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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-4274-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRUCE A. KERN, a/k/a
BRUCE A. KERNS, BRUCE KERNS,
JR., and BRUCIE KERNS,

Defendant-Appellant.

Submitted March 13, 2018 – Decided April 13, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 15-03-0864.

Joseph E. Krakora, Public Defender, attorney for appellant (Molly O'Donnell Meng, Assistant Deputy Public Defender, of counsel and on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Adam D. Klein, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

After pleading guilty to third-degree burglary, N.J.S.A. 2C:18-2(a)(1), defendant appeals from the denial of his motion to suppress evidence, arguing:

> POINT I
>
> THE TRIAL COURT ERRED IN FINDING THAT POLICE LAWFULLY ORDERED DEFENDANT TO STOP AND CHASED HIM DOWN WHERE THERE WAS NO SUSPICION THAT HE WAS ENGAGED IN CRIMINAL ACTIVITY. BECAUSE THE EVIDENCE SEIZED WAS TAINTED BY THE UNLAWFUL STOP, DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.[1]

We agree with the motion judge that the stop was proper, and affirm the denial of defendant's motion to dismiss.

The motion judge's findings were based on the evidence – including the testimony of Haddon Heights Police Officer Michael Smollock – presented at the suppression hearing. On December 29, 2014, at approximately 10:30 p.m., Smollock responded to a report of a car burglary. After learning the burglary likely occurred five to ten minutes prior, based on the owner's observation of his burgled vehicle's four-way flashers from his home, Smollock viewed the car located in the owner's driveway and observed exposed wires jutting from a hole in the console from which an electronic device had been removed. Smollock, as he walked back to his police

[1] Although the notice of appeal provides defendant is appealing from a May 12, 2017 judgment, defendant, in his merits brief, contests only the August 31, 2015 denial of his motion to suppress.

vehicle to retrieve a camera, noticed a man – later identified as defendant – carrying a grocery bag as he walked on the sidewalk away from the area of the burglary. Smollock's stop of defendant is the focus of this appeal.

Defendant contends the motion judge erred in concluding Smollock's stop of defendant was "a mere field inquiry." He, instead, characterizes it as an investigatory stop – invalid because there was no suspicion defendant was engaged in illegal activity when Smollock ordered him to stop, chased him down, and again ordered him to stop.

Our review of a judge's decision on a motion to suppress evidence is limited. State v. Vargas, 213 N.J. 301, 326-27 (2013). We are obliged to uphold the motion judge's factual findings that are supported by sufficient credible evidence in the record. State v. Diaz-Bridges, 208 N.J. 544, 565 (2012) (citing State v. Locurto, 157 N.J. 463, 471 (1999)). Deference to those findings is particularly appropriate when the trial court has the "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). We are not, however, required to accept findings that are "clearly mistaken" based on our independent review of the record. Ibid. And we need not give deference to a judge's

interpretation of the law and review legal issues de novo. Vargas, 213 N.J. at 327.

A field inquiry is "the least intrusive" form of police encounter, occurring "when a police officer approaches an individual and asks 'if [the person] is willing to answer some questions.'" State v. Pineiro, 181 N.J. 13, 20 (2004) (alteration in original) (quoting State v. Nishina, 175 N.J. 502, 510 (2003)). "A field inquiry is permissible so long as the questions '[are] not harassing, overbearing, or accusatory in nature.'" Ibid. (alteration in original) (quoting Nishina, 175 N.J. at 510). During such an inquiry, "the individual approached 'need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.'" State v. Privott, 203 N.J. 16, 24 (2010) (quoting State v. Maryland, 167 N.J. 471, 483 (2001)).

An investigatory stop,[2] by contrast, is a police detention of a person who would not reasonably feel free to leave, even though the encounter falls short of a formal arrest. State v. Stovall, 170 N.J. 346, 355-56 (2002); see also Terry v. Ohio, 392 U.S. 1, 16 (1968). Under Terry, a police officer can detain an individual for a brief period, if the stop is "based on 'specific and

[2] An investigatory stop is also known as a Terry stop. Terry v. Ohio, 392 U.S. 1 (1968).

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, 126-27 (2002) (quoting Terry, 392 U.S. at 21). Under this standard, "[a]n investigatory stop is valid only 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).

Applying these principles and our standard of review, we discern no basis for disturbing the motion judge's determination that the stop and subsequent search were valid.

Smollock testified that when he saw defendant walking, he "yelled out" words to the effect "can you stop so I can -- I got a couple questions." He explained that he was interested to know if defendant "had seen anyone in the area." The motion judge found

> [t]he testimony suggests that [Smollock], possibly wanting to find anyone who had potentially witnessed the incident, spotted an individual that he later came to know as the defendant walking away from the direction of the scene and called out for him to stop so that he could [ask] him questions.

Notwithstanding that Smollock testified that he called for defendant to stop, we agree with the motion judge that Smollock's purpose was investigatory, not accusatory. That is, it was not a

demand. See Davis, 104 N.J. at 497 n.6 (noting "an officer would not be deemed to have seized another if his questions were put in a conversational manner, if he did not make demands or issue orders, and if his questions were not overbearing or harassing in nature"). Obviously, defendant did not feel compelled to remain at the scene. He kept walking, signaling either, as the motion judge found, he felt "no obligation to remain at the scene" or he didn't hear Smollock. The latter scenario is possible in light of Smollock's testimony that defendant was wearing a hood; Smollock could not see his face and, therefore, was unable to discern defendant's emotions. Smollock was justified in jogging up to the unresponsive defendant to make sure he heard Smollock's request. Up to that point, the encounter was no more than a field inquiry.

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.
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> [Maryland, 167 N.J. at 483 (alteration in original) (quoting Florida v. Royer, 460 U.S. 491, 497-98 (1983) (citations omitted)).]

Smollock's initial request for defendant's name did not convert the field inquiry to an investigatory stop. See Pineiro, 181 N.J. at 20. Smollock recognized defendant's face, but did not associate him with other thefts and burglaries until after he learned defendant's name. The officer also noticed defendant was sweating in the December night air and "seemed jittery."

As is often the case, ensuing events gave rise to a reasonable and articulable suspicion that defendant had been engaged in criminal activity, justifying an investigatory stop. Even before he approached and engaged defendant, Smollock observed wiring in defendant's bag that he associated with the car burglary. In light of his knowledge about the wires protruding from the hole in the burgled car and defendant's close proximity – in time and location – to the burglary, Smollock was justified in investigating defendant's possession of a bag containing loose wires, even if he kept the encounter casual, asking only the defendant's name. While conversing with defendant, Smollock once more noticed wires protruding from the bag that defendant had placed on the ground. Although it was not necessary that Smollock had a reasonable and articulable suspicion at that juncture, he certainly did have one.

We, therefore disagree with defendant's contention that he was subject to an investigatory stop from the time Smollock initially called to him.

We also reject defendant's argument that Smollock was not lawfully in the viewing area to justify the search of the bag under the plain view doctrine. The plain view doctrine permits law enforcement to seize contraband without a warrant under the following conditions:

> First, the police officer must be lawfully in the viewing area.
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> Second, the officer has to discover the evidence "inadvertently," meaning that he did not know in advance where evidence was located nor intend beforehand to seize it.
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> Third, it has to be "immediately apparent" to the police that the items in plain view were evidence of a crime, contraband, or otherwise subject to seizure.
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> [State v. Bruzzese, 94 N.J. 210, 236 (1983) (citing Coolidge v. New Hampshire, 403 U.S. 443, 465-70 (1971)).]

Smollock was lawfully in the viewing area by virtue of his lawful encounter with defendant. The discovery of the wires connected to the stolen car electronics was inadvertent.[3] It was immediately apparent to Smollock that the loose wires protruding from defendant's bag related to the burglary.

[3] This search pre-dated State v. Gonzales, 227 N.J. 77, 82 (2016), in which our Supreme Court held prospectively "that an inadvertent discovery of contraband or evidence of a crime is no longer a predicate for a plain-view seizure." We, therefore, consider that prong.

The motion judge's factual findings are supported by sufficient credible evidence in the record; he correctly denied defendant's motion to suppress.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION