RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2465-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

B.T.B.,

Defendant-Appellant.

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Argued April 25, 2023 – Decided June 19, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Count of New Jersey, Law Division, Passaic County, Indictment No. 12-10-0810.

Steven E. Braun argued the cause for appellant.

Leandra L. Cilindrello, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Leandra L. Cilindrello, of counsel and on the brief).

PER CURIAM

Defendant B.T.B. appeals from his guilty plea conviction for third-degree possession of a controlled dangerous substance (CDS). He contends the trial court erred in denying his motion to suppress the cocaine seized from his vehicle following his arrest. He also contends the trial court abused its discretion in imposing a two-year term of probation.

After carefully reviewing the record in light of the governing legal principles, we conclude the police entry into defendant's vehicle to retrieve the suspected cocaine they observed from outside the car was not permitted under the automobile exception to the warrant requirement. The governing case at the time of the entry, State v. Pena-Flores, 198 N.J. 6 (2009), overruled by State v. Witt, 223 N.J. 409 (2015), required the State to prove there were exigent circumstances that made it impracticable to obtain a warrant. The detective who seized the cocaine testified there were no circumstances requiring him to immediately enter defendant's vehicle. That candid acknowledgment undercuts the trial court's finding there was sufficient exigency under the strict test announced in Pena-Flores.

Furthermore, the trial court did not consider whether probable cause arose unexpectedly, which is a separate prerequisite under Pena-Flores. The detectives were lying in wait based on information a confidential informant (CI)

had provided more than an hour before the stop and arrest. The CI described the subject vehicle and predicted precisely where and when the driver would be delivering the CDS. Although probable cause did not ripen until the detective actually saw the suspected cocaine in the defendant's hands, finding the CDS in the vehicle described by the CI was not unexpected. We therefore reverse the denial of the motion to suppress and vacate defendant's conviction.

I.

This case has a long history. The arrest and ensuing seizure of the CDS occurred in April 2012. In October 2012, defendant was charged by indictment with: (1) third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); (2) first-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(1); and (3) third-degree possession of CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-5(a) and -7. Defendant was also charged with a disorderly persons offense for possession of drug paraphernalia, N.J.S.A. 2C:36-2.

Defendant moved to suppress the evidence, and a suppression hearing was held in December 2013. On January 28, 2015,[1] the judge denied the motion to

[1] The record shows the parties asked the motion judge to reserve her decision while they attempted to negotiate a plea. After defendant's application to

suppress, rendering an eight-page written opinion. After numerous delays, defendant pled guilty pursuant to a plea agreement in February 2022. He was sentenced to two years of probation and a total of $1,205 in fines and penalties. The remaining charges were dismissed pursuant to the plea agreement.

Defendant raises the following contentions for our consideration:

> POINT I
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> THE EVIDENCE MUST BE SUPPRESSED BECAUSE THE CONFIDENTIAL INFORMANT UPON WHOM THE DETECTIVES RELIED IN DETAINING DEFENDANT WAS NOT SHOWN TO BE RELIABLE AND KNOWLEDGEABLE. THUS, DEFENDANT'S RIGHTS PURSUANT TO BOTH THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION WERE VIOLATED.
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> POINT II
>
> THE TRIAL COURT ERRED WHEN IT FOUND THAT THE OBSERVATION OF THE DETECTIVES INSIDE DEFENDANT'S VEHICLE WAS INADVERTENT BECAUSE THE DETECTIVES CREATED THEIR OWN EXIGENCY.
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> POINT III
>
> DEFENDANT'S SENTENCE WAS EXCESSIVE BECAUSE HE HAD BEEN EFFECTIVELY ON PROBATION FROM THE TIME OF HIS TRIAL UNTIL SENTENCING, A PERIOD OF TEN YEARS, AND HE SHOULD HAVE BEEN GIVEN A

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recovery court was denied, the case was sent back to the motion judge for a ruling on the suppression motion.

SUSPENDED SENTENCE OR A SENTENCE IN WHICH HE WOULD HAVE RECEIVED TIME SERVED.

II.

We begin by recounting the facts adduced at the suppression hearing and the motion court's findings. At around 5:00 p.m. on April 9, 2012, Detective Paul Miccinilli of the Paterson Police Department received an unexpected phone call from a CI he had used in the past. The CI reported that a Black male driving a green Dodge Magnum would be delivering CDS to a specific address in Paterson at about 6:30 p.m. No other details were provided by the CI during the brief phone call.

At approximately 6:00 p.m., Detective Miccinilli drove to that address in an unmarked police vehicle, accompanied by Detectives Russell Curving and Mario Formentin. All three were dressed in plain clothes. They parked about seventy-five feet from the reported address and surveilled the area from inside the unmarked police vehicle. At about 6:40 p.m., the detectives saw a green Dodge Magnum stop "several feet from the curb" in front of the relevant address. Defendant was the driver and sole occupant.

The detectives saw defendant look at the relevant house and then look back down a few times. Detective Miccinilli then maneuvered the police vehicle

into the middle of the street near defendant's vehicle but did not activate the emergency lights. At that point—roughly thirty seconds after the Magnum stopped—all three detectives exited the police vehicle and quickly surrounded defendant's car. Detective Miccinilli approached the driver's window, Detective Curving went to the passenger side, and Detective Formentin went to the rear of the vehicle.

As Detective Miccinilli got near the driver-side window, he observed defendant holding a bag that appeared to contain powder cocaine. When defendant noticed the detectives, he dropped the bag to the floor. Detective Miccinilli then ordered defendant out of the car. As that was happening, Detective Curving saw a small digital scale on the front passenger seat.

Defendant complied with the detectives' orders and was handcuffed by Detective Formentin. Detective Miccinilli retrieved the bag of suspected cocaine from the floor of the Magnum while Detective Curving retrieved the scale from the passenger seat. A search of defendant's person incident to his arrest revealed $1,879 and a cell phone. With defendant's permission, Detective Curving parked the Dodge Magnum in a legal parking space.

On cross-examination, Detective Miccinilli was asked, "at the point that you and [Detective] Curving went into the car, there hadn't been a crowd

gathering or some emergency situation that required your immediate going into the car; is that correct, sir?" Detective Miccinilli replied, "[c]orrect." During Detective Curving's cross-examination, he was asked if there was anything "that gave rise to a concern for you for either your safety or for evidence being destroyed." Detective Curving responded, "[w]ell, it is Paterson. . . . It's not a good area." When defense counsel asked if anyone "did anything specifically that caused a concern for officer safety or for destruction of evidence," the detective replied, "[w]ell, nobody else did nothing, yes, but." Defense counsel cut in with "[o]kay, thank you," and Detective Curving finished with "[y]eah." The prosecutor did not clarify the issue during redirect.

The motion judge began her written opinion by recounting the procedural history and the detectives' testimony. Regarding the detectives' authority to stop defendant based on the CI information, the judge ruled that the detectives did not initiate an investigative detention by the manner in which they approached the Magnum. She reasoned, "[s]ince the detectives approached the [d]efendant's car after it came to a stop, the action they undertook thereafter to investigate the information from the confidential informant was permissible and lawful."

The judge then considered the plain view exception to the warrant requirement, explaining the three elements of that exception are:

> 1) the officer is lawfully present in the viewing area; 2) the officer inadvertently discovers the evidence in plain view[2]; and 3) it is "immediately apparent" to the officer that the items in pain view are "evidence of a crime, contraband, or otherwise subject to seizure." State v. Bruzzese, 94 N.J. 210, 236 (1983); see also Coolidge v. New Hampshire, 403 U.S. 443 (1971).

The judge reasoned the first element was met because "a person categorically does not have a reasonable expectation of privacy in portions of a car that are viewable from outside the car." She then stated the second element was inapplicable because "inadvertence is only required when the officer has intruded on a constitutionally protected area." She found the third element was satisfied because of the detectives' experience and their testimony regarding the bag of white powder and digital scale.

The judge next made findings as to whether there was exigency to excuse getting a warrant under the automobile exception, explaining "[p]lain view observations . . . when made pre-intrusion into a constitutionally protected location do not solely justify a warrantless intrusion and seizure." The judge referenced Pena-Flores for the factors bearing on exigency under the automobile exception.

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[2] We note the inadvertence requirement, long rejected under federal law, was eliminated prospectively by our Supreme Court in State v. Gonzales, 227 N.J. 77, 82 (2016).

The judge relied on several factors in finding exigent circumstances. First, she referenced "the nature of the neighborhood." She also noted defendant's car was "stopped several feet from the curb." Next, the judge suggested, "[a]lthough no one exited the house while the detectives were present, someone could have removed the contraband at a later time." She then explained, "[w]hile it was light out during the incident, dusk was approaching." Lastly, she mentioned the inherent mobility of automobiles. Based on those circumstances, the judge concluded "in this case, there were sufficient concerns about police safety and the preservation of evidence to permit the seizure of the evidence upon the plain view observations of the detectives."

III.

The scope of our review on a motion to suppress ruling is limited. State v. Ahmad, 246 N.J. 592, 609 (2021). "Generally, on appellate review, a trial court's factual findings in support of granting or denying a motion to suppress must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). Factual findings will not be disturbed on appeal unless they are "so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Gamble, 218 N.J. 412, 425 (2014)

(quoting State v. Elders, 192 N.J. 224, 244 (2007)). However, legal conclusions drawn from those facts are reviewed de novo. State v. Radel, 249 N.J. 469, 493 (2022).

Even accepting the State's position that Detective Miccinilli was lawfully present in the location where he viewed the CDS, the plain view doctrine on its own does not permit an intrusion into an automobile. In State v. O'Herron, we held "a 'plain view' observation made without intrusion into a constitutionally protected location does not itself justify a warrantless intrusion or seizure." 153 N.J. Super. 570, 581 (App. Div. 1977). That principle was reaffirmed in State v. Pineiro. 369 N.J. Super. 65, 73 (App. Div. 2004). Simply stated, and as the motion judge correctly noted, the plain view observation of suspected cocaine made from outside the Magnum did not automatically authorize police to enter the vehicle to retrieve the CDS. Rather, the warrantless incursion into the vehicle required some other exception to the warrant requirement.

Because the detectives did not ask defendant for consent to enter the Magnum,[3] this case turns on whether the detectives were authorized to enter the

[3] We note the detectives received permission from defendant to enter the vehicle to park it properly only after they had entered it to seize the cocaine and scales. The State on appeal does not seek to invoke the inevitable discovery doctrine. See State v. Aloi, 458 N.J. Super. 234, 243 n.6 (App. Div. 2019) (noting an issue

vehicle under the automobile exception. The entry in this case occurred before our Supreme Court revamped the elements of the New Jersey automobile exception in Witt. The State thus bears the formidable burden of meeting the rigorous multi-factored exigency test spelled out in Pena-Flores.[4] In that case, the Court held that under the New Jersey Constitution, the State must prove there were exigent circumstances that made it impracticable to secure the vehicle and obtain either a regular or telephonic search warrant. Pena-Flores, 198 N.J. at 28.

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not briefed on appeal is deemed waived (citing Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n.4 (App. Div. 2008))).

[4] The Court in Pena-Flores explained that circumstances relevant to the exigency test

> include, for example, the time of day; the location of the stop; the nature of the neighborhood; the unfolding of the events establishing probable cause; the ratio of officers to suspects; the existence of confederates who know the location of the car and could remove it or its contents; whether the arrest was observed by passersby who could tamper with the car or its contents; whether it would be safe to leave the car unguarded and, if not, whether the delay that would be caused by obtaining a warrant would place the officers or the evidence at risk.
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> [198 N.J. at 29.]

Notwithstanding the deference we ordinarily afford to fact-sensitive decisions by a trial court, Ahmad, 246 N.J. at 609, we reach a different conclusion than the motion court, which found sufficient exigency based on the "nature of the neighborhood," the position of defendant's car, the possibility someone from inside the house "could have removed the contraband at a later time," the fact that "dusk was approaching," and the inherent mobility of the car.

We caution that although the majority in Pena-Flores included the "nature of the neighborhood" in its non-exhaustive list of potentially relevant circumstances, the fact this encounter occurred on an urban residential street is not a talisman before which the protections of the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution evaporate. This was not a situation where a crowd had formed prompting police to take immediate action to complete their business and retreat from the scene. Indeed, nothing in the record suggests that anyone was standing near the car who might have posed a risk of interfering with the police investigation. Nor do we give credence to the notion that someone might have been so brazen as to emerge from the house and

attempt to wrest control of the CDS from the four[5] armed officers. Nothing in the record supports any such speculation.

In Witt, Justice Albin, writing for the majority, explained that the multi-factor exigency test embraced in Pena-Flores needed to be overturned, in part, because it provided too much latitude to reviewing courts and led to "inconsistent judicial outcomes." Witt, 223 N.J. at 444–45. The Court added, "[w]arrantless searches should not be based on fake exigencies." Id. at 449.

The notion that multiple police officers could not safely guard a vehicle on a residential urban street once the sun had set falls within the purview of fake, or at least exaggerated, exigency. Indeed, in Witt, while discussing a previous case, the Court said exigency concerns that "third parties may have been alerted and removed drugs from the car . . . were not real given that the car could easily have been placed under police control." Id. at 433 (citation omitted).

We reiterate and stress that Detective Miccinilli candidly acknowledged there was no emergency that required him to immediately enter the Magnum to retrieve the suspected CDS. We certainly can envision circumstances where a neutral and detached reviewing court would not accept an officer's assessment

[5] The record shows that a fourth officer mustered to the scene to transport defendant after he was arrested.

that exigent circumstances existed. It is less certain a reviewing court should substitute its judgment for an experienced officer when that officer acknowledges under oath there was no immediate need to conduct a warrantless entry. In light of Detective Miccinelli's frank acknowledgement, the State is hard pressed to show exigency sufficient to justify an automobile exception search under the demanding Pena-Flores paradigm.

But even putting aside the analytical process of weighing a multitude of real and not-so-real circumstances under the since-repealed Pena-Flores exigency test, the motion court did not consider another portion of Pena-Flores that requires the State to prove "the stop is unexpected." Pena-Flores, 198 N.J. at 28. That prerequisite has not been overturned or relaxed. Our Supreme Court in Witt, and most recently in State v. Smart, confirmed the longstanding principle that the State must prove the ripening of probable cause was both "unforeseeable and spontaneous." Witt, 223 N.J. at 450; Smart, 253 N.J. 156, 171 (2023).

In this instance, we focus on foreseeability. It was entirely foreseeable that the CI's tip would prove to be true. The State cannot on the one hand argue the CI's tip was reliable and at the same time contend it was unforeseeable that the CI's prediction would come to fruition. We are not suggesting the detectives

had and "sat on" probable cause before the street encounter unfolded. As we have noted, the CI's tip by itself did not meet the probable cause standard needed to obtain a search warrant. Probable cause did not ripen until the detectives corroborated the tip and observed defendant holding suspected CDS. But it was foreseeable that the police decision to stake out the address specified by the CI would bear fruit. We conclude this was essentially a planned encounter where detectives were lying in wait for a suspected drug dealer driving a distinctive vehicle and headed toward a specific location at a specific time.

Because the State cannot satisfy the elements of the automobile exception set forth in Pena-Flores, the detectives did not have lawful authority to enter defendant's vehicle. The seized CDS and paraphernalia must therefore be suppressed as a fruit of the unlawful entry.

Because we reverse and vacate defendant's conviction, we need not address his contentions regarding the sentence that was imposed.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.