

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2484-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELADIO ECHARTEVERA,
a/k/a ELADIO ECHARTE,
ELADIN ECHARTEVERA,
ELADIN ECHARTE,
ELADIO VERA, and
ELADIN VERA,

Defendant-Appellant.

Submitted October 18, 2023 – Decided November 2, 2023

Before Judges Susswein and Vanek.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 17-12-1468.

Joseph E. Krakora, Public Defender, attorney for appellant (Susan L. Romeo, Assistant Deputy Public Defender, of counsel and on the brief).

Yolanda Ciccone, Middlesex County Prosecutor,
attorney for respondent (Joie D. Piderit, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Eladio Echartevera appeals from the August 5, 2021 Law Division order denying his motion to suppress controlled dangerous substances (CDS) found on his person. Defendant contends that the pat-down which led to the seizure of the CDS was unlawful and that the trial court erroneously concluded that the State proved there was an objectively reasonable concern for police officer safety to allow a pat-down for concealed weapons.

After reviewing the record, we are satisfied that the responding officers had an objectively reasonable basis to stop defendant and initiate a protective frisk, but conducted that pat-down for concealed weapons in a manner that violated defendant's constitutional rights. Accordingly, we conclude that the CDS recovered from defendant's person should have been suppressed and we therefore reverse the order denying defendant's suppression motion.

I.

After he was indicted, defendant moved to suppress evidence seized from his person on the grounds that he was subjected to an illegal warrantless search. The State opposed the motion. On June 25, 2018, the trial court denied defendant's motion without conducting an evidentiary hearing. A judgment of

conviction was entered on December 24, 2018 and defendant then appealed both the conviction and the order denying his motion to suppress.

We remanded this matter to the Law Division to conduct an evidentiary hearing on defendant's suppression motion in State v. Echartevera, No. A-1902-18 (App. Div. Nov. 30, 2020). We directed the trial court to vacate the judgment of conviction if it suppressed the evidence seized from defendant.

The Law Division held the evidentiary hearing on July 15, 2021. On August 5, 2021, the court denied defendant's motion to suppress in a written decision and accompanying order. On appeal, defendant raises the following contention:

THE DENIAL OF DEFENDANT'S SUPPRESSION MOTION MUST BE REVERSED, BECAUSE THE POLICE CONDUCTED AN ILLEGAL WARRANTLESS SEARCH WHEN THEY DID A PAT-DOWN OF DEFENDANT WITH NO EVIDENCE THAT HE WAS ARMED AND DANGEROUS.

II.

We discern the following facts from the suppression hearing.

The State presented the testimony of Perth Amboy Detective Jessica DeJesus and Patrolman Matthew Vasquez. On August 23, 2017, DeJesus was in an unmarked police car on Goodwin Street near the corner of Market Street conducting narcotics surveillance. DeJesus knew from her years of experience

on the police force that drugs were commonly bought and sold in that area of Perth Amboy.

DeJesus was surveilling a woman, known to the detective as a drug user, who was pacing back and forth and looking around while on and off her cell phone in a manner that led the detective to believe the individual may be about to purchase narcotics. When Vasquez arrived at the scene, he also observed the woman exhibiting the same behavior.

A U-Haul van with Arizona license plates pulled up to the corner where the surveillance was taking place and illegally parked next to a yellow curb and a sign that designated the corner as a "no parking" zone. Upon stopping in the "no parking" zone, the driver of the van honked the horn and motioned to the female to approach him. DeJesus, Vazquez and the other responding officers suspected a narcotics transaction was about to occur and approached the van. The officers showed their badges to defendant and identified themselves as law enforcement.

As he was approaching the van, Vazquez saw defendant make quick and rapid movements towards his waistline area with his hands. DeJesus observed defendant fidgeting with his waistline. Both officers concluded that defendant could possibly have a concealed weapon on him. Vasquez nonetheless acknowledged that defendant also could have engaged in this behavior for other

reasons such as adjusting his belt, trying to get keys out of his pocket or picking up paperwork that was next to him.

DeJesus asked defendant to step out of the vehicle and to move to the rear of the van so that the officers could conduct a pat-down for weapons. Defendant cooperated with the request.

During the pat-down, defendant "swiped" Vasquez's hand away as it came near defendant's waistline in an apparent effort to prevent him from continuing the pat-down. Vasquez testified that based on his experience, defendant's actions indicated there was "potentially something there that [he didn't] want me to find, or feel, or locate" which could "be anything from a weapon to narcotics." Vasquez also acknowledged that defendant could have been concerned the officer was intruding on a "very personal zone" of his body during the pat-down.

Vasquez "felt a bulge protruding" from defendant's waistline that was not consistent with human anatomy or defendant's clothing. However, Vasquez was not able to tell if the bulge was a weapon, an item concealing a weapon, or contraband. Vasquez testified that the item just near the beltline area felt sturdy and was plastic in texture, but he was unsure if his initial contact was with the end of a plastic bag. The officer also heard the sound of rustling plastic as he conducted the pat-down.

Vasquez could not determine the dimensions of the item from the pat-down of the outer clothing. Vasquez testified the item did not feel like the butt of a handgun. When asked by the court whether he believed the item was more likely drugs than a weapon, Vasquez responded that "[a]t that point it was still unknown."

After feeling the object, coupled with the way defendant swiped at the officer during the initial pat-down, Vasquez believed there was "a potential" that the object was a concealed weapon that posed a threat to his safety. Vasquez searched under defendant's clothing and initially he could not determine whether the item was a weapon. Vasquez removed the item from inside defendant's clothing and discovered it was a plastic bag containing 133 glassine envelopes of suspected heroin. Defendant's arrest followed.

On August 5, 2021, the trial court denied defendant's motion to suppress the CDS. In the written decision, the motion judge held that the police "conducted a constitutionally valid investigatory stop, pat-down, and seizure." The trial court found that the police lawfully stopped defendant based on defendant's illegal parking of the van. The court also found defendant's fidgeting near his waistband and the potential occurrence of a drug transaction were specific and particularized reasons to believe defendant could have been armed. The motion judge found that although a weapon was not identified

during the pat-down, the bulge in defendant's waistline was properly retrieved to ensure officer safety. The motion judge found the officers' actions were reasonable and justified under prevailing case law.

III.

Our review of the trial court's decision on a motion to suppress requires application of two different standards. "[A]n appellate court reviewing 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. Robinson, 200 N.J. 1, 15 (2009) (alteration in original) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). Those factual findings warrant particular deference when they "are substantially influenced by [the trial court's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid. (quoting Elders, 192 N.J. at 244). "A trial court's interpretation of the law, however, and the consequences that flow from established facts are not entitled to any special deference" and its "legal conclusions are reviewed de novo." State v. Gamble, 218 N.J. 412, 425 (2014) (quoting Elders, 192 N.J. at 244).

Citizens are protected against unreasonable searches and seizures under both the United States and New Jersey Constitutions. State v. Mann, 203 N.J. 328, 337 (2010). 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 and "impose a standard of reasonableness on the exercise of discretion by government officials to protect persons against arbitrary invasions." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7; Gamble, 218 N.J. at 425 (quoting State v. Maristany, 133 N.J. 299, 304 (1993)).

Unless they fall within the confines of one of the recognized exceptions to the warrant requirement, warrantless searches are presumed to be unreasonable. Elders, 192 N.J. at 246-47; State v. Pineiro, 181 N.J. 13, 19-27 (2004). It is the State's burden to demonstrate that the frisk and seizure were lawful at the outset and sufficiently limited in scope and duration. State v. Privott, 203 N.J. 16, 31 (2010); Florida v. Royer, 460 U.S. 491, 500 (1983).

In Terry v. Ohio, the United States Supreme Court established the bedrock principle that a warrantless investigative stop is valid only if it is based on a reasonable and articulable suspicion of involvement in criminal activity or a motor vehicle infraction. 392 U.S. 1, 21 (1968); Elders, 192 N.J. at 247. The "highly fact-sensitive inquiry" that determines whether reasonable and articulable suspicion exists requires an analysis of "the totality of the circumstances surrounding the police-citizen encounter." State v. Goldsmith, 251 N.J. 384, 399 (2022) (quoting Privott, 203 N.J. at 25-26). This standard is

less demanding than probable cause. Ibid.; State v. Thomas, 110 N.J. 673, 678 (1988).

A law enforcement officer, for their own protection and safety, may conduct a pat-down to find weapons that they reasonably believe or suspect "are then in the possession of the person" they have lawfully stopped. Privott, 203 N.J. at 30 (citing Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979)). "Because the intrusion is designed to protect the officer's safety, the standard governing protective searches is 'whether a reasonably prudent [person] in the circumstances would be warranted in [their] belief that [their] safety or that of others was in danger.'" State v. Roach, 172 N.J. 19, 27 (2002) (quoting State v. Valentine, 134 N.J. 536, 543 (1994)). "The officer must be able 'to point to particular facts from which [they] reasonably inferred that the individual was armed and dangerous.'" Thomas, 110 N.J. at 679 (quoting Sibron v. New York, 392 U.S. 40, 64 (1968)).

A protective frisk must be confined in scope to an intrusion designed only to reveal weapons, not CDS, and can be conducted only by a carefully limited pat-down of outer clothing to determine whether the defendant has a weapon that might be used to assault the officer rather than an under-the-clothing search. Roach, 172 N.J. at 27 (citing Terry, 392 U.S. at 30). "Nothing in Terry can be understood to allow a generalized 'cursory search for weapons' or, indeed, any

search whatever for anything but weapons." Privott, 203 N.J. at 30 (quoting Ybarra, 444 U.S. at 93-94).

In Privott, the Court noted that "[o]ur jurisprudence attempts to strike a balance between the competing interests of an individual's right to privacy and the need to protect the police from person with weapons." Id. at 32. The Privott court concluded that the officer's conduct was unlawful when they lifted the defendant's shirt to search for weapons during an investigative stop regarding an anonymous tip of a man with a gun after the defendant walked away with his hands near his waistband.

We now apply this constitutional framework to the present facts with careful attention to the timing and chronology of events. We agree with the motion judge that the responding officers had a reasonable and articulable suspicion to justify stopping defendant under Terry in light of defendant committing a motor vehicle infraction by parking the van in a prohibited area.

We also find that the trial court correctly concluded that asking defendant to step out of the vehicle and walk to the rear of the van for officers to conduct a pat-down for concealed weapons on the outside of his clothing was lawful. The motion judge found that the officers' credible testimony established that defendant was moving his hands by his waistband while seated in an illegally parked vehicle in an area where narcotics surveillance evidenced the potential

for an imminent drug sale. We are satisfied that on these facts, the officers were permitted to conduct a pat-down of defendant's outer clothing to determine whether he had a concealed weapon that might be used to assault them.

We part company with the trial court's conclusion that the manner in which the protective frisk was conducted was lawful under Fourth Amendment jurisprudence. The officer's testimony did not establish an objectively reasonable basis to conclude the object he felt in defendant's waistband was a weapon, as distinct from CDS. Accordingly, the officer was not authorized to remove the object. Officer Vasquez testified that during the initial pat-down on defendant's outer clothing, he felt a sturdy item with a hard plastic texture and he could hear the sound of rustling plastic. Vasquez did not testify that after the initial pat-down he thought the bulge was a weapon or that he feared for his safety. Instead, the officer testified there was a "potential" that the object posed a threat to his safety. There was also no evidence that the officers asked defendant any questions that might have led to the discovery of further information regarding the contents of the bulge before proceeding with the search under his clothing.

We find guidance in the Supreme Court's unanimous decision in Roach, 172 N.J. 19. In that case, the Court acknowledged that it had upheld seizures of unidentifiable objects on a suspect's person where a lawful pat-down was

inconclusive. The Court reasoned that police officers do not have to "perceive tactile recognition of a firearm" before they may protect themselves by removing a potential weapon. Id. at 28 (quoting State v. Ransom, 169 N.J. Super. 511, 521 (App. Div. 1979)). Nor is it necessary for an officer to "identify by species the object of concern," so long as the fear for their safety resulting from the pat-down is reasonable. Ibid. (quoting Ransom, 169 N.J. Super. at 522).

In Roach, the officers were faced with a nervous and intoxicated defendant with bloodstains on his shirt who refused to obey their lawful orders, continued to move his hands toward the unidentified bulge, and had to be physically restrained. The Court characterized the circumstances as "frenetic," concluding "[t]hat erratic behavior justified the officers' further action to neutralize any potential threat." Id. at 28-29. The Court cautioned that officers will not be free to seize an item every time an officer pats down a defendant and cannot ascertain what he is feeling, noting that hidden objects may be seized where the totality of the circumstances creates an objectively reasonable concern for officer safety. Ibid.

Here, in stark contrast to the facts in Roach, defendant was compliant and did not refuse to obey any of the officers' lawful orders. Nor did he continue to move his hands toward the unidentified bulge after the one time he swiped at the officer's hand, which may have been a reflexive response to the officer

reaching towards his front waistband. Defendant's conduct, in other words, was neither erratic nor threatening. This conclusion is consistent with the officer's testimony that there are a number of items the suspect might not have wanted the officer to retrieve, including CDS.

Thus, we are constrained to conclude the removal of the plastic bag exceeded the permissible scope of a Terry frisk because it was not reasonably believed to be a weapon based on the initial pat-down considered in light of the totality of the circumstances. See Roach, 172 N.J. at 29. Since the CDS was found after and only as a direct result of the unlawful search, that evidence must be suppressed as fruit of the poisonous tree. See State v. Bryant, 227 N.J. 60, 71 (2016).

Reversed and remanded for 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.


CLERK OF THE APPELLATE DIVISION