating that he had been lawfully placed in the police car. Defendant contends the jury was prejudiced by the mentions of the warrant.

As the State correctly notes, the Supreme Court in State v. Marshall, 148 N.J. 89, 239-40 (1997), rejected an overly broad reading of our holding in Alvarez. In Marshall, the Court found no authority to support the proposition that a jury must be shielded from all knowledge of search warrants relating to a defendant. Id. at 239-40. The Court was unpersuaded that disclosure of a prior judicial determination of probable cause to issue a warrant will inexorably influence a jury to assume a defendant's guilt. Id. at 240. Indeed, the Court recognized that sometimes the fact that a warrant had been issued might necessarily be put before a jury, in order to establish that the police had acted properly. Ibid. See State v. Williams, 404 N.J. Super. 147, 167 (App. Div. 2008); State v. McDonough, 337 N.J. Super. 27,

32 (App. Div. 2001). As the Supreme Court more recently noted in State v. Cain, 224 N.J. 410, 435 (2016), "[a] search warrant can be referenced to show that the police had lawful authority in carrying out a search to dispel any preconceived notion that the police acted arbitrarily. A prosecutor, however, may not repeatedly mention that a search warrant was issued by a judge if doing so creates the likelihood that a jury may draw an impermissible inference of guilt."

Here, the prosecutor referred to defendant's arrest warrant three times in her opening. In addition, both Officer Samol and Officer Walls described the process used to determine whether there was an active arrest warrant for defendant. However, the State did not refer to this subject in its summation.

The trial judge duly provided a stipulation and a limiting instruction to the jurors regarding the predicate offense for the certain persons charge. We must presume the jurors followed that instruction. State v. Burns, 192 N.J. 312, 335 (2007) (citing State v. Nelson, 155 N.J. 487, 526 (1998), cert. denied, 525 U.S. 1114 (1999)).

Most tellingly, defendant did not object to, or move to strike, the references to the arrest warrant. This failure to raise the issue below signifies that defense counsel did not

consider the error, if any, to be significant in the context of the overall trial. Macon, 57 N.J. at 333.

Further, the arrest warrant was relevant here with respect to explaining to the jury how the officers came to have defendant in their custody when they found the gun. Part of the State's theory of the case was that Bland was acting as a distraction during the police encounter, in an effort to enable defendant, his companion, to get away with the gun. This theory required explaining to the jurors why defendant had been taken into custody but Bland was not.

The proof was relevant under N.J.R.E. 401, and not unduly prejudicial under N.J.R.E. 403. We discern no error, let alone plain error, concerning this issue.

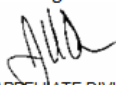
IV.

Lastly, we reject defendant's claim that his seven-year custodial sentence for this weapons offense was excessive. The judge appropriately found aggravating sentencing factors three, six, and nine applied, particularly given defendant's multi-state, multi-offense prior criminal record. See N.J.S.A. 2C:44-1(a)(3), (6) and (9). We also concur with the judge's rejection of the various mitigating factors suggested by defense counsel, especially in light of defendant's gang affiliation and his commission of the instant offense while on parole. See N.J.S.A.

2C:44-1(b). We discern no improper double-counting of factors. Applying the strong deference we accord to a sentencing court's discretion, see, e.g., State v. Bieniek, 200 N.J. 601, 607-08 (2010), we readily affirm the sentence that was imposed.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION