

**NOT FOR PUBLICATION WITHOUT THE  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-3526-16T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

TERRENCE PRESLEY,

Defendant-Respondent,

and

BRIAN WATT,

Defendant.

---

Submitted November 15, 2017 – Decided January 25, 2018

Before Judges Fuentes and Manahan.

On appeal from Superior Court of New Jersey,  
Law Division, Hudson County, Indictment No.  
16-09-1225.

Esther Suarez, Hudson County Prosecutor,  
attorney for appellant (Andrew M. Baginski,  
Assistant Prosecutor, on the briefs).

Joseph E. Krakora, Public Defender, attorney  
for respondent (John Douard, Assistant Deputy  
Public Defender, of counsel and on the brief).

PER CURIAM

The State of New Jersey (State) appeals from an order granting defendant Terrence Presley's motion to suppress evidence seized pursuant to a warrantless search.<sup>1</sup> Following our review of the arguments, in light of the facts and applicable law, we conclude the State satisfied its burden that the police had a reasonable articulable suspicion that defendant was armed, necessitating a stop and frisk. Accordingly, we reverse.

We discern the following taken from the suppression hearing record. Jersey City police officer Anthony Scally was the sole witness for the State. Presley also testified. The entire incident, which was captured on videotape, was viewed by the motion judge and formed a basis for the decision.

At approximately 8:30 p.m. on April 6, 2016, Scally and police officer Joseph Seals were on duty in plain clothes in an unmarked police vehicle. The officers stopped a silver Nissan Altima with tinted windows that they observed make an illegal U-turn and illegally park next to a fire hydrant. As they approached the vehicle, one officer went to the driver's side, while the other went to the passenger's side. There were three male occupants in the vehicle. Presley was seated in the back on the passenger side. The officers requested that the occupants provide

---

<sup>1</sup> Co-defendant Brian Watt did not join in the motion to suppress.

identification and used their flashlights to view the interior of the vehicle.

Sally observed Presley moving around in the back seat. While speaking with the Presley, Sally observed Presley move his hands toward his waist area, whereupon Sally ordered Presley to keep his hands in plain view. Presley initially complied, but again moved his hands as Sally spoke with the front-seat passenger. Sally ordered Presley numerous times to keep his hands stationary. Despite the command, Presley moved his hands from his knees to a bin in the back seat and an open rear window. Shortly after, while Sally was speaking with the front passenger, Sally observed Presley again move his hands to his waistband despite the command to keep them stationary.

Predicated upon the nature of the location, along with Presley's movements, Sally requested that Presley exit the vehicle. Based upon his training and experience, Sally believed that Presley might be in possession of a weapon. Prior to exiting the vehicle, Sally observed Presley bending down.

Presley resisted exiting the vehicle until Sally ordered him out. While Presley exited the car, he turned his body away from Sally, causing the officer to grab Presley in an attempt to guide him into the officer's preferred position. When Presley resisted, a scuffle ensued. Presley pushed away from Sally. During the

scuffle, Presley reached into his waist area and tossed a handgun into the front of the vehicle. Scally eventually wrestled Presley to the ground and handcuffed him. The discarded weapon was recovered.

Presley was indicted by a Hudson County grand jury for second-degree unlawful possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); and third-degree resisting arrest, N.J.S.A. 2C:29-2(a).

Post indictment, Presley filed a motion to suppress evidence, specifically the seized weapon. Following the testimonial hearing, the judge issued an oral opinion granting the motion.

The judge found most of Scally's testimony credible. Based on State v. Smith, 134 N.J. 599 (1994), the judge held Scally appropriately requested Presley to step out of the vehicle considering it was a high crime and drug area where weapons have been discovered. However, the judge questioned the credibility of Scally's testimony concerning how Presley exited the vehicle. Based upon the judge's review of the video, the judge found Presley did not attempt to flee.<sup>2</sup> The judge held Scally lacked a

---

<sup>2</sup> Given our Supreme Court's decision in State v. S.S., 229 N.J. 360, 380-81 (2017), our standard for review relating to the video footage is one of deference to the trial court's fact-findings.

sufficient basis to believe Presley or the other occupants of the vehicle were armed, and that it was not reasonable to believe Scally was concerned with officer safety. The judge also concluded that it was unreasonable for Scally to restrain Presley, which led to the seizure of the weapon. As such, the judge granted the motion. This appeal followed.

In a single point on appeal, the State argues:

POINT I

THE TRIAL COURT INCORRECTLY GRANTED  
DEFENDANT'S MOTION TO SUPPRESS.

A. POLICE HAD PROBABLE CAUSE TO STOP  
THE VEHICLE.

B. DEFENDANT WAS LAWFULLY ORDERED OUT  
OF THE VEHICLE.

Our Supreme Court has recited the standard of review applicable to an appellate court's consideration of a trial judge's fact-finding on a motion to suppress:

[A]n appellate court reviewing a motion to suppress 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. Elders, 386 N.J. Super. 208, 228 (App. Div. 2006) (citing State v. Locurto, 157 N.J. 463, 474 (1999)); see also State v. Slockbower, 79 N.J. 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the . . .

---

Nonetheless, we have viewed the video and agree with the judge's finding on flight.

investigatory search [was] not based on probable cause"); State v. Alvarez, 238 N.J. Super. 560, 562-64 (App. Div. 1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present in the record" (citing State v. Johnson, 42 N.J. 146, 164 (1964))).

An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Johnson, [] 42 N.J. at 161. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. Id. at 162. A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." Ibid. In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." Ibid.

[State v. Elders, 192 N.J. 224, 243-44 (2007).]

An appellate court need not give deference to a trial judge's interpretation of the law. State v. Vargas, 213 N.J. 301, 327 (2013); State v. Gandhi, 201 N.J. 161, 176 (2010); State v. Handy, 412 N.J. Super. 492, 498 (App. Div. 2010) ("Our review of the judge's legal conclusions [] is plenary."). "Legal issues are

reviewed de novo." Vargas, 213 N.J. at 327. "A trial court's interpretation of the law . . . and the consequences that flow from established facts are not entitled to any special deference." State v. Lamb, 218 N.J. 300, 313 (2014).

The State argues the judge erred in holding the officers were justified in requesting Presley to exit the vehicle, but were not justified in conducting a pat down once Presley exited. The State contends the pat down of Presley was justified by specific, articulable facts, and thus the suppression of the firearm was in error. For the following reasons, we agree and reverse.

When analyzing a warrantless search and seizure, we start with the parameters defined by our Federal and State Constitutions. These protections require police to first secure a warrant before seizing a person or conducting a search of a home or a person. State v. Watts, 223 N.J. 503, 513 (2015); State v. Reece, 222 N.J. 154, 167 (2015).

[B]oth the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guarantee to New Jersey's citizens "[t]he right to walk freely on the streets of a city without fear of an arbitrary arrest." State v. Gibson, 218 N.J. 277[, 281] (2014). When evaluating the reasonableness of a detention, the "totality of circumstances surrounding the police-citizen encounter" must be considered. State v. Privott, 203 N.J. 16, 25 (2010) (quoting [State v. Davis, 104 N.J. 490, 504 (1986)]).

[State v. Coles, 218 N.J. 322, 343  
(2014) (alterations in original).]

The constitution also allows a person the privilege, "upon noting a police presence, to decide that he or she wishes to have nothing to do with the police, without risking apprehension solely by reason of the conduct manifesting that choice." State v. L.F., 316 N.J. Super. 174, 179 (App. Div. 1998) (quoting State v. Ruiz, 286 N.J. Super. 155, 162-63 (App. Div. 1995)). "[D]eparture alone signifies nothing more than behavior in fulfillment of a wish to be a somewhere else." Ibid. (quoting Ruiz, 286 N.J. Super. at 163). Thus, police officers may not place their hands on citizens "in search of anything" without "constitutionally adequate, reasonable grounds for doing so." Sibron v. New York, 392 U.S. 40, 64 (1968).

While the "warrantless seizure of a person is 'presumptively invalid as contrary to the United States and the New Jersey Constitutions,'" Coles, 218 N.J. at 342 (quoting State v. Mann, 203 N.J. 328, 337-38 (2010)), there remains a critical "balance to be struck between individual freedom from police interference and the legitimate and reasonable needs of law enforcement." Id. at 343. A reviewing court must determine whether the State has met its burden, by a preponderance of the evidence, to establish the warrantless search or seizure of an



individual was justified in light of the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983).

To remove a passenger from a car, the police "need not point to specific facts that the occupants are 'armed and dangerous.' Rather, the officer need point only to some fact or facts in the totality of the circumstances that would create in a police officer a heightened awareness of danger . . . ." State v. Mai, 202 N.J. 12, 22 (2010) (quoting State v. Smith, 134 N.J. 599, 618 (1994)). Such grounds for heightened caution need not rise to the level of a reasonable suspicion that the occupants are engaged in criminal activity. See Smith, 134 N.J. at 618.

The parameters for an investigatory stop are well-defined.

[A] police officer may conduct an investigatory stop of a person if that officer has "particularized suspicion based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing." [Davis,] 104 N.J. [at] 504. The stop must be reasonable and justified by articulable facts; it may not be based on arbitrary police practices, the officer's subjective good faith, or a mere hunch.

[Coles, 218 N.J. at 343 (citation omitted).]

The Terry<sup>3</sup> exception to the warrant requirement 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

---

<sup>3</sup> Terry v. Ohio, 382 U.S. 1 (1968).

'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, 392 U.S. at 21); see also State v. Williams, 192 N.J. 1, 9 (2007) (quoting Terry, 392 U.S. at 30) (stating a Terry pat down is constitutionally permissible when the police officer believes the suspect "may be armed and presently dangerous . . . .").

When reviewing whether the State has shown a valid investigative detention, consideration of the totality of the circumstances requires we "give weight to 'the officer's knowledge and experience' as well as 'rational inferences that could be drawn from the facts objectively and reasonably viewed in light of the officer's expertise.'" State v. Bard, 445 N.J. Super. 145, 156 (App. Div. 2016) (citing State v. Citarella, 154 N.J. 272, 279 (1998)). "The fact that purely innocent connotations can be ascribed to a person's actions does not mean that an officer cannot base a finding of reasonable suspicion on those actions as long as 'a reasonable person would find the actions are consistent with guilt.'" Citarella, 154 N.J. at 279-80 (quoting State v. Arthur, 149 N.J. 1, 11 (1997)).

Finally, we must not lose sight that the "touchstone" for evaluating whether police conduct has violated constitutional

protections is "reasonableness." State v. Hathaway, 222 N.J. 453, 476 (2015) (quoting State v. Judge, 275 N.J. Super. 194, 200 (App. Div. 1994)). The reasonableness of police conduct is assessed with regard to circumstances facing the officers, who must make split second decisions in a fluid situation. State v. Bruzzese, 94 N.J. 210, 228 (1983).

Such encounters are justified only if the evidence, when interpreted in an objectively reasonable manner, shows that the encounter was preceded by activity that would lead a reasonable police officer to have an articulable suspicion that criminal activity had occurred or would shortly occur. No mathematical formula exists for deciding whether the totality of circumstances provided the officer with an articulable or particularized suspicion that the individual in question was involved in criminal activity. Such a determination can be made only through a sensitive appraisal of the circumstances in each case.

[Davis, 104 N.J. at 505.]

It is similarly important for courts to take a realistic approach to "reviewing police behavior in the context of the ever-increasing violence in society." State v. Valentine, 134 N.J. 536, 545 (1994) ("As the front line against violence, law-enforcement officers are particularly vulnerable to violence often becoming its victims."). Guided by these principles, we examine the facts and circumstances presented in this case.

The stop of the vehicle was reasonable and supported by articulable facts. Just prior to the stop, the officers observed two motor vehicle infractions: an illegal U-turn and illegal parking. Further, as the judge held, and we agree, it was also reasonable for Scally to request that Presley exit the vehicle based upon the totality of the circumstances including the location of the stop, the observation of Presley's bodily movement while in the vehicle, and Scally's training and experience. All of the above gave rise to a heightened caution by Scally which, as we noted above, did not need to "rise to the level of a reasonable suspicion that the occupants [were] engaged in criminal activity." Smith, 134 N.J. at 618.

Once outside the vehicle, Presley's continued conduct of evasiveness and resistance, even in the absence of flight, constituted activity that would lead a reasonable police officer to believe "that criminal activity had occurred or would shortly occur." Davis, 104 N.J. at 504. Armed with that belief, notwithstanding our agreement with the judge's factual findings relative to the issue of flight, we conclude that the detention and attempt to pat down Presley by Scally was not in derogation of his constitutional rights as the product of an unreasonable search. We add, given the uncontroverted fact that Presley

possessed the weapon, the pat down would have revealed it was on his person.

Given our holding, we reverse the order granting the motion to suppress evidence. We remand to the Law Division for further proceedings.

Reversed. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION