SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4882-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ORLANDO RIVERA-LOPEZ,
a/k/a ORLANDO LOPEZ,
ORLANDO RIVERA and
ISRAEL ULLOA,

Defendant-Appellant.

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Submitted January 11, 2018 – Decided April 9, 2018

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 15-03-0466.

Helmer, Conley & Kasselman, PA, attorneys for appellant (Patricia B. Quelch, of counsel and on the briefs).

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

PER CURIAM

After the trial court denied defendant Orlando Rivera-Lopez's motion to suppress, he pled guilty to one of two counts of invasion of privacy, N.J.S.A. 2C:14-9(b), that he was charged with in an indictment. The indictment alleged that he had been involved with "upskirting," - that is, taking pictures of underneath a woman's skirt, - while at a store on August 9, 2014, and, on another day, taking unauthorized pictures of another woman through her bathroom window. The court sentenced defendant, in accordance with his plea agreement, to two years of probation conditioned on his serving sixty days in the county jail. Defendant now appeals from the denial of his motion to suppress, arguing that information provided by the police to the judge who issued a search warrant was based upon the improper, warrantless search and seizure of his cell phone and the use of statements he made to the police without Miranda[1] warnings. We disagree and affirm.

The facts developed at defendant's suppression hearing as found by the motion judge are summarized as follows. On August 9, 2014, a female customer at a store notified another woman there that she had witnessed a man crouch down near the other woman and take a photograph with his cell phone pointed up, aiming under the woman's skirt. The two women located and confronted the man,

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

later identified as defendant, about taking the picture. When defendant denied taking the picture, the women asked to see his phone. Defendant did not comply and instead ran out of the store. The women followed him into the parking lot where they saw him drive away in his car. They were able to take down the vehicle's license plate number before he drove away.

Following the incident, the police were contacted and Officer Jason Buono responded to the scene. The women described defendant to the officer "as a stocky Hispanic male with spiked hair . . . and [possibly] a mustache," and gave the officer the license plate number from the car in which defendant drove away. Using the license plate number, the police were able to track down the owner, who turned out to be defendant's brother-in-law. Upon locating the brother-in-law and questioning him about his whereabouts, the brother-in-law advised that he had loaned the vehicle to defendant. The brother-in-law complied with the officers' request to call defendant to his home so that they could speak to him. He contacted defendant on his cell phone and defendant arrived shortly thereafter.

When defendant arrived, police observed that he resembled the description of the suspect that the women provided at the store. Police escorted defendant to the front of the patrol car, "which

was equipped with a dashboard-mounted mobile video recorder (MVR)," to record the encounter.

Defendant, whose native language is Spanish, confirmed that he understood English and responded to the police in English. Before he was given Miranda warnings, defendant stated he knew why the police wanted to talk to him, admitted that he was at the store earlier in the day and had been accused by the two women of taking photos, but denied taking any photographs or videos of any women. In response to their questions, he told police he had his cell phone with him.

The police then gave defendant his Miranda warnings in English, using his brother-in-law as a translator to ensure defendant understood what he was being told. Defendant responded affirmatively that he understood the warnings.

After the police issued the Miranda warnings and defendant physically indicated he had nothing more to say, a police officer asked defendant if he would consent to a search of defendant's cell phone, including looking at the photographs stored on the phone. Defendant responded affirmatively and presented the phone to the officers. Instead of taking the phone, the officer read a consent to search form to defendant in English, reading one sentence at a time, allowing defendant's brother-in-law to translate before moving on to the next. When the officer completed

reading the form, he had defendant sign and initial it to confirm that he consented freely and voluntarily, understood his right to refuse to consent to the search or stop it if he changed his mind, had the right to be present during the search, and authorized the police to take any evidence they discovered as a result of the search.

After signing the consent to search form, defendant told the officers his password in English so that they could search his phone. The officers used the password and searched through his phone, finding pictures, but nothing in relation to the incident. The officers then informed defendant that they planned to take his phone and apply for a warrant to search the phone for any deleted files. Defendant's brother-in-law translated what the police said and defendant asked how long he would be without his phone. Police then seized and secured defendant's phone.

The police applied for a warrant, relying upon an affidavit from Detective Jayson Moore. In his affidavit, Moore provided detailed reports from the two women at the store, information about defendant's connection to the vehicle that fled the scene, a physical description of the suspect that matched defendant's physical appearance, and defendant's prior criminal history of similar crimes. The affidavit also stated that when police first confronted defendant, he admitted being in the store and having

been accused by the two women of taking photographs, but he denied that he did so and only left the store because he was scared. Moore also provided information about his training and experience with "upskirting" cases, which were usually connected to cell phones. There was no mention of anything discovered through the earlier search of defendant's phone. Based on the information provided, the court issued the warrant.

The ensuing forensic search of the phone revealed "upskirting" and other videos, but none related to the August 9, 2014 incident. The other videos included an "upskirting" video taken at the same store on a different day, and a June 27, 2014 video of a naked woman in her bathroom, who the police were able to identify and confirm that the video was taken without permission.

Defendant was subsequently charged in a two-count indictment with invasion of privacy for the August 9, 2014 "upskirting" incident, and for the other video taken on June 27, 2014, of the woman in the bathroom. Defendant filed his motion to suppress his statement to police and the evidence they obtained from seizing and searching in his phone.

Judge Ronald L. Reisner conducted an evidentiary hearing and issued an order granting defendant's motion in part, suppressing his pre-Miranda statements to police, and denying it in part,

finding that defendant's consent to search his phone was invalid, while allowing the admission of the evidence obtained from his cell phone under the inevitable discovery doctrine. The judge set forth his reasoning in an eighteen-page written decision.

Addressing defendant's pre-Miranda statements, Judge Reisner found that upon encountering defendant, the police officers had probable cause to arrest him, but they did not do so. Instead, they "neither arrested nor told [defendant] that he was under arrest," but it was clear "defendant was not free to leave." Therefore, the judge held that the "State violated defendant's Miranda rights in questioning him prior to administering him" Miranda warnings. The judge suppressed any statements made by defendant "about his whereabouts prior to waiving [his] rights[,]" and any "admissions made before the administration of [those] rights. . . ." The judge ruled, however, that once defendant "was informed of his Miranda rights, he understood [those] rights," and that "he just did not think that he would be caught."

Judge Reisner also concluded that the State failed to meet its burden of establishing that there was a valid consent to search defendant's phone. He noted that even though defendant understood why the police were questioning him, the judge could not determine that "defendant's consent was freely and voluntarily given" to police, since it was not clear from the MVR recording transcript

that he had a full understanding of his rights. Nonetheless, the judge ruled that the inevitable discovery doctrine independently enabled the State's admission of the fruits of the search.

Quoting from Nix v. Williams, 467 U.S. 431, 448 (1984) and citing to State v. Sugar (III), 108 N.J. 151 (1987), Judge Reisner explained that the inevitable discovery doctrine "may be invoked to admit evidence that was the product of an illegal search when the evidence 'would inevitably have been discovered without reference to the police error or misconduct. . . .'" Citing State v. Johnson, 120 N.J. 263, 289 (1990) and State v. Sugar (II), 100 N.J. 214, 238-40 (1985), the judge observed that the burden was on the State to satisfy by clear and convincing evidence a three-prong test in order to rely on the doctrine. Judge Reisner explained the State had to prove:

> (1) proper, normal and specific investigatory procedures would have been pursued; (2) pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) such discovery would have occurred wholly independently of the discovery of such evidence by unlawful means.

Applying that test, Judge Reisner found "the officers had probable cause to arrest the defendant once . . . it was determined that he matched the description" given by the eyewitness and the victim. "Once arrested, they could have seized the cell-phone incident to a lawful arrest and applied for a search warrant

to search its contents." Citing State v. Hinton, 333 N.J. Super. 35, 41 (App. Div. 2000), the judge concluded that the only reason the police did not arrest defendant was that he voluntarily handed over the phone to be searched, so there was no need to actually arrest him to get the phone. Citing State v. Hunt, 91 N.J. 338, 349 (App. Div. 1982) and State v. De Lane, 207 N.J. Super. 45, 53 (App. Div. 1986), Judge Reisner found no reason to suppress evidence that the police would have discovered wholly independent of the unlawful means, as the evidence was recovered from the phone only after a valid warrant was issued, which was not based upon information obtained as a result of a premature search of the phone.

After the court denied the motion, defendant pled guilty to the one count in the indictment relating to the June 27, 2014 incident, and the charge relating to the August 9, 2014 "upskirting" incident was dismissed. The judge sentenced defendant to probation and this appeal followed.

On appeal, defend argues the following:

> POINT I
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> THE COURT ERRED BY HOLDING THE ILLEGAL CONSENT DID NOT TAINT THE EXECUTION OF THE SEARCH WARRANT AND THE PHOTOGRAPHS AND VIDEO RECOVERED MUST BE SUPPRESSED.

POINT II

THE COURT ERRED BY FAILING TO EXCLUDE DEFENDANT'S ENTIRE STATEMENT TO LAW ENFORCEMENT BECAUSE ADMINISTRATION OF MIRANDA RIGHTS DO NOT CURE THE INITIAL ILLEGALITY.

Turning first to the denial of defendant's motion to suppress information obtained from his cell phone, he contends that the motion judge erred because "the search and seizure of [his] iPhone were not justified pursuant to inevitable discovery," as the record does not support a finding that the police would have inevitably discovered his phone upon a search incident to arrest. Relying on State v. Maltese, 222 N.J. 525, 553 (2015), defendant argues that the record "does not indicate that the officers intended to arrest [him] that night." Moreover, defendant asserts that there is no testimony to support the court's conclusion that the sole reason the officers did not arrest defendant was because he "voluntarily handed over his cell phone to be searched." We find these contentions to be without merit.

"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)). This court "will set aside a trial court's findings of fact only" if the 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)).

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution protects individuals from unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Under the New Jersey Constitution, "a warrant authorizing the police to conduct a search may not issue 'except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.'" State v. Smith, 212 N.J. 365, 387 (2012); N.J. Const. art. I, ¶ 7.

When a search warrant is obtained as a result of information procured by unconstitutional means, the evidence seized upon the authority of that warrant must be examined under the exclusionary rule, "'a judicially created remedy designed to safeguard' the right of the people to be free from 'unreasonable searches and seizures.'" State v. Williams, 192 N.J. 1, 14 (2007) (citation omitted). Its purpose is two-fold. One "'is to deter future unlawful police conduct' by denying the prosecution the spoils of constitutional violations." State v. Badessa, 185 N.J. 303, 310

(2005) (quoting State v. Evers, 175 N.J. 355, 376 (2003)). The second purpose "is to uphold judicial integrity by serving notice that our courts will not provide a forum for evidence procured by unconstitutional means." Williams, 192 N.J. at 14. In essence, the exclusionary rule is designed to deter constitutional violations by law enforcement officers. The rule should not be used, however, unnecessarily to place law enforcement in a worse position than it otherwise would be, solely because of police misconduct. Smith, 212 N.J. at 388.

The "inevitable discovery doctrine" is an exception to the exclusionary rule that permits evidence to be admitted in a criminal case, even though it was obtained unlawfully, when the government can show that discovery of the evidence by lawful means was inevitable. State v. Holland, 176 N.J. 344, 361-62 (2003). The doctrine recognizes that "the exclusionary rule [is] not served by excluding evidence that, but for the misconduct, the police inevitably would have discovered. If the evidence would have been obtained lawfully . . . exclusion of the evidence would put the prosecution in a worse position than if no illegality had transpired." Sugar II, 100 N.J. at 237.

In order to invoke the inevitable discovery doctrine, the State must prove by clear and convincing evidence that:

> (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.
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> [Id. at 238.]

Guided by these principles, we conclude that Judge Reisner properly applied the inevitable discovery doctrine's three-prong test, see Maltese, 222 N.J. at 552; Sugar II, 100 N.J. at 238, and found that the State met its burden. Although the warrant affidavit contained information obtained by the police before they administered Miranda warnings to defendant, the judge correctly determined that the police had "independent, probable cause" to obtain a valid search warrant apart from the tainted information. See State v. Chaney, 318 N.J. Super. 217, 221 (App. Div. 1999). That other information included the eyewitness' report about defendant's conduct and his description, defendant being in possession of the car he was seen driving, and his having possession of his cell phone when he was called to his brother-in-law's home. Thus, the evidence found on defendant's cell phone in execution of the search warrant was not subject to suppression.

Holland, 176 N.J. at 357-61; State v. Ortense, 174 N.J. Super. 453, 454-55 (App. Div. 1980).

We affirm the denial of the suppression motion as to the information recovered from the cell phone substantially for the reasons expressed by the judge in his comprehensive written decision. We find defendant's arguments to the contrary to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). Suffice it to say, defendant has not established that the judge's ruling was "clearly mistaken" so as to warrant our intervention. We add only the following brief comments.

Defendant raises for the first time on appeal an issue about the police officers use of his cell phone's password to not only gain initial access to the phone while he was in their presence, but also in their later forensic search of the phone. According to defendant, because access to the password was not part of the application for the search warrant, "there was no judicial authorization for the State to make use of the password[.]" He supports his contention, without reference to any evidence in the record, by asserting that "[l]aw enforcement cannot search an iPhone without the password." The State contends, also without any support in the record, that defendant's assertion is incorrect as to the specific model of the iPhone he used and, in any event,

that providing a password to police is not testimonial in nature subject to a Fourth Amendment analysis, but presents a Fifth Amendment issue, involving a determination as to whether providing access to the object of the search warrant was a testimonial, self-incriminating statement.

Because this argument was not raised before Judge Reisner and does not involve "the jurisdiction of the trial court or concern matters of great public interest," we choose to not address it now. State v. Robinson, 200 N.J. 1, 20 (2009); see also State v. Witt, 223 N.J. 409, 419 (2015) ("Parties must make known their positions at the suppression hearing so that the trial court can rule on the issues before it"). "[I]t would be unfair, and contrary to our established rules, to decide the lawfulness" of the use of the password without giving both parties an opportunity to address it and for the trial court to have made the determination. Witt, 223 N.J. at 419.

Turning to defendant's argument that the statements he made after he was given Miranda warnings should have been suppressed, we conclude it is also without any merit. Defendant's statements to police only related to his involvement at the store on August 9, 2014. The charges arising from that day's events were dismissed at defendant's sentencing. Significantly, defendant made no statements to the police that related in any manner to the charge

to which he ultimately pled guilty that related to the June 27, 2014 incident. Under these circumstances "defendant's appeal of a pre-trial motion [to suppress statements] relating only to a dismissed count is moot." State v. Davila, 443 N.J. Super. 577, 581 (App. Div. 2016).

Even if defendant's argument had any vitality, we conclude that the officer's "pre-warning questioning [was] brief and the defendant's admissions . . . [were] barely incriminating," State v. O'Neill, 193 N.J. 148, 181 (2007), as they amounted to a denial of any involvement in the conduct he was being accused of at the store. His post-warning statements only related to his turning over his cell phone and password to the police. Defendant did not make any statements about his conduct relative to either incident. Under these facts, suppression was not required. Ibid.

Affirmed.