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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2278-10T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JEROME MCGHEE,

Defendant-Respondent.

Submitted June 2, 2011 - Decided June 16, 2011

Before Judges Axelrad and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 10-03-00419.

Edward J. DeFazio, Hudson County Prosecutor, attorney for appellant (Nicole M. Ghezzar, Assistant Prosecutor, on the brief).

DeLuca & Taite, attorneys for respondent (George T. Taite, on the brief).

PER CURIAM

By leave granted, the State appeals from the Law Division's interlocutory order of November 29, 2010, which granted defendant Jerome McGhee's motion to suppress. We affirm.

I.

A.

We recite the facts based upon the parties' stipulation and the N.J.R.E. 104 hearing that was conducted on October 8, 2010. The motion revolved around events that occurred one year earlier, on October 27, 2009. On that day, fifteen-year veteran Jersey City Police Officer Terrence Doran received information from a reliable confidential informant[1] that "there was an individual by the name of Jerome McGhee who was selling heroin and cocaine in the area of . . . 571 Montgomery Street [in Jersey City]." The informant also passed on information indicating that McGhee "uses a gold Lincoln, and that he's constantly in and out of the back of 571, and uses the gold Lincoln to make his deliveries." A physical description of McGhee was communicated to Doran, as well as information that the informant had actually "purchased drugs from Mr. McGhee, but only on the seventh floor of 571, so the informant wasn't able to give [him] an exact apartment." Lastly, the informant volunteered that "Mr. McGhee has, in the past, carried the drugs within his shoe."

[1] Doran testified that the confidential informant had provided information to him ten times in the past, which had resulted in ten narcotic arrests. Doran did not indicate the outcome of any of those ten arrests.

Based upon this information, Doran canvassed the area of 571 Montgomery Street, which included the Montgomery Gardens public housing complex (Montgomery Gardens), and observed a 1989 two-door gold Lincoln automobile parked nearby. A records check of the vehicle's license plates indicated that it was registered to Irving McGhee of East Orange. The police set up a surveillance location nearby to further observe the Lincoln.

Around 7:20 p.m., Doran received a telephone call from the confidential informant, who told the police officer that McGhee was going to make a drug delivery between 7:30 p.m. and 8:00 p.m. that day, and he would be using the Lincoln in that endeavor. Within thirty minutes of that call, McGhee was seen leaving the building at 571 Montgomery Street and walking directly to the Lincoln. He thereafter entered the automobile and started the engine. Before the Lincoln could be moved, Jersey City Detective Ludwig and Sergeant Nestor blocked the Lincoln to prevent such travel, and approached McGhee. The police officers asked McGhee to step out of the vehicle, and he complied. They then asked him to remove his left sneaker, which was also readily accomplished.

Secreted inside McGhee's sneaker were fifteen glassine bags of heroin, branded "Star Track," and two vials of cocaine with clear caps. Sixty-eight dollars in cash was then retrieved from

McGhee's right front jeans pocket, along with an apartment key. The police officers thereupon arrested McGhee and he was transported to a police facility for further questioning.

After being provided the appropriate Miranda[2] warnings, McGhee was asked why he was in possession of a key to an apartment located in Montgomery Gardens. He responded by indicating that he occasionally "stayed at his girlfriend's apartment, Priscilla Gadson, at [unit] 776."

A police officer then contacted Gadson and informed her of McGhee's arrest and the contraband recovered from his person. She confirmed that McGhee "does live there and that he comes and goes." Gadson was advised that it was believed that McGhee was selling controlled dangerous substances from her apartment. A consent to search form was proferred to her, which she read and signed.

Upon the police entry and search of Gadson's apartment, the following were seized:

- One defaced loaded High Point nine millimeter handgun;
- eight ballpoint bullets inside a gun magazine;
- twenty-eight dollars in cash;

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

- one police scanner set to the Jersey City Police Department's radio frequency;

- one East Orange High School diploma that belonged to McGhee;

- 102 glassine bags of heroin branded "Star Track";

- five vials of cocaine, two with clear caps and three with orange caps; and

- one and one-half grams of marijuana, two and one-half grams of crack cocaine, numerous empty vials, rubber bands, caps, zip lock bags, one Hide-a-Key, and one scale "commonly used to weigh narcotics."

B.

On February 3, 2010, McGhee was indicted by a Hudson County Grand Jury in a seventeen-count indictment that included several counts of possession of controlled dangerous substances with the intent to distribute, unlawful possession of a weapon, and unlawful interception of emergency communications. On April 29, 2010, McGhee moved to suppress all of the evidence that was seized without a warrant, including the material found as a result of the consent search of Gadson's apartment. An evidentiary hearing was conducted on October 8, 2010, at which time only Doran testified. The parties stipulated that the transcript of Doran's testimony in the Grand Jury would also be

incorporated into the record for purposes of the suppression motion.

The motion court issued a thorough twelve-page opinion on November 29, 2010, in which it granted McGhee's motion. The court held, "[a]ll evidence seized from the Defendant and from the apartment at 571 Montgomery Street, apartment 77-6 is hereby suppressed and inadmissible as evidence against the Defendant." Analyzing the case as if it were a conventional motor vehicle stop, the court found that "the information received from the [confidential informant] in the case at bar provided the police with a reasonable and articulable suspicion to justify the initial stop of the motor vehicle." However, it determined that there were no facts

> which showed any action by the Defendant which gave probable cause that the Defendant was engaged in criminal activity.
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> . . . .
>
> As such, this Court finds that the Defendant's actions did not rise to the level of establishing probable cause, which would permit the officers to arrest the Defendant. It is clear, therefore, that the search of the Defendant was not a search incident to a lawful arrest as the police did not establish probable cause to arrest the Defendant prior to stopping his vehicle.
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> . . . .
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> This Court finds, based on the testimony presented and the facts . . . that the

> police never established probable cause to arrest or search the Defendant based solely on the tips received from the [confidential informant].

Thus, the search of McGhee's shoe "was unreasonable and not supported by probable cause," as was the seizure of the sixty-eight dollars in cash and the apartment key. Moreover, the court held that because Gadson's acquiescence to the search of her apartment was (1) "heavily influenced by the unlawful seizure of the keys and drugs" from McGhee, and (2) "the purpose of the police misconduct (i.e., the unlawful search) was to establish probable cause that was lacking from the [confidential informant's] tip," the seizure of evidence in the apartment "was a product of the unlawful search and seizure of the drugs and keys from the Defendant's person that was not supported by probable cause."

A memorializing order confirmed the disposition, and the court stayed further proceedings in the Law Division to await the State's anticipated motion for leave to appeal. The State timely moved for leave to appeal, which we granted on January 10, 2011.

II.

On appeal, the State raises the following points:

POINT I: THE LOWER COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

POINT II: THE LOWER COURT ERRED BY SUPPRESSING EVIDENCE SEIZED FROM 571 MONTGOMERY STREET APARTMENT 77-6.

Although we do not necessarily agree with all aspects of the legal analysis performed by the Law Division —— we take issue particularly with its heavy reliance upon the so-called "automobile exception" that is part of search-and-seizure jurisprudence —— we nevertheless agree substantially with its ultimate legal conclusions, and do not find the State's arguments to be persuasive.

In reviewing an order disposing of a motion to suppress evidence we must defer to the motion court's factual findings, "so long as those findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007). We accord no special deference to the motion judge's legal conclusions. State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div.), certif. denied, 182 N.J. 148 (2004); State v. Ventura, 353 N.J. Super. 251, 258 (App. Div. 2002).

The State argues first —— correctly in our view —— that this case did not involve a motor vehicle stop. The motion court relied upon State v. Amelio, 197 N.J. 207 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2402, 173 L. Ed. 2d 1297 (2009), for the proposition that "'a lawful stop of an

automobile must be based on reasonable and articulable suspicion that an offense, including a minor traffic offense, has been or is being committed.'" Id. at 211 (quoting State v. Carty, 170 N.J. 632, 639-40, modified by 174 N.J. 351 (2002)). This is a correct statement of the law, but the happenstance that McGhee was apprehended in his idling motor vehicle that had not yet been moved from the curb does not bring this case within the niche of the law that touches and concerns searches and seizures relating to automobiles. Instead, we rely upon the more generalized law relating to the establishment of probable cause (for a warrantless search) derived from confidential informants as the touchstone for our analysis.[3] See, e.g., State v. Keyes, 184 N.J. 541 (2005); State v. Sullivan, 169 N.J. 204 (2001); State v. Zutic, 155 N.J. 103 (1998); State v. Smith, 155 N.J. 83 (1998).

"Broadly speaking, the reliability of a known police informant is judged by any indicia of the informant's veracity and an analysis of the basis of the informant's knowledge." Byrnes, N.J. Arrest, Search & Seizure, § 6:3-2(d) (2010) (citing

[3] We recognize that many of the confidential informant cases also involve automobile stops and seizures. See e.g., State v. Birkenmeier, 185 N.J. 552, 561 (2006) (involving an automobile stop based upon information from a confidential informant); cf. Amelio, supra, 197 N.J. at 213 (involving a tip from a known citizen, the defendant's seventeen-year old daughter).

Keyes, supra, 184 N.J. at 555-56; Sullivan, supra, 169 N.J. at 212). "An informant's 'veracity' and 'basis of knowledge' are two highly relevant factors" in determining probable cause under a totality of the circumstances test. Zutic, supra, 155 N.J. at 110-11 (quoting Smith, supra, 155 N.J. at 92). Veracity may be shown by past reliability; basis of knowledge may come from the informant's statement or it may be inferred from the level of detail and amount of hard-to-know information disclosed in the tip. Byrnes, supra, at § 6:3-2(d).

In this case, the confidential informant's information was found to establish a basis to justify the initial stop of McGhee. This was a proper application of the law because the informant's information was corroborated when, as predicted, McGhee emerged from 571 Montgomery Avenue around 7:50 p.m., and walked to a gold Lincoln. See Birkenmeier, supra, 185 N.J. at 561 ("As the informant predicted, the police observed defendant leaving his home at 4:40 p.m., carrying a laundry tote bag, and driving away in the car identified by the confidential informant."). "Reasonable suspicion necessary to justify an investigatory stop is a lower standard than the probable cause necessary to sustain [a warrantless search]." State v. Stovall, 170 N.J. 346, 356 (2002).

However, notwithstanding a justification to stop McGhee, the motion court did not find that asking McGhee to remove his shoe to conduct a warrantless search was proper because "there were no observations made by the Officers which showed any action by the Defendant which gave probable cause that the Defendant was engaged in criminal activity." Also, it was noted that given the circumstances, the police had sufficient time to request a telephonic search warrant to further their investigation.

The State contends that asking McGhee to alight from his vehicle was minimally intrusive, as was the demand that he remove his shoe. We cannot agree with this overly broad proposition, based upon the facts of this case. Although, arguably, it was a de minimis request to ask McGhee to step out of the automobile to talk with the police, the removal of McGhee's shoe at the insistence of police moved the encounter into a heightened sphere. Even under the totality of the circumstances, the details provided by the confidential informant were not sufficient to establish probable cause to support the warrantless search.

In Birkenmeier, the Court noted that the confidential informant's corroborated information was sufficient for purposes of the "collective circumstances" test of State v. Nishina, 175

N.J. 502, 511 (2003), and validated the police stop of the defendant's car. Id. at 562. However, more was necessary —— the smell of "a very strong odor of marijuana" —— to establish probable cause to actually search the vehicle. Ibid. So too, in this case, more was necessary in order to ask McGhee to partially disrobe.

The impermissible search and seizure from McGhee in the street outside of 571 Montgomery Street was also the basis for the motion judge's determination to suppress the cash and apartment key found on McGhee's person, as well as the contraband found upstairs in Gadson's apartment. The State argues that the consent search of the apartment was independently derived, thereby saving the fruits of the search. We, however, agree with the motion court's legal analysis that recognized the linkage of all of the circumstances, and resulted in the suppression of all of the evidence.

When McGhee's sneaker was improperly removed and searched, and the contraband hidden inside found, that gaffe sent into motion the balance of the police investigation. As such, it was fatally infected, and the confidential informant's information did not suffice to inoculate the consent search from the earlier contagion. We note that at no time did the confidential informant indicate where on the seventh floor of 571 Montgomery

Street McGhee was residing. Thus, the consent to search that was requested of Gadson was irretrievably connected to the apartment key improperly seized from McGhee. Any suggestion that the police would have gone door-to-door on the seventh floor of 571 Montgomery Street asking permission to search all of the apartment units located there is absurd. Plainly, the consent to search could only have matured from the planting of the poisonous tree in the street search of McGhee. Wong Sun v. United States, 371 U.S. 471, 485, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441, 454 (1963); State v. James, 346 N.J. Super. 441, 453 (App. Div.), certif. denied, 174 N.J. 193 (2002). All of the evidence was properly suppressed.

Affirmed.