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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-3869-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELEX HYMAN,

Defendant-Appellant.

Submitted April 16, 2018 – Decided May 11, 2018

Before Judges Sabatino, Ostrer, and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No.
09-06-1015.

Joseph E. Krakora, Public Defender, attorney
for appellant (Michele A. Adubato, Designated
Counsel, on the brief).

Joseph D. Coronato, Ocean County Prosecutor,
attorney for respondent (Samuel Marzarella,
Chief Appellate Attorney, of counsel; Shiraz
Imran Deen, Assistant Prosecutor, on the
brief).

PER CURIAM

Defendant Elex Hyman appeals from his conviction by guilty
plea following the Law Division's denial of his motions to suppress
evidence. We affirm.

This appeal has its genesis in telephone conversations intercepted pursuant to a court-authorized wiretap of a cellular telephone utilized by co-defendant Alex Gantt. See N.J.S.A. 2A:156A-1 to -37. In April 2008, the Ocean County Prosecutor's Office conducted an investigation into a narcotics-distribution network led by Gantt. Following information received from intercepted calls on May 5, 2008, detectives established mobile surveillance outside Gantt's residence in Howell. The conversations indicated Gantt and co-defendant Hiram Cotto would be traveling in separate vehicles from New York to Gantt's home, and Cotto would be transporting a large quantity of cocaine.

Upon arrival, Cotto drove his car into Gantt's garage. A Howell detective then pulled his marked vehicle into Gantt's driveway, exited the car and announced, "Police!" One of the individuals in the garage lowered the garage door, but the detective ran underneath before the door closed. Carrying a pink plastic bag and running from the garage toward the entrance of the home, Cotto disregarded the detective's orders to stop, and shut the door behind him. The detective then pushed or forced open the door and ran into the house, joined by other officers.

Cotto, Gantt, and several other individuals in the house, were detained. Following the issuance of a telephonic search warrant, officers seized more than 900 grams of cocaine, currency

and drug paraphernalia from Gantt's house and garage. Defendant was not present at Gantt's home and was later arrested on a warrant issued pursuant to intercepted telephone conversations with Gantt between April and May, 2008.

On June 3, 2009, an Ocean County grand jury returned an indictment against thirteen individuals, charging defendant in one of the seven counts with second-degree conspiracy to possess with intent to distribute more than five ounces of cocaine, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(1) and N.J.S.A. 2C:5-2.

Defendant joined in "every motion filed by his co-defendants." Pertinent to this appeal, in separate written opinions, Judge Wendel E. Daniels denied defendant's motions to suppress: (1) evidence seized at Gantt's residence; and (2) his intercepted telephonic conversations with Gantt.

After considering the parties' briefs, including police reports, grand jury testimony, and the search warrant affidavit, Judge Daniels denied the motion to suppress evidence seized at Gantt's residence without holding an evidentiary hearing. In a written decision issued on October 23, 2011, the judge found there were no material facts in dispute that would warrant a testimonial hearing. In doing so, he rejected the defense argument that an issue of material fact existed as to whether the Howell detective forcibly entered Gantt's residence in pursuit of Cotto.

The trial court determined law enforcement officers had probable cause to believe Cotto had picked up cocaine in New York and transported it to Gantt's home based on intercepted text messages and telephone calls. Having found the Howell detective "had sufficient probable cause to believe that Cotto possessed large quantities of cocaine[,] . . . when the detective chased Cotto into Gantt's home it was to apprehend Cotto before he could hide or destroy the cocaine in the pink plastic bag." The court, therefore, found exigent circumstances justified law enforcement's initial warrantless entry of Gantt's residence.

In a written decision issued on December 3, 2013, Judge Daniels denied defendant's motion to suppress the contents of his telephone conversations with Gantt. The judge considered oral argument, the submissions of counsel and, "at defendant's express request on the record, the [c]ourt heard seven sessions involving defendant in which he engages in a [controlled dangerous substance]-distribution conspiracy." Defendant did not, however, identify a single instance where his calls should have been minimized because they were personal. Analyzing the applicable sections of the wiretap statute, N.J.S.A. 2A:156A-21(a) and N.J.S.A. 2A:156A-12(f), and our Supreme Court's decision in State v. Catania, 85 N.J. 418 (1981), the judge rejected defendant's

claims that the State failed to extrinsically and intrinsically minimize the communications.

In particular, the judge found the State extrinsically minimized intercepted communications by "not monitor[ing] communications between approximately 1:00 a.m. and 7:30 a.m." The judge also found the State appropriately "spot[-]monitored" calls, thereby meeting "its prima facie burden of compliance with the [intrinsic] minimization requirements." In doing so, the court observed "[t]he monitors' diligence in minimizing some conversations of less than two minutes and even some pertinent conversations is evidence of [a] good-faith effort to minimize." Indeed, defendant conceded "the State spot[-]monitored even conversations between suspected participants in the conspiracy."

Following the trial court's rulings, defendant pled guilty to an open indictment, and was sentenced to the statutory minimum five-year term of imprisonment, N.J.S.A. 2C:43-6(a)(2). Defendant preserved his right to appeal the trial judge's decisions regarding the motions to suppress. R. 3:5-7(d).

On appeal, defendant raises the following arguments for our consideration:

POINT I

DEFENDANT WAS ENTITLED TO A
TESTIMONIAL HEARING ON THE
SUPPRESSION ISSUE AS MATERIAL FACTS

WERE IN DISPUTE AND THE DENIAL OF SUCH A HEARING DENIED HIM HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

POINT II

THE WARRANTLESS ENTRY OF [CO-DEFENDANT] GANTT['S] RESIDENCE BY [THE HOWELL] DETECTIVE VIOLATED []DEFENDANT'S RIGHT AGAINST UNLAWFUL SEARCHES AND SEIZURES GUARANTEED BY THE NEW JERSEY AND UNITED STATES CONSTITUTIONS.

POINT III

WIRETAP CONVERSATIONS INVOLVING [DEFENDANT] SHOULD HAVE BEEN SUPPRESSED FOR FAILURE TO PROPERLY MINIMIZE THE INTERCEPTIONS.

Our review of a trial court's factual findings in support of granting or denying a motion to suppress is deferential, even absent an evidentiary hearing. State v. S.S., 229 N.J. 360, 379 (2017). Specifically, our review is limited to determining whether "a trial court's factual findings are not supported by sufficient credible evidence in the record." Id. at 381. We may not reverse a court's findings of fact unless they are clearly erroneous or mistaken. Ibid. However, we review issues of law de novo. State v. Gamble, 218 N.J. 412, 425 (2014).

Applying these standards, we discern no error, and affirm substantially for the reasons expressed by Judge Daniels in his

thorough and well-reasoned written opinions of October 23, 2011¹ and December 3, 2013. We add the following brief remarks.

Initially, we reject defendant's claim that a disputed issue of fact exists regarding the manner of police entry into Gantt's residence, entitling him to an evidentiary hearing. See R. 3:5-7(c); State v. Kadonsky, 288 N.J. Super. 41, 45-46 (App. Div. 1996). The Howell detective's entry into the house, by either pushing or breaking down the door, was not an unreasonable use of force where, as here, exigent circumstances justified entry and reasonable use of force. See State v. Josey, 290 N.J. Super. 17, 22-23 (App. Div. 1996) (upholding entry into the defendant's residence by breaking down the door where police had observed defendant selling drugs on the street outside his house).

Therefore, the manner of entry does not create a material issue of fact, under the circumstances of this case, because it does not bear upon the claim being advanced. See State v. Behn, 375 N.J. Super. 409, 431 (App. Div. 2005) (citing State v. Henries,

¹ In affirming Gantt's direct appeal, in part from his conviction on the same indictment here, another panel of our court upheld the search of Gantt's residence without holding a testimonial hearing. State v. Gantt, No. A-6014-12 (App. Div. July 20, 2015) (slip op. at 6-9). While we agree with the reasons expressed by that panel, we have independently considered defendant's arguments on appeal before us, arriving at the same conclusion.

306 N.J. Super. 512, 531 (App. Div. 1997) (observing a material fact is one which has "some bearing on the claims being advanced")). Further, "[conclusory] assertions contained in defendant's counterstatement of facts are insufficient to create a material factual dispute" for purposes of Rule 3:5-7(c). State v. Hewins, 166 N.J. Super. 210, 215 (Law Div. 1979).


Nor are we persuaded by defendant's argument that the police impermissibly created the exigency through unreasonable tactics. Rather, the exigency was the "result of reasonable police investigative conduct intended to generate evidence of criminal activity." State v. Hutchins, 116 N.J. 457, 460 (1989); see also State v. Stanton, 265 N.J. Super. 383 (App. Div. 1993) (finding police conduct was reasonable under the exigent circumstances warrant exception where police received a tip that a suspect was dealing drugs from a motel room, observed the suspect through the window in plain view, and entered the room after knocking).

After Cotto pulled his car into Gantt's garage, the Howell detective attempted to stop Cotto and determine if the pink plastic bag contained cocaine. Approaching Cotto and identifying himself as an officer was a reasonable investigative technique. Further, police were aware Gantt utilized surveillance cameras to monitor the area outside his home. Had officers waited until Cotto was inside the house, Gantt and Cotto could have observed officers

approach and destroy evidence. Given the entirety of the circumstances, the officers did not create the exigency.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION