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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2107-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSHUA T. NOLAN a/k/a
NOLAN JOSHUA,

Defendant-Appellant.

Argued May 23, 2023 – Decided August 9, 2023

Before Judges Geiger, Susswein, and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 21-02-0195.

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Alyssa Aiello, of counsel and on the brief).

Gretchen A. Pickering, Senior Assistant Prosecutor, argued the cause for respondent (Jeffrey H. Sutherland, Cape May County Prosecutor, attorney; Gretchen A. Pickering, of counsel and on the brief).

PER CURIAM

Defendant Joshua T. Nolan appeals from the denial of his motion to suppress controlled dangerous substances (CDS) and drug paraphernalia found on his person during an encounter with police inside another's residence where he was a guest. After carefully reviewing the record in light of the applicable legal principles, we conclude defendant was subjected to an unlawful search when he was directed to empty the contents of his sweatshirt pocket. We therefore reverse the denial of his suppression motion.

I.

On June 8, 2021, the Law Division judge convened a suppression hearing during which the State presented the testimony of the arresting officer, Lower Township Police Department Officer Kyle Boyle. The State also presented the officer's body worn camera recording, which captures the entire encounter.

We discern the following facts from the suppression hearing record. On November 17, 2020, at approximately 5:34 p.m., Boyle and Officer Hayden

Denham¹ were dispatched to a call for assistance by E.M.² at her apartment. While Boyle was inside the apartment, he noticed a bedroom door that was open and a bathroom door that was closed. He did not see anyone inside the apartment other than E.M.

Boyle described E.M. as "very manic, very panicked, and just all over the place[;] [she was] very erratic, hysterical at times, [and] started crying at a point." Boyle called for emergency medical technicians (EMTs) to assist because E.M. appeared to be experiencing a mental health breakdown and Boyle was concerned about her well-being. Boyle and Denham remained in the apartment to assist the EMTs. They did not open the closed door or look into the other rooms.

Approximately a half-hour after police arrived at E.M.'s apartment, the bathroom door opened. Boyle was surprised and moved to the doorway to look in the bathroom. He saw defendant standing inside quickly stuffing his hands in his sweatshirt pocket. Boyle was concerned, testifying "he started to put his

¹ Officer Denham's surname appears phonetically in the motion transcript, and the parties used different spellings in their briefs. We determined the correct spelling and utilize it throughout this opinion.

² E.M.'s identity is not relevant to this appeal. Because the testimony reveals possible mental health issues, we use initials to protect her privacy.

hands in his sweatshirt pocket. I have no idea what's in that sweatshirt pocket at this point. It could be a weapon; it could be anything."

Boyle recognized defendant as someone he had encountered before but did not recall his name until Denham addressed defendant by his first name. Defendant was known to law enforcement as a drug user. The following conversation ensued, captured by Boyle's body-worn camera:

[BOYLE]: Hello. Sir? Hi.

[DEFENDANT]: Hello. What's up?

[BOYLE]: You've been in there the entire time?

[DEFENDANT]: Huh?

[BOYLE]: You been in here the entire time?

[DEFENDANT]: Yeah, hiding from you guys.

[BOYLE]: Why?

[DEFENDANT]: Because --

[DENHAM]: What's up, Josh? What's going on, man?

[DEFENDANT]: What's up?

[DENHAM]: You live - you live here?

[DEFENDANT]: No. (Indiscernible) my mom³
(indiscernible).

³ Defendant considers E.M. to be a "second mother" to him.

[BOYLE]: Okay. What are you doing in there?
Stuffing your pockets.

[DEFENDANT]: No, I'm not. (Indiscernible).

[BOYLE]: I know. But when the door opened, you
stuffed something in your pockets. And you're still
holding --

[DEFENDANT]: It's my cigarettes.

At this point, defendant displayed the pack of cigarettes to Boyle. Boyle testified that throughout the conversation, defendant had his hands in the pocket of his sweatshirt, moving something around. Boyle claimed he could hear a rustling noise indicating there was something in the pocket. He testified that after defendant showed him the cigarette pack, defendant's sweatshirt pocket "remained open, like, out for a little bit[.]" enabling the officer to see that there was something else inside. Boyle testified he saw a "cotton ball accompanied by what appeared to be a white wax fold."

On cross-examination, however, Boyle acknowledged it was not "immediately apparent" that the item was a wax fold, "[b]ecause if it was, I would have [taken] him in custody in the bathroom right there immediately." Boyle also testified that based upon his experience and training, cotton balls were a form of paraphernalia used by individuals who inject CDS.

The following exchange took place immediately after defendant removed the pack of cigarettes from his pocket.

[BOYLE]: And what else?

[DEFENDANT]: It's trash dude. It's trash.

[BOYLE]: What else is in there, bud?

[DEFENDANT]: Nothing.

[BOYLE]: I literally see something in your pouch.

[DEFENDANT]: Nothing.

[BOYLE]: Josh, it's in there. What is that, in your sweatshirt pouch?

[DEFENDANT]: There's nothing in there. It's my debit card. It's trash. That's what I'm trying to tell you.

[BOYLE]: I'm asking you to show me all of it. Where is the -- where is the trash?

[DEFENDANT]: I don't need to show you it.

[BOYLE]: You're being shady as shit, dude. You're hiding from us. Why are you hiding from us? Because I don't want --

[DEFENDANT]: Why -- why would I want to see you guys?

[BOYLE]: Why -- why aren't you helping her? She clearly needs help. This is like --

[DEFENDANT]: I knew she was calling the cops. And she's (indiscernible). I don't know what she's talking about. I have no idea. I really don't.

[E.M.]: He uses (indiscernible).

[DEFENDANT]: This is all it was. It was a piece of fucking trash, dude. I'm throwing it out.

[BOYLE]: Let me see it. That's a wax fold.

[DEFENDANT]: There's nothing in it though.

[BOYLE]: That's paraphernalia though.

[E.M.]: (Indiscernible) in my house, Joshua.

Boyle further acknowledged on cross-examination that it is neither illegal nor uncommon for members of the community to avoid contact with the police, and that it is not illegal or abnormal for people to put their hands in their pocket.

After Boyle confirmed defendant had a "wax fold" in his hand, he placed him under arrest and directed Denham to take defendant to the police car. An ensuing search incident to arrest revealed several empty wax folds, a hypodermic syringe, a cotton ball, an empty clear glassine baggie, and a clear glassine baggie containing a clear crystal-like substance, believed to be methamphetamine.

II.

The motion court issued an oral decision. The court found Boyle "to be very credible[,] . . . there's no way either on direct or cross that he was trying to deceive." The court also compared Boyle's testimony to the body-worn camera footage and determined that "what the officer testified to was exactly what happened on the video."

The court found that Boyle and Denham were lawfully in E.M.'s home. The court noted defendant was "sticking his hands into a sweatshirt pocket" when the bathroom door opened and "[t]he officer candidly testified in a way that can only be truthful[;] he had . . . no idea what was in the sweatshirt pocket. How would he know? And then the defendant again said he was hiding from the police."

Additionally, the court found that when Boyle asked what was in the pocket, defendant refused to tell him, repeatedly saying there was "nothing" in his pocket. The motion court found that based on defendant's behavior, the officers had reasonable articulable suspicion of criminal activity to detain him and ask further questions. It also concluded that Boyle's questions were logical and appropriate in view of defendant's admission that he had been hiding from police.

The motion court acknowledged that asking someone to reveal the contents of their pocket is the functional equivalent of a search. The court concluded, however, that Boyle had probable cause to believe defendant was in possession of drug paraphernalia once he saw in plain view a cotton ball and what appeared to be a wax fold inside defendant's pocket. The court added that once defendant handed Boyle a folded empty wax fold, Boyle had probable cause to arrest defendant. On that basis, the court denied defendant's suppression motion.

III.

Defendant raises the following contentions for our consideration:

POINT I

THE TRIAL COURT'S ORDER DENYING SUPPRESSION MUST BE REVERSED FOR TWO REASONS: (1) [DEFENDANT]'S ACT OF REMAINING IN THE BATHROOM TO AVOID THE POLICE, AS IS HIS RIGHT, DID NOT FURNISH THE OFFICERS WITH REASONABLE SUSPICION TO DETAIN HIM, AND (2) NO WARRANT EXCEPTION JUSTIFIED THE DE FACTO SEARCH THAT RESULTED WHEN POLICE RELENTLESSLY PRESSURED [DEFENDANT] TO REVEAL THE CONTENTS OF HIS SWEATSHIRT POCKET..

A. The Officers Did Not Have Reasonable Suspicion To Subject [Defendant] To An Investigatory Stop.

B. Even If The Officers Had Had A Legitimate Basis to Detain [Defendant], They Exceeded The Permissible Scope Of An Investigatory Stop By Pressuring [Defendant] To Reveal The Contents Of His Pocket.

C. As The Trial Court Correctly Found, Pressuring A Detainee To Reveal The Contents Of Their Pocket Is A De Facto Search. Because There Was No Justification For A Warrantless Search Of [Defendant]'s Pocket, [Defendant]'s Motion To Suppress Should Have Been Granted.

i. The de facto search of [defendant]'s pocket was not justified as a protective frisk for weapons because the officers lacked reasonable, articulable suspicion to believe that [defendant] was armed. Moreover, the search exceeded the permissible scope of a protective frisk.

ii. The cotton ball and white paper that Officer Boyle allegedly saw in [defendant]'s pocket did not furnish police with probable cause to arrest.

iii. The judge's ruling overlooked the fact that [defendant]'s removal of the cigarette pack, which enabled the officers to see inside his pocket, was the product of de facto search.

IV.

The scope of our review of a suppression hearing is limited. See State v. Handy, 206 N.J. 39, 44–45 (2011). We "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." Id. at 44 (quoting State v. Elders, 192 N.J. 224, 243 (2007)). "An appellate court 'should give deference to those findings of the trial judge which are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

In State v. Hubbard, our Supreme Court explained:

[W]hen the evidence consists of testimony of one or more witnesses and a videotaped recording of a statement by a witness or a suspect, an appellate court is obliged to review the entire record compiled in the trial court to determine if the factual findings are supported by substantial credible evidence in the record. State v. Locurto, 157 N.J. 463, 470–71 (1999). The appellate panel may reference a videotaped statement to verify a specific finding. It may not substitute its interpretation of events.

[222 N.J. 249, 269 (2015).]

See also State v. Hagans, 233 N.J. 30, 38 (2018) (noting "a trial court's fact-finding based solely on a video recording is disturbed only 'when factual findings are so clearly mistaken—so wide of the mark—that the interests of justice demand intervention.'" (quoting State v. S.S., 229 N.J. 360, 381 (2017))).

In contrast to the deference owed to a trial court's factual and credibility findings, we review a trial court's legal conclusions de novo. S.S., 229 N.J. at 380.

Because issues of law "do not implicate the fact-finding expertise of the trial courts, appellate courts construe the Constitution, statutes, and common law de novo—with fresh eyes—owing no deference to the interpretive conclusions of trial courts, unless persuaded by their reasoning." Ibid. (internal quotation marks omitted) (quoting State v. Morrison, 227 N.J. 295, 308 (2016)); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (noting that appellate courts are not bound by a trial court's interpretations of the "legal consequences that flow from established facts"). In the event of a mixed question of law and fact, we review a trial court's determinations of law de novo but will not disturb a court's factual findings unless they are "clearly erroneous." State v. Marshall, 148 N.J. 89, 185 (1997).

Turning to substantive legal principles, the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guarantee the right of people to be secure against unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. These protections "impose a standard of reasonableness on the exercise of discretion by government officials to protect persons against arbitrary invasions." State v. Gamble, 218 N.J. 412, 425 (2014) (quoting State v. Maristany, 133 N.J. 299, 304 (1993)).

Warrantless searches are presumed to be unreasonable unless they fall under one of the recognized exceptions to the warrant requirement. Elders, 192 N.J. at 246 (quoting State v. Pineiro, 181 N.J. 13, 19–20 (2004)). One of those exceptions is a search incident to an arrest. State v. Torres, 253 N.J. 485, 503 (2023); State v. Dangerfield, 171 N.J. 446, 455 (2002). That exception applies only when the underlying arrest is lawful. Torres, 253 N.J. at 503.

In State v. O'Neal, our Supreme Court held that under the search-incident-to-arrest doctrine, police may in some circumstances conduct a search and remove drugs before actually placing the suspect under arrest. 190 N.J. 601, 614 (2007). The Court explained that when police search a person before arresting him or her "as part of a single, uninterrupted transaction, it does not matter whether the arrest precedes the search." Ibid. (quoting State v. Bell, 195 N.J. Super. 49, 58 (App. Div. 1984)). "It is the 'right to arrest,' rather than the actual arrest, that 'must pre-exist the search.'" Ibid. (quoting State v. Doyle, 42 N.J. 334, 342 (1964)).

An arrest must be predicated upon probable cause. Torres, 253 N.J. at 503. "Probable cause exists when the totality of the facts and circumstances presented to an arresting officer would support a person 'of reasonable caution in the belief that an offense has been or is being committed.'" Ibid. (quoting

State v. Sims, 75 N.J. 337, 354 (1978)). The timing of when probable cause ripens is critical to the analysis. Under the plain view doctrine, the State must prove by a preponderance of the evidence not only that the officer was lawfully present when he or she observed and seized the incriminating item or contraband but also that it was "immediately apparent that the seized item is evidence of a crime." State v. Gonzales, 227 N.J. 77, 101 (2016); see also Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (requiring "probable cause to believe that an object in plain view is contraband without conducting some further search of the object" to determine its incriminating character).

V.

We next apply these principles to the present facts, paying close attention to the timing and sequencing of events. We agree with the motion court that Boyle and Denham were lawfully present in the apartment when defendant emerged unexpectedly from the bathroom. We also agree with the court that the officers had a reasonable and articulable suspicion to justify detaining defendant while they posed questions to him.

The motion court correctly recognized the officer's request that defendant show him the contents of his pocket was the functional equivalent of a search.⁴ Because that search was not authorized by a warrant, the direction would only be lawful if, at that specific moment, Boyle had probable cause to initiate a search incident to a lawful arrest.

We part company with the motion court with respect to its determination that Boyle had probable cause to make a custodial arrest when he directed defendant to empty his pockets. Boyle testified that what he saw in defendant's pocket was a "cotton ball accompanied by what appeared to be a white wax fold." Boyle candidly acknowledged that it was not "immediately apparent" that

⁴ We note the State does not contend that Boyle initiated a de facto protective frisk when he directed defendant to empty his sweatshirt pocket. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) ("An issue not briefed on appeal is deemed waived." (quoting Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017))). Although a frisk requires only reasonable suspicion rather than the higher standard of probable cause, it requires a particularized suspicion the person is armed and dangerous. See Terry v. Ohio, 392 U.S. 1, 27 (1968). The present record does not support any such suspicion. Furthermore, a protective frisk must be conducted in a manner designed only to reveal weapons, not CDS. In State v. Privott, our Supreme Court explained that a frisk should be conducted by patting down outer clothing, not by lifting the suspect's shirt to visually observe for weapons. 203 N.J. 16, 31–32 (2010). Ordering a suspect to empty his or her pockets would reveal non-weapon objects to police, exceeding the limited scope of a frisk under Privott.

the item was a wax fold, explaining "if it was [apparent], I would have [taken] him in[to] custody in the bathroom right there immediately."

As we have noted, under the plain view doctrine, the State must prove by a preponderance of the evidence that the incriminating character of the object was immediately apparent. Dickerson, 508 U.S. at 375; Gonzales, 227 N.J. at 101. Although the motion court found Boyle to be completely credible on both direct and cross examination, it discounted Boyle's critical concession that it was not immediately apparent the paper object was a wax fold—an object commonly associated with illicit drugs.

We next consider the significance of the cotton ball as part of the totality-of-the-circumstances analysis. Even accepting Boyle's testimony regarding his training and experience in recognizing drug paraphernalia, we do not believe his observation of a cotton ball, viewed in context with the other suspicious circumstances, was sufficient to elevate the level of suspicion to the probable cause needed to justify an arrest and search incident thereto.

Considering the totality of the relevant circumstances, there was reasonable suspicion defendant was engaged in criminal activity while hiding in the bathroom. However, especially in view of the officer's candid acknowledgment that it was not immediately apparent the item he observed was

a wax fold associated with illegal drug possession, we hold the State did not meet its burden of proving there was probable cause to arrest defendant and conduct a search incident thereto at the moment Boyle first directed defendant to reveal the contents of his pocket. See Dickerson, 508 U.S. at 375; Gonzales, 227 N.J. at 101.

It follows that the formal arrest and ensuing search of defendant's person was a fruit of Boyle's unlawful command that defendant reveal the contents of his pocket. See In re J.A., 233 N.J. 432, 446 (2018) (explaining the fruit-of-the-poisonous-tree doctrine). We therefore reverse the denial of defendant's motion to suppress and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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



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