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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1870-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

VICTOR A. ROSARIO,

Defendant-Respondent.

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Argued August 1, 2023 – Decided October 16, 2023

Before Judges Firko and Mitterhoff.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 22-09-0840.

David M. Liston, Assistant Prosecutor, argued the cause for appellant (Yolanda Ciccone, Middlesex County Prosecutor, attorney; David M. Liston, of counsel and on the brief).

Joseph M. Mazraani argued the cause for respondent (Mazraani & Liguori, LLP, attorneys; Jeffrey S. Farmer, on the brief).

PER CURIAM

In this interlocutory appeal, the State appeals from the Law Division's order granting defendant Victor Rosario's motion to suppress the warrantless seizure of physical evidence from his person after he, and several other individuals, were detained when police executed a search warrant at the home of defendant's neighbor. We affirm, substantially for the reasons stated by Judge Pedro J. Jimenez, Jr. in his oral decision. We add the following brief remarks.

Because no officer testified at the suppression hearing, we derive the following facts from the transcript of the telephonic search warrant request; two bodycam videos; and the incident report, which were the only items entered into evidence at the suppression hearing. On June 24, 2022, Detective Alex Flores of the New Brunswick Police Department sought a search warrant for 109 Howard Street via a telephonic application to Judge Joseph Paone. The location is a single-family home owned by Antonio Lima-Pineda. Flores testified that a confidential informant (CI) provided information to law enforcement that Lima-Pineda would be receiving a delivery of firearms on either June 23, 2022, - or June 24, 2022. The detective made the warrant application at 11:12 p.m. Flores told the judge that the subject delivery of

suspected firearms, however, had occurred sometime earlier during the "late afternoon hours."

Flores stated that as he surveilled the location in the afternoon on June 24, 2022, he noticed a black sedan arrive at 109 Howard Street. The sedan was operated by a person described as a tall, skinny Hispanic male with a beard. The bearded man and Lima-Pineda approached the trunk, popped it open, looked inside, and then quickly closed it again. After conversing for approximately two minutes, they opened the trunk again, and the driver retrieved a duffle bag from the trunk. The pair then walked out of view into the detached garage. Flores stated that "a couple minutes later" the CI advised him that he had received a text message from Lima-Pineda that "they're here," followed by a phone call alerting the CI that the guns had arrived.

Flores testified that by the time of the search warrant application at 11:12 p.m., there were three to five other people hanging around the porch area, one of whom was "the target Antonio Lima-Pineda." The CI did not provide any further information regarding the other individuals.

Based on Flores's testimony, Judge Paone found probable cause and issued a warrant limited to a search of the premises of 109 Howard Street,

including the detached garage, and Lima-Pineda's person, to search for the weapons delivered to the premises.

According to the incident report, at 12:33 a.m., members of the Middlesex County Special Operations Response Team (SORT) arrived at the scene. The relevant portions of the SORT bodycam video showed officers shouted, "hands up!" to all the individuals on the porch and "on the ground" to defendant, who was standing between the house and a chain link fence. Defendant immediately complied by lying face down on the ground with his hands behind his back. A SORT officer then turned around with his back to defendant and entered the house to execute the warrant. He instructed another officer who was outside the chain link fence to keep defendant on the ground. No frisk of defendant was conducted by any of the SORT officers.

A second bodycam video recorded by the New Brunswick police showed defendant was left unattended, still lying in the same prone position, while officers were shown questioning Lima-Pineda and two other men in the front yard. It was only when an unknown officer directed Flores's attention to defendant that he finally approached him. Flores rolled defendant over and ordered him to stand up, which he did. The detective then patted defendant down without asking any questions and found a gun in defendant's left front

pocket. Neither video depicted any threatening movements or gestures that would raise suspicion that defendant was armed or dangerous and no officer testified otherwise.

After defendant was charged with fourth-degree possession of a defaced firearm under N.J.S.A. 2C:39-3(d), fourth-degree possession of a large-capacity ammunition magazine under N.J.S.A. 2C:39-3(j), and second-degree unlawful possession of a weapon (a handgun) under N.J.S.A. 2C:39-5(b)(1), he moved to suppress the evidence of the weapons seized in the pat-down. On January 19, 2023, Judge Jimenez granted the motion in an oral decision, finding the State failed to show there was either probable cause or a reasonable suspicion that defendant was armed and dangerous to justify the frisk.

On appeal, the State makes a single argument;

> POINT I
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> THIS COURT SHOULD REVERSE THE TRIAL COURT'S SUPPRESSION OF EVIDENCE BECAUSE THE EVIDENCE WAS SEIZED PURSUANT TO A LAWFUL PAT-DOWN FOR WEAPONS.

Our standard of review on a motion to suppress is limited. State v. Gamble, 218 N.J. 412, 424 (2014). Deference is given to the trial court's factual findings unless they were "clearly mistaken" or "so wide of the mark"

that the interests of justice require appellate intervention. State v. Elders, 192 N.J. 224, 245 (2007). "[A] trial court's factual findings should not be overturned merely because an appellate court disagrees with the inferences drawn and the evidence accepted by the trial court," State v. S.S., 229 N.J. 360, 374 (2017), but rather only if the findings are "so clearly mistaken that the interests of justice demand intervention and correction." Gamble, 218 N.J. at 425 (quoting Elders, 192 N.J. at 244). "That standard governs appellate review even when the trial court's findings are premised on a recording or documentary evidence that the appellate court may also review." State v. Tillery, 238 N.J. 293, 314 (2019) (citing S.S., 229 N.J. at 380-81). However, we review a trial court's legal conclusions de novo. State v. Ahmad, 246 N.J. 592, 609 (2021).

A police officer may conduct a pat-down search for weapons only if he has "reason to believe that he is dealing with an armed and dangerous individual." Terry v. Ohio, 392 U.S. 1, 27 (1968). The law prohibits an officer from "simply assum[ing] that everyone is armed and dangerous until proven otherwise." State v. Garland, 270 N.J. Super. 31, 43 (App. Div. 1994). Instead, the officer must point to specific facts and may not rely on "his inchoate and unparticularized suspicion or 'hunch.'" Id. at 41 (quoting Terry,

392 U.S. at 27); see also Sibron v. New York, 392 U.S. 40, 64 (1968) (requiring the officer to be able "to point to particular facts" with respect to the individual); State v. Thomas, 110 N.J. 673, 685 (1988) (declining to find a "specific, particularized basis for an objectively reasonable belief that defendant was armed and dangerous.")

Eleven years after the Terry decision, the United States Supreme Court in Ybarra v. Illinois[1] reaffirmed the principle that a frisk requires an articulable and reasonable belief that an individual is armed and presently dangerous. In Ybarra, 444 U.S. at 88, an Illinois state court judge issued a search warrant based on an informant's statements that he had seen "Greg," a bartender at the Aurora Tavern, possess tinfoil packets behind the bar and that "Greg" had told him that he would have heroin for sale on Monday, March 1, 1976. The warrant authorized the search of the premises and the person of the bartender for "evidence of the offense of possession of a controlled substance." Ibid.

The officers executing the warrant entered the tavern and advised everyone in the bar that they were going to conduct a "cursory search for weapons." Ibid. When an officer frisked Ybarra, he felt what he described as

[1] 444 U.S. 85 (1979).

"a cigarette pack with objects in it." Ibid. Several minutes later, the officer frisked Ybarra again, relocated and retrieved the cigarette pack from Ybarra's pants pocket, and found six tinfoil packets containing a brown powdery substance which later turned out to be heroin. Id. at 89.

Under those facts, the Supreme Court held that the lawful execution of a warrant at the premises did not supply the reasonable suspicion required for a Terry frisk of anyone not identified in the warrant. Id. at 90. The Court reasoned that:

> Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.
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> Notwithstanding the absence of probable cause to search Ybarra, the State argues that the action of the police in searching him and seizing what was found in his pocket was nonetheless constitutionally permissible. We are asked to find that the first patdown search of Ybarra constituted a reasonable frisk for weapons under the doctrine of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. If this finding is made, it is then possible to conclude, the

State argues, that the second search of Ybarra was constitutionally justified. The argument is that the patdown yielded probable cause to believe that Ybarra was carrying narcotics, and that this probable cause constitutionally supported the second search, no warrant being required in light of the exigencies of the situation coupled with the ease with which Ybarra could have disposed of the illegal substance.

We are unable to take even the first step required by this argument. The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons. Adams v. Williams, 407 U.S. 143, 146-[(1972)]; Terry v. Ohio, 392 U.S., at 21-24, 27. When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a ¾-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.

The Terry case created an exception to the requirement of probable cause, an exception whose

> "narrow scope" this Court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. See, e.g., Adams v. Williams, supra (at night, in high-crime district, lone police officer approached person believed by officer to possess gun and narcotics). Nothing in Terry can be understood to allow a generalized "cursory search for weapons" or indeed, any search whatever for anything but weapons. The "narrow scope" of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.
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> [Ybarra, 444 U.S. at 91-94.]

The circumstances in this case are strikingly similar to those in Ybarra, and compel the same result. Here, as in Ybarra, there was no probable cause to search defendant based on his happenstance presence at a premises subject to a lawful search warrant, which warrant was for a specific premises and a specific individual. See also State v. Dolly, 255 N.J. Super. 278, 283 (App. Div. 1991) (holding that "mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause" to search a person or automobile). Defendant was not identified by the CI; he was not described or named in the search warrant; the execution of the warrant

was remote in time from the alleged crime; there was no evidence he was present at the time of the subject weapons delivery; there was no evidence that he entered the home; and the police did not recognize him when they arrived at the scene.

Lacking probable cause, the police were required to meet the Terry test for a frisk. As the judge found, however, and our independent review of the bodycam videos confirm, the record is devoid of any threatening or furtive conduct by defendant that would support a reasonable belief that he was armed and dangerous. He immediately complied with the officer's command to get on the ground, and he remained there with his hands behind his back despite being left unattended for a period of time. We do not find the length of time he was left unattended to be significant because the fact that he was left unattended at all undermines the suggestion the officers perceived him to be a threat. Tellingly, no officer testified why the frisk was conducted in light of defendant's obvious submission to police commands and without any inquiry about why he was present.

The State's suggestion that the Terry requirements should be relaxed "in the context of the ever-increasing violence in society" is akin to the public policy argument in Ybarra that Terry requirements may be dispensed with in

light of the important governmental interest "in effectively controlling traffic in dangerous, hard drugs." Ybarra, 444 U.S. at 94. That argument was soundly rejected by the Supreme Court, id. at 94-95, and we reject it as well.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION