

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3354-12T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

XIOMARA GONZALES,

Defendant-Appellant.

Submitted October 1, 2014 – Decided April 6, 2015

Before Judges Waugh and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 09-11-2182.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael Confusione, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Acting Monmouth County Prosecutor, attorney for respondent (Mary R. Juliano, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel; Laura C. Sunyak, Legal Assistant, on the brief).

PER CURIAM

Defendant Xiomara Gonzales appeals from the denial of her motion to suppress evidence seized in a warrantless search of her automobile. She also appeals the sentence imposed following a guilty plea to third-degree conspiracy to possess a controlled

dangerous substance (CDS), N.J.S.A. 2C:5-2 and 2C:35-10(a)(1), which was time served of 1156 days of imprisonment. For the reasons that follow, we reverse.

I.

On November 18, 2009, a Monmouth County Grand Jury returned an eighty-three count indictment against defendant and several co-defendants, following a large-scale narcotics investigation. Indictment No. 09-11-2182, charged defendant with second-degree racketeering conspiracy, N.J.S.A. 2C:5-2, 2C:41-2(d) (count one); third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1) (count eighteen); first-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(1) (count nineteen); and first-degree distribution of CDS, N.J.S.A. 2C:35-5(b)(1) (count twenty-two).

Defendant and co-defendant Allen Height moved to suppress the drugs seized following the motor vehicle stop. Following the four-day evidentiary hearing, the judge delivered an oral decision explaining her reasons for denying the motion. An implementing order was entered the same day.

We glean the following facts from the record of the motion to suppress. In December 2008, the Monmouth County Prosecutor's office commenced a wiretap narcotics investigation, called "Operation Life," investigating co-defendant Height and his

activities. Operation Life joined a parallel probe being conducted by the Newark Police Department Narcotics Unit and the Drug Enforcement Administration (DEA), investigating George Thompson, a suspected narcotics trafficker. Detective Scott Samis of the Monmouth County Prosecutor's office served as the lead detective.

Detective George Snowden, of the Monmouth County Prosecutor's office Narcotics Strike Force, testified that he was assigned to the wiretap room to monitor and register calls made through Height's cell phone. Immediately after every phone call, he would inform Samis what was said. On February 6, Snowden monitored a call in which he heard Height ordering a large quantity of heroin from Thompson. Height planned that he and a female would drive to Newark the next day to pick up the heroin from Thompson's convenience store on Ampere Parkway. The next day, at 12:07 p.m., Snowden heard Height call Thompson to discuss the purchase of heroin later that day in Newark.

Samis testified that he received surveillance information gathered during the investigation from Snowden, and then he relayed the information to DEA Special Agent Brian Crowe, who was the intermediary with the Newark police officers. On February 7, Samis received information from Snowden that Height and an unidentified female were traveling to Newark that day to

"pick [up] a package." Samis advised Crowe that he and Detective Bonanno, from the Monmouth County Prosecutor's office, were en route to Newark where Height planned to purchase a large package of heroin. Samis informed Crowe, "if [Height] was going to be getting this package, we would be picking it off - - attempting to make an arrest."

Samis explained the plan was to arrest Height and intercept the package of heroin by using the Newark police officers in a "wall off" traffic stop. He explained that a wall off is:

a word used with wiretaps. Again, it's a motor vehicle stop that we use to protect the wiretap so defendants don't realize that we're on phones [] that it appears that it's just a traffic stop, and from that we attempt to get that package, either by, you know, search warrant, consent, or a plain view.

Samis and Crowe set up surveillance near Thompson's bodega. When Height and defendant arrived in Essex County, driving separate vehicles, police surveillance units began to follow them at a distance. Height made two stops, one at the bodega and another at a drug stash house, both owned by Thompson. Height came out of the stash house carrying two shopping bags. He placed these bags in the back seat area of defendant's red Camry, and briefly spoke to her before returning to his vehicle. Samis believed that these bags contained narcotics, because the

events at the bodega and stash house were consistent with a narcotics transaction, and they were in a high-crime area.

Snowden informed him that Height had called defendant to tell her to follow him. Samis told the surveillance units to let them leave the area. "I didn't want to make any stops yet. I wanted to see where they were going. I didn't want to make any stops in [] Thompson's area because we certainly didn't want to bring any attention, again, of these vehicles getting stopped." Snowden next relayed that Height called defendant again, this time to tell her that he would lead her to the Garden State Parkway because he had to turn back, and that he would meet her again later. When she told him she had no money for the toll, Height told her how to go through the booth without paying. At that time, Height separated from defendant. Police units stayed with defendant and did not follow Height.

Once the defendant and Height's vehicles separated, Samis made the decision to stop defendant's vehicle. He explained that the fact that they had separated "was huge."

[Samis]: If we could remove [] Height from that package, then we could certainly get more dirty phone calls on the phone once he was aware that [defendant] has been picked off and of course the other individuals in the organization would have been upset that the package was picked off and, again, the plan was if we had to arrest [] Height for what we observed and what the phone calls were, we were going to, but when he pulled

off it just made the investigation and this operation so much better.

[Prosecutor]: And you said "dirty phone call." What do you mean by "dirty phone calls," just for the record?

[Samis]: Again, [] Height talking about drugs on the phone to include the conversation he had with [defendant].

[Prosecutor]: And in particular you were hoping to get phone calls in regard to this package after the package was picked off, correct?

[Samis]: Absolutely.

According to Samis, the "wall off . . . just got better because [] Height wouldn't be present. The plan would be to stop [defendant]." Samis trailed behind Newark police officers Wilfredo Perez and Willie Thomas as they followed defendant.

Perez testified he and Thomas were assigned to assist the DEA in its investigation of Thompson. Perez was also aware of the ongoing Monmouth County wiretap investigation involving individuals related to the Thompson investigation. On February 7, he and several officers were told to participate in the surveillance of defendant and Height. He understood that Newark officers were used rather than Monmouth County officers "to keep the integrity of the wiretap. It was not to be let out and known that there was an actual wiretap going on." He and Thomas

were directed by Crowe to be prepared to stop "a certain vehicle" and to arrest someone.

After standing by for some time, Perez was told to trail a red Camry. He followed that vehicle at about thirty or thirty-five miles per hour in the twenty-five-mile-per-hour-limit residential zone, while the red car drove "well over" that limit, traveling at fifty or fifty-five miles per hour. Perez observed that the vehicle approached a red light, slowed down, then make a left-hand turn through the red light. At that time, Perez received information from Crowe to stop defendant's red Camry as it was heading for the Garden State Parkway. As she approached the toll booth she went through the "exact change" toll lane without rolling down her window or putting her hand out "or anything of that nature." Perez and Thomas followed defendant onto the southbound on-ramp, activated their overhead lights, and pulled her over.

Perez testified that when he and Thomas approached the stopped car, he "look[ed] into the rear portion, the rear seat and right on the floorboard" and there he saw "two bags of what had spilled over, bricks of heroin." He explained he knew they were bags of heroin because "[i]t was quite visible. He also stated he "had the information that there were two blue bags back there, and once [he] looked in there, [he] saw the two blue

bags which had also spilled over into the floorboard, you know, what [he] perceived and identified to be, at the time, bricks of heroin." Perez stressed that in his experience working on narcotics investigations he identified the spilled items as heroin from its packaging "and the way it's put together for distribution."

After they arrested defendant, Perez entered the Camry and "secured the actual bricks that had spilled onto that floorboard, put them in a bag. While Perez re-packaged the heroin, Samis and Crowe were nearby, but stayed back to avoid being seen by either defendant, or Height, who knew Samis and Crowe "very well" from prior investigations. Samis and Bonanno then got in the Camry and drove the car, followed by Crowe, to a garage operated by the DEA in Newark.

Perez further testified that defendant received several motor vehicle summonses. He identified the tickets she received.

The judge found the officers' testimony credible and the testimony undisputed. She found the motor vehicle stop to be lawful and supported by the evidence that Perez and Thomas had a reasonable and articulable suspicion that defendant had committed numerous traffic infractions. Upon finding the motor vehicle stop lawful, the judge then considered the three prongs

of the plain view exception, as articulated in State v. Johnson, 171 N.J. 192, 206-08 (2002) (citing State v. Bruzzese, 94 N.J. 210, 236-38 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984)).

First, the judge determined Perez was lawfully in a position to view the drugs in the back seat, while he was standing at the rear portion of the vehicle. Second, Perez discovered the heroin "inadvertently" because the heroin bags had spilled in the back seat area allowing him to see the drugs without searching the bags. Third, the judge accepted Perez's unrefuted testimony that the spilled items were bricks of heroin, which is contraband subject to seizure.

On May 22, 2012 defendant pled guilty to amended count eighteen, conspiracy to possess a CDS. In exchange, the State agreed to recommend a sentence of time served, and a dismissal of the remaining three counts of the indictment and the traffic offenses. After defendant gave a factual basis for that offense, the judge accepted the plea. On July 12, 2012, the court sentenced defendant to time served of 1156 days of imprisonment. In accordance with the plea agreement, the remaining counts against her and the motor vehicle summonses were dismissed.

This appeal followed, raising the following arguments.

POINT I: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED BY POLICE.

POINT II: DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

Defendant contends the evidence is not sufficient to satisfy the plain view exception. She argues the court erred in finding that the State proved the discovery of the CDS was inadvertent.

"Appellate courts reviewing a grant or denial of a motion to suppress 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." State v. Gamble, 218 N.J. 412, 424 (2014) (citing State v. Elders, 192 N.J. 224, 243 (2007)). "Deference to these factual findings is required because those findings are substantially influenced by [an] opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy." Id. at 424-25 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)) (internal quotation marks omitted). We "cannot substitute [our] own findings merely because [we] would have drawn different inferences from the evidence." State v. Brown, 216 N.J. 508, 538 (2014). "A trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'"

Elders, supra, 192 N.J. at 244 (citing Johnson, supra, 42 N.J. at 162). We review its conclusions of law de novo. State v. Rockford, 213 N.J. 424, 440 (2013) (citing State v. J.D., 211 N.J. 344, 354 (2012); State v. Gandhi, 201 N.J. 161, 176 (2010)).

The United States Constitution, U.S. Const. amend. IV, § 1, and the New Jersey Constitution, N.J. Const. art. 1, ¶ 7 protect an individual's reasonable expectation of privacy by requiring police to obtain a warrant from a neutral magistrate before conducting a search or seizure. E.g., State v. Hinton, 216 N.J. 211, 228 (2013). A warrantless search is presumptively invalid, Bruzzese, supra, 94 N.J. at 218; Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639, 651 (1980), unless the search 'falls within one of the specific exceptions created by the United States Supreme Court.'" State v. Davila, 203 N.J. 97, 111-12 (2010) (quoting State v. Hill, 115 N.J. 169, 173 (1989)).

We are concerned here with the plain view exception to the warrant requirement. This exception applies when: (1) the officer is lawfully in the viewing area; (2) the officer discovers evidence "inadvertently," without knowing "in advance where evidence was located nor intend[ing] beforehand to seize it"; and (3) it is "immediately apparent to the officer that

items in plain view were evidence of a crime, contraband, or otherwise subject to seizure." Johnson, supra, 171 N.J. at 206-07 (citations and internal quotation marks omitted).

The purpose of the second element, the inadvertence requirement, is to insure that a "plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general one[.]'" Horton v. California, 496 U.S. 128, 137-38, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112, 123 (1990) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 470, 91 S. Ct. 2022, 2039, 29 L. Ed. 2d 564, 585 (1971)). "It is to prevent the police from engaging in planned warrantless searches, where they know in advance the location of certain evidence and intend to seize it, relying on the 'plain view' exception as a pretext." State v. Damplias, 282 N.J. Super. 471, 478-79 (App. Div. 1995) (citation omitted).

The "inadvertence" requirement "is satisfied if the police did not 'know in advance the location of the evidence and intend to seize it,' essentially relying on the plain-view doctrine only as a pretense." Johnson, supra, 171 N.J. at 211 (emphasis added) (quoting Coolidge, supra, 403 U.S. at 470, 91 S. Ct. at 2040, 29 L. Ed. 2d at 585 (1971)); see also Bruzzese, supra, 94 N.J. at 236 ("[T]he officer has to discover the evidence 'inadvertently,' meaning that he did not know in advance where

evidence was located nor intend beforehand to seize it.") (citing Coolidge, supra, 403 U.S. at 470, 91 S. Ct. at 2040, 29 L. Ed. 2d at 585).

In Johnson, police responded to a certain address based upon a tip of drug and ordinance violations. When they arrived, they saw several individuals on the porch. Id. at 199-200. Upon seeing the police, one of the individuals, the defendant, placed a light-colored object near a support post. Id. at 200. In affirming the application of the plain view doctrine, the Court noted that the officers were responding to a tip from a citizen informant and there was no evidence of pretext. Id. at 212. Rather, the officer saw the defendant place an object into the hole during the course of the investigation. Ibid. The Court stated, "[w]e conclude that whatever remains of the 'inadvertence' requirement of plain view since Horton was satisfied in this case because the police officers did not know in advance that evidence would be found in a hole beside one of several posts on the porch." Id. at 213. In our view, the Court's conclusion turned on the specificity of the information known by the police prior to the seizure.

Applying these principles here, we conclude the plain view exception to the warrant requirement is not satisfied because discovery of the heroin by Perez was not inadvertent. At the

outset, we agree with the trial court on the first requirement, that the traffic stop was lawful. The record amply supports the finding that Perez had formed a reasonable and articulable suspicion that defendant committed numerous traffic violations to justify the motor vehicle stop. State v. Golotta, 178 N.J. 205, 212-13 (2003); State v. Puzio, 379 N.J. Super. 378, 381 (App. Div. 2005). We, therefore, agree that Perez was lawfully in the viewing area after he stopped the car.

However, we part company with the trial court's analysis regarding the second prong. In its consideration of the second prong of the plain view exception, the judge focused on the police testimony that the drugs spilled from the bags, and could be readily seen without Perez having to open the bags to discern their contents. The court did not address the effect of the officers' prior knowledge of the presence of narcotics in the car.

Here, unlike in Johnson, the police, including Perez and Thomas, knew in advance of the traffic stop that Height had placed two bags of heroin in the back seat area of defendant's car. According to Samis, through a well-orchestrated investigation and surveillance operation, the police planned to effectuate a "wall off" traffic stop to seize the drugs. The police followed through on their plan using Perez and Thomas to

effectuate the motor vehicle stop. In this case, the presence of the drugs in defendant's car was clearly known in advance, and the motor vehicle stop, as planned, was a pretext to enable police to seize the narcotics.

Based upon the police having advance knowledge of the presence of the evidence, we conclude the "inadvertence" prong was not satisfied and, hence, the plain view exception to the warrant requirement was not met in this case. Thus, we hold that the conduct of the police in seizing the bags of heroin from defendant's car violated defendant's rights under the federal and New Jersey Constitutions. The order denying defendant's motion to suppress the evidence is reversed, and the matter is remanded for further proceedings.

Defendant also argues that the automobile exception does not apply to the facts of this case because of the planned nature of the stop. Specifically, defendant urges that the facts show that no exigency existed that would have relieved the police of their obligation to obtain a warrant or a telephonic warrant. We agree.

The automobile exception to the warrant requirement provides that the police may conduct a warrantless search of a vehicle if: (1) the police have probable cause to believe the vehicle contains contraband; (2) the circumstances demonstrate

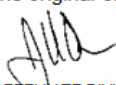
an exigency making it impracticable for the police to obtain a warrant; and (3) and the traffic stop is "unforeseen and spontaneous," as opposed to planned. State v. Pena-Flores, 198 N.J. 6, 20-22 (2009) (citing State v. Martin, 87 N.J. 561 (1981)).

The first criteria is satisfied by the police having observed the narcotics being placed into defendant's car. Thereafter, according to Samis, the investigation continued as the police followed defendant. The Newark officers trailed defendant for some time through the streets of Newark before stopping her on the Garden State Parkway. During that time, the police could have obtained a telephone warrant for the search of the vehicle based upon their knowledge that narcotics were in the car. The record does not demonstrate there was any exigency that impeded the police from doing so. Under these circumstances, the second criteria is not met. Pena-Flores, supra, 198 N.J. at 29. Therefore, this traffic stop does not meet the requirements of the automobile exception.

In light of our disposition in this matter, we need not address defendant's sentencing argument.

Reversed and remanded.

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


CLERK OF THE APPELLATE DIVISION