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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2596-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DALE M. MCCORD,

Defendant-Appellant.

Submitted May 15, 2024 – Decided June 7, 2024

Before Judges Vernoia and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 22-01-0095.

Afonso Archie Law, PC, attorneys for appellant (Troy A. Archie, of counsel and on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Steven K. Cuttonaro, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Dale M. McCord appeals from a September 20, 2022 order denying his motion to suppress evidence—including conversations, data, and GPS monitoring information—seized pursuant to an October 6, 2021 communications data warrant (CDW) for defendant's cell phone and wiretap order that authorized the interception of communications made using the cell phone. The September 20, 2022 order further denied defendant's motion to suppress physical evidence—controlled dangerous substances (CDS) and firearms—seized during the execution of search warrants that were issued, in part, based on information derived from what defendant claims was the improperly issued CDW and wiretap order.

Defendant argues the court erred by rejecting his claim the affidavit supporting the wiretap order did not establish probable cause for the wiretap of his cell phone and otherwise failed to establish the necessity for a wiretap as required under the New Jersey Wiretapping and Electronic Surveillance Control Act (the Wiretap Act), N.J.S.A. 2A:156A-1 to -37. Defendant further contends the court erred by denying his motion to suppress the physical evidence because the warrants authorizing the search that resulted in the seizure of the evidence were based, in part, on the information, data, and communications that had been

improperly obtained through the wiretap and execution of the CDW. Unpersuaded by defendant's arguments, we affirm.

I.

A grand jury returned a seventy-count indictment charging defendant and numerous codefendants, including James Hemenway, with conspiracy and various drug, weapons, and other offenses. The charges in the indictment resulted from a months-long investigation of alleged illegal drug distribution and possessory weapons offenses and financial facilitation of criminal activity in Ocean County.

Following his indictment, defendant moved to suppress evidence—intercepted communications and GPS data—the State had obtained pursuant to a CDW for data from defendant's cell phone and a wiretap order permitting interceptions of communications from the cell phone. Defendant argued the affidavit supporting the issuance of the CDW and wiretap order did not establish probable cause as required for the issuance of the CDW or wiretap order, and the affidavit did not otherwise demonstrate that a wiretap was necessary as required under N.J.S.A. 2A:156A-9(c)(6).

Defendant also requested suppression of physical evidence, including CDS and weapons, that had been seized during the execution of search warrants,

which had been issued in part based on the evidence obtained through the execution of the CDW and wiretap order. Defendant claimed the physical evidence was the fruit of the poisonous tree—the allegedly improperly seized information, communications, and data obtained from the CDW and wiretap order—such that the State could not properly use the seized evidence against him. See State v. Shaw, 213 N.J. 398, 412-13 (2012) (quoting Wong Sun v. United States, 371 U.S. 471, 485 (1963)) ("The exclusionary rule generally bars the State from introducing into evidence the 'fruits' of an unconstitutional search or seizure.").

After hearing argument on the motion, Judge Lisa A. Puglisi issued a detailed and thorough written opinion detailing the information included in the affidavit supporting the issuance of the challenged October 6, 2021 CDW and wiretap order. More particularly, Judge Puglisi noted that the affiant, Ocean County Prosecutor's Office Detective Kristie Williams, had explained that between July and October 2021, the Ocean County Prosecutor's Office Narcotics Strike Force investigated allegations of cocaine distribution in Ocean, Monmouth, and Middlesex counties and New York City. Prior to applying for the October 6, 2021 CDW and wiretap order, the State had obtained and

executed three wiretap orders and six orders permitting the installation of GPS signal monitoring and tracking devices on various suspects' vehicles.

Detective Williams's supporting affidavit also explained that while intercepting October 5, 2021 communications on Hemenway's cell phone, officers intercepted a call between Hemenway and defendant. As detailed by Judge Puglisi, Detective Williams's affidavit explained that during the call, defendant and Hemenway discussed a prior purchase of cocaine Hemenway had made from an individual, "Lou," and Hemenway explained he had returned the cocaine to Lou because Hemenway believed it to be of poor quality. The affidavit quoted the statements made by Hemenway and defendant during the intercepted call, and Detective Williams explained that detectives involved in the investigation understood that Hemenway had referred to a kilogram of cocaine and told defendant that Lou would likely call him because Hemenway's conversation with Lou about the quality of the cocaine had been "heated."

Judge Puglisi also noted Detective Williams's affidavit stated that GPS tracking and text message logs from September 2021 showed Hemenway had driven to New York City on four occasions, stayed in New York City for about forty minutes each time, and had exchanged various text messages with defendant "around and sometimes during each trip." Detective Williams

explained the officers involved in the investigation understood that Hemenway had traveled to New York City on each occasion to purchase a resupply of cocaine, and Hemenway and defendant were engaged in selling cocaine purchased from a supplier they called "Lou."

Although not expressly referenced in Judge Puglisi's opinion, Detective Williams's affidavit also explained that based on the statements made by Hemenway during the call, she understood that Hemenway had advised defendant that Lou might call him to discuss the conversation Hemenway had with Lou, and defendant had agreed, stating "[y]eah he's probably gonna call." Detective Williams further explained in the affidavit that based on the statements made during the call, "Lou[] was likely unhappy with the way Hemenway spoke with him, so [Lou] would be reaching out to [defendant], who could be the more calm voice of reason." Detective Williams's affidavit further stated that Hemenway and defendant had regularly communicated over Hemenway's cell phone and "[t]he two . . . have spoken in the past about 'traps' in their vehicles and spending money together."

In the affidavit, Detective Williams also addressed the other investigative techniques that had been employed during the investigation and explained why they were no longer viable, thereby necessitating the wiretap. She explained

that since defendant and Hemenway contacted suppliers and purchasers by phone, it would likely be futile to surveil "random areas" with the hope of encountering defendant purchasing or distributing a CDS. She also noted that Hemenway was known to be "surveillance conscious" and police anticipated the same behavior from defendant. Detective Williams asserted that regular surveillance would not only be ineffective, but it would compromise the investigation because the surveillance would "eventually" be detected by the conspirators.

Detective Williams also explained that the use of confidential informants would be ineffective because it was too dangerous for the informants to inquire about the identities of suppliers and distributors. She also explained that a traditional search warrant, interviews pursuant to a grand jury subpoena, and retrieval of phone records would be similarly unsuccessful because the conspirators would become alerted to the investigation, halt trafficking activities, and compromise the investigation. Detective Williams further explained that because most of the conspirators' communications took place by cell phone, the investigators would be unlikely to expose the scope of the conspiracy, including the locations where drugs or proceeds were stored, without access to cell phone communications. Accordingly, Detective Williams

had concluded that all other investigative techniques had failed or would likely not succeed, leaving the wiretap as the only viable option.

Judge Puglisi rejected defendant's arguments that Detective Williams's affidavit did not establish probable cause for the CDW and wiretap order for defendant's cell phone and that the wiretap order was unnecessary. The court entered an order denying defendant's suppression motion.

Defendant later pleaded guilty to second-degree conspiracy to possess cocaine with intent to distribute, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:35-5(b)(2); and second-degree certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b)(1). The court sentenced defendant to an aggregate ten-year sentence with a five-year period of parole ineligibility in accordance with defendant's plea agreement.

This appeal followed. Defendant presents the following arguments for our consideration:

POINT I

DETECTIVE WILLIAMS NEVER DEVELOPED NECESSITY OR PROBABLE CAUSE REGARDING NEITHER [DEFENDANT] NOR HIS CELLULAR TELEPHONE AND THEREFORE THE WIRETAP GRANTED IN ONE DAY SHOULD HAVE BEEN SUPPRESSED.

POINT II

THE TRIAL COURT MIS[]CONSTRUED THE FACTS AN[D] SHOULD HAVE SUPPRESSE[D] THE WIRETAP FOR BEING FACIALLY DEFIC[I]ENT AND FOR LACK O[F] NEC[]ESSITY AND PROBABLE CAUSE.

In his reply brief, defendant presents the following point:

POINT I

THE STATE[']S CONCESSION THAT ONE CALL AMOUNTED TO PROBABLE CAUSE FURTHER DEMONST[R]ATES WHY THE TRIAL COURT MIS[]CONSTRUED THE FACTS AN[D] SHOULD HAVE SUPPRESSE[D] THE WIRETAP FOR BEING FACIALLY DEFIC[I]ENT AND FOR LACK O[F] NEC[]ESSITY AND PROBABLE CAUSE.

II.

When reviewing a trial court's decision on a motion to suppress, we must determine whether the findings of fact made by the judge could reasonably have been reached on sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). We review a trial court's legal conclusions de novo. State v. Rockford, 213 N.J. 424, 440 (2013).

"In nearly identical language, the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution protect 'against unreasonable searches and seizures.'" Facebook, Inc. v. State, 254 N.J.

329, 346 (2023) (quoting U.S. Const. amend. IV; N.J. Const. art. I, ¶ 2). "Both constitutions state that warrants must be supported by probable cause and must describe with particularity 'the place to be searched' and the 'things to be seized.'" Ibid. (quoting U.S. Const. amend. IV; N.J. Const. art. I, ¶ 2). Such "provisions extend to the interception of [communications] by law enforcement officials," and require the State to obtain a warrant prior to executing a wiretap. State v. Ates, 217 N.J. 253, 265 (2014).

The Wiretap Act "regulates the electronic interception of communications in New Jersey . . . to protect citizens' privacy from unauthorized intrusions." State v. Martinez, 461 N.J. Super. 249, 266 (App. Div. 2019) (quoting State v. Toth, 354 N.J. Super. 13, 21 (App. Div. 2002)). In an application for a wiretap, the applicant should include a "particular statement of the facts," including: (1) the identity of the alleged offender; (2) the details of the offense; (3) the type of communication to be intercepted and a showing of probable cause; (4) the character and location of the wire or electronic facilities involved; (5) the period of time the wiretap will last; and (6) "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." N.J.S.A. 2A:156A-9(c).

Our Supreme Court has defined probable cause as a "'well-grounded suspicion that a crime has been or is being committed.'" State v. Nishina, 175 N.J. 502, 515 (2003) (quoting State v. Sullivan, 169 N.J. 204, 211 (2001)). "Probable cause is not a stringent standard, but does require 'something more than a raw, unsupported suspicion.'" In re J.G., 151 N.J. 565, 591 (1997) (quoting In re A.J., 232 N.J. Super. 274, 286 (App. Div. 1989)). "[P]robable cause exists where the facts and circumstances within an officer's 'knowledge . . . [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed.'" State v. Vanderee, 476 N.J. Super. 214, 233 (App. Div. 2023) (alterations in original) (citations omitted).

A trial court's determination of probable cause is entitled to "'substantial deference[,]" Sullivan, 169 N.J. at 211-12 (quoting State v. Marshall, 123 N.J. 1, 72 (1991)), "unless there was clearly no justification for that conclusion," State v. Kasabucki, 52 N.J. 110, 117 (1968) (citing State v. Tanzola, 83 N.J. Super. 40, 43 (App. Div. 1964)). "[W]hen the adequacy of the facts offered to show probable cause is challenged after a search made pursuant to a warrant, and their adequacy appears to be marginal, the doubt should ordinarily be resolved by sustaining the search." Kasabucki, 52 N.J. at 116 (citing United

States v. Ventresca, 380 U.S. 102, 109 (1965); State v. Mark, 46 N.J. 262, 273 (1966)).

We are tasked with determining whether the findings made by the court could reasonably have been reached based on sufficient credible evidence in the record. Elders, 192 N.J. at 243. Here, the phone call between Hemenway and defendant—that had been intercepted, and upon which Detective Williams relied in support of the State's request for the wiretap order—clearly implicated defendant in a conspiracy to distribute CDS. Defendant argues the call was vague and therefore the wiretap order was based only on Detective Williams's hunch that defendant was involved in a conspiracy to distribute CDS. Defendant contends "[n]othing even remotely suggests that [defendant] and Hemenway were in business together. Rather, Hemenway and [defendant] grew up together, were friends, and Hemenway cried on [defendant]'s shoulder about his . . . failings in his drug business."¹

¹ Defendant does not argue Detective Williams lacked the experience to interpret the cell phone conversation, or that an expert was required to do so. See State v. Novembrino, 105 N.J. 95, 185 (1987); State v. Hyman, 451 N.J. Super. 429, 446-47 (App. Div. 2017). He asserts only that his intercepted conversation with Hemenway is vague and does not establish probable cause. We limit our discussion of the issues to those argued by defendant on appeal. See generally Drinker Biddle & Reath LLP v. N.J. Dep't of L. & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (explaining an issue not briefed

However, during the call, Hemenway told defendant that he had a dispute with Lou, who claimed Hemenway had provided him with subpar quality "shits" that the police understood to be kilograms of cocaine. Detective Williams explained the officers involved in the investigation discerned Hemenway and defendant were discussing cocaine during the intercepted call because Hemenway said "they made him keep one of them shits and cuz [sic] I had it broken down[,] " which Detective Williams explained refers to the process of breaking down kilograms of cocaine into smaller quantities to transport, conceal, and sell, as is a common practice for narcotics traffickers. During the call, Hemenway also said, "they know they gave us some D work, that's not fucking A work, bro." Hemenway added that there was no way he could have delivered the poor quality "shit" to "Dre,"² saying Dre "would have never took [sic] that." Defendant agreed, stating "[n]ever took [sic] that!" Finally, Hemenway stated, "[y]eah so, alright, I figured I'd let you know in case [Lou]

on appeal is deemed abandoned). It is defendant's burden to demonstrate that there was no probable cause for the CDW and wiretap order. Sullivan, 169 N.J. at 211 (2001).

² Detective Williams explained that she believed "Dre" to be Andre Johnson, "a known CDS distributor in the Bayshore, Monmouth County area."

calls you!" Defendant replied, "[y]eah, he's probably gonna call. He's probably gonna call."

The conversation, as explained by Detective Williams, supported a reasonable suspicion defendant was involved in Hemenway's alleged criminal activity—distributing cocaine—because the statements made reflect that defendant was familiar with Hemenway's actions, understood that Hemenway was upset about the quality of the product he obtained, and acknowledged his involvement in the criminal activity by indicating he would take the call from the disgruntled supplier, with whom defendant appeared familiar. That information is sufficient to have "warrant[ed] a [person] of reasonable caution in the belief that an offense has been or is being committed," and therefore established probable cause for the wiretap order. State v. Moore, 181 N.J. 40, 46 (2004) (second alteration in original) (quoting Schneider v. Simonini, 163 N.J. 336, 361 (2000)). See also State v. Christy, 112 N.J. Super. 48, 71-72 (Law Div. 1970) (citing Kasabucki, 52 N.J. at 117) (explaining that trial courts should take into account the "specialized experience and work-a-day knowledge" that allow police to interpret information received in a wiretap and "reach a reasoned and well-founded conclusion as to whether and what kind of criminal activity is transpiring").

We are not persuaded by defendant's claim that a single intercepted call cannot and did not establish sufficient probable cause to allow the interception of his cell phone communications under the Wiretap Act. The call established probable cause defendant was involved in Hemenway's suspected and alleged drug distribution operation, and the other facts presented in the affidavit—including the regularity and frequency of the communications between Hemenway and defendant, their intercepted conversations about "traps" in their vehicles, and defendant's prior record of convictions for possessory CDS offenses—established probable cause to believe defendant had and would use his cell phone for communications related to an ongoing conspiracy to distribute CDS.

"When a search is conducted pursuant to a warrant, the defendant has the burden of proving the invalidity of that search, namely, 'that there was no probable cause supporting the issuance of warrant or that the search was otherwise unreasonable.'" Sullivan, 169 N.J. at 211 (2001) (quoting State v. Valencia, 93 N.J. 126, 133 (1983)). In our assessment of a defendant's challenge to a search conducted pursuant to a warrant, "[w]e accord substantial deference to the discretionary determination resulting in the issuance of a [search]

warrant." Id. at 211-12 (alterations in original) (quoting Marshall, 123 N.J. at 72).

Defendant failed to sustain his burden of establishing Detective Williams's affidavit did not establish probable cause for the CDW and wiretap order. And, we otherwise discern no basis to upset Judge Puglisi's well-supported determination the affidavit established probable cause defendant was involved in a conspiracy to possess and distribute CDS and, as evidenced by the call, utilized his cell phone as a means of participating in the conspiracy. Accordingly, we find the court correctly rejected defendant's claim the CDW and wiretap order were not supported by probable cause. See Marshall, 123 N.J. at 72; Sullivan, 169 N.J. at 211-12.

Defendant also contends the court erred by denying the suppression motion because other investigative techniques were available and viable and, as a result, the wiretap order was unnecessary. Defendant argues "a wiretap warrant must be necessary due to the exhaustion of normal investigative techniques." Defendant also claims that although Detective Williams described the other investigative techniques that had been employed and explained why other techniques would not be fruitful, it is "unreasonable to believe that traditional investigative techniques were unlikely to succeed."

N.J.S.A. 2A:156A-9(c)(6) provides that an affidavit supporting a request for a wiretap must include "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." Because the Wiretap Act is closely related to Title III, 18 U.S.C. §§ 2510 to 2523, New Jersey courts "give careful consideration to federal decisions interpreting the federal statute." Ates, 217 N.J. at 269; see also State v. Feliciano, 224 N.J. 351, 371 (2016). We therefore look to guidance from federal precedent.

A decision as to whether an affiant submitted in support of a request for a wiretap established that traditional investigative techniques would likely be unsuccessful should be made in a "practical and commonsense fashion." In re Dunn, 507 F.2d 195, 197 (1st Cir. 1974). Furthermore, the federal statute "does require that normal investigative procedures be used first, [but] it does not require that law enforcement officers exhaust all possible techniques before applying for a wiretap." United States v. Macklin, 902 F.2d 1320, 1326-27 (8th Cir. 1990) (citing United States v. Leisure, 844 F.2d 1347, 1356 (8th Cir. 1988); United States v. O'Connell, 841 F.2d 1408, 1415 (8th Cir. 1988)). Thus, a

wiretap need not be executed only as a last resort. Id. at 1327 (citing United States v. Matya, 541 F.2d 741, 745 (8th Cir. 1976)).

"Whether the statutory requirement is met is to be determined by the issuing judge in a commonsense manner, and the determination is a finding of fact, which can be reversed only if clearly erroneous." Ibid. (citing United States v. Davis, 882 F.2d 1334, 1343 (8th Cir. 1989); United States v. Garcia, 785 F.2d 214, 223 (8th Cir. 1986)). Here, the court determined that based on the representations in Detective Williams's affidavit, the traditional investigative techniques had been exhausted, or were unlikely to succeed.

The court also rejected defendant's argument the State did not employ any standard investigative techniques before applying for the wiretap, explaining the State had been investigating the distribution network for months, and that "GPS tracking, dialed number retrievers, physical surveillance, controlled purchases of CDS and purchases of CDS through an undercover officer" had been employed but with limited success in identifying the CDS supplier. The court also accepted Detective Williams's sworn representations that confidential informants were unable to engage with defendant, Hemenway, or other suppliers, and if they had continued attempting to do so, it would have aroused suspicion and jeopardized the investigation. The court concluded that based on

the information presented in the affidavit, a wiretap was necessary and justified under the Wiretap Act.

In State v. Pemberthy, we found the affiant had reasonably concluded that other investigative techniques would be unsuccessful and could compromise the investigation where some members of a conspiracy had been arrested and there was "heightened suspicion" from conspirators. 224 N.J. Super. 280, 297 (App. Div. 1988) (citing Christy, 112 N.J. Super. at 64). We further found a wiretap was necessary because of the affiant's conclusion "[t]he surreptitious activities of this individual rendered physical surveillance alone extremely difficult if not impossible." Ibid. (citing Christy, 112 N.J. Super. at 64-65; United States v. Vento, 533 F.2d 838, 850 (3d Cir. 1976)). We reach the same conclusion for the same reasons here.


Detective Williams's affidavit explained in detail that further traditional investigative techniques were unlikely to succeed and might compromise the investigation. Defendant provides no more than bald assertions to the contrary. We affirm the court's determination the State established that the wiretap was necessary under the Wiretap Act because it is based on sufficient credible evidence in the record. Elders, 192 N.J. at 243; see also Pemberthy, 224 N.J.

Super. at 297. Accordingly, we find the court did not abuse its discretion by denying the suppression motion. Elders, 192 N.J. at 243-44.

To the extent we have not addressed any of defendant's remaining arguments, we find they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



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