

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4672-08T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASHAD WALKER a/k/a DERRICK MOSS,

Defendant-Appellant.

Submitted June 16, 2011 - Decided June 28, 2011

Before Judges Fisher and Grall.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 08-09-2693.

Yvonne Smith Segars, Public Defender, attorney for appellant (Amira R. Scurato, Assistant Deputy Public Defender, of counsel and on the brief).

Paula T. Dow, Attorney General, attorney for respondent (Hillary Horton, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Following his unsuccessful motion to suppress evidence, which was seized during a warrantless search of his residence, defendant pled guilty to two counts of third-degree possession of a controlled dangerous substance (CDS) with the intent to

distribute, N.J.S.A. 2C:35-5a(1), and one count of third-degree CDS possession with the intent to distribute within 500 feet of public housing, N.J.S.A. 2C:35-7.1. Defendant was sentenced to three concurrent and extended six-year prison terms, subject to three-year periods of parole ineligibility.

Defendant appealed, arguing:

I. THE TRIAL JUDGE ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS UNDER THE CONTROLLING CASES OF STATE v. BOLTE [115 N.J. 579, cert. denied, 493 U.S. 936, 110 S. Ct. 330, 107 L. Ed. 2d 320 (1989),] AND ITS PROGENY.

II. THE TRIAL JUDGE ERRED IN FAILING TO CONSIDER A LESSER SENTENCE AND IN GRANTING MULTIPLE EXTENDED TERMS (Not Raised Below).

In light of our disposition of Point I, we need not reach Point II.

With regard to the denial of defendant's suppression motion, the record reveals that the judge conducted an evidentiary hearing at which only a police officer testified. The officer testified that a tip was received from a confidential informant, who had provided reliable information at least ten times in the past. The informant advised that a black male was selling heroin, cocaine, and marijuana from a specified apartment on Riverview Court in Newark. The judge described what occurred after police officers arrived at that location:

Officer Rios knocked on the apartment door. The door was opened by a black male, later identified as [defendant]. He was wearing blue jeans, a white tee shirt and was smoking a marijuana cigarette. Officer Rivera began to approach the door with his badge visibly displayed around his neck. After seeing Officer Rivera's badge, [defendant] tossed the marijuana cigarette inside the apartment and attempted to close the door and run into the apartment. Officer Rios, however, kept the door from closing and apprehended [defendant] inside of the apartment. Officer Rivera then retrieved the marijuana cigarette from the living room floor and placed [defendant] under arrest.

Once inside, the officers observed materials that appeared to be cocaine and other contraband.

Defendant does not dispute these facts -- or, at least, recognizes that our standard of review requires that we defer to these findings, see, e.g., State v. Elders, 192 N.J. 224, 244 (2007) -- but instead argues that, as a matter of law, the circumstances did not provide a sufficient basis for the officers' entry into his residence. We agree.

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752, 764 (1972). A warrantless search of a person's home is "presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639, 651 (1980). This "basic principle of Fourth

Amendment law" is also "a fundamental precept" of New Jersey's constitution. State v. Henry, 133 N.J. 104, 110, cert. denied, 510 U.S. 984, 114 S. Ct. 486, 126 L. Ed. 2d 436 (1993). To justify a warrantless search of a home, the State must establish that police had probable cause and that exigent circumstances excused the need to seek a warrant. Welsh v. Wisconsin, 466 U.S. 740, 741, 104 S. Ct. 2091, 2093, 80 L. Ed. 2d 732, 738 (1984); see also Bolte, supra, 115 N.J. at 585–86. Because the confidential informant's tip did not establish probable cause and the exigent circumstances were police-created, we reverse the denial of defendant's suppression motion.

I

The State must first establish that police had probable cause to justify a warrantless home entry. Ibid. Probable cause, which is defined as "a well grounded suspicion that a crime has been or is being committed," State v. Basil, 202 N.J. 570, 585 (2010), requires "'more than a mere suspicion of guilt' but less evidence than is needed to convict at trial," State v. Brown, 205 N.J. 133, 144 (2011) (quoting Basil, supra, 202 N.J. at 585). Probable cause is established by examining the "totality of the circumstances"; "the court must make a practical, common sense determination whether, given all of the circumstances, there is a fair probability that contraband or

evidence of a crime will be found in a particular place." State v. O'Neal, 190 N.J. 601, 612 (2007) (internal quotation omitted).

"Information that police receive from confidential informants may" establish probable cause if there is "substantial evidence in the record to support the informant's statements." State v. Keyes, 184 N.J. 541, 555 (2005). In analyzing a tip, a court must examine the informant's "veracity and basis of knowledge." Ibid. Veracity "may be satisfied by demonstrating that the informant has proven reliable in the past," but "past instances of reliability do not conclusively establish an informant's reliability"; instead, the "current evidence must give the court an opportunity to make an independent evaluation of the informant's present veracity." Ibid. Basis of knowledge examines if "the informant obtained his information in a reliable manner," and "the court must decide whether the tip reveals 'expressly or clearly' how the informant became aware of the alleged criminal activity." Id. at 555–56. Without discovering how the informant obtained the information, basis of knowledge can be established "if the nature and details revealed in the tip . . . imply that the informant's knowledge of the alleged criminal activity is derived from a trustworthy source." Id. at 556. Lastly, "an

essential part of the determination of probable cause" is independent police corroboration. Id. at 556.

Here, the tip did not establish probable cause to enter defendant's home. First, although the confidential informant provided reliable information on ten previous occasions, this does not conclusively establish veracity. See id. at 555. In fact, the "current evidence" does not give the court "an opportunity to make an independent evaluation of the informant's present veracity." Ibid. The informant told the police that a black male was selling heroin, cocaine, and marijuana from a specific apartment, and he explained who would answer the door and how the transaction would occur; a black male did answer the door. This information does not allow the police to make an independent evaluation of the informant's present veracity because the only thing that was verified was that a black man answered the door of a specific apartment. In addition, the record does not reveal how the informant became aware of "the alleged criminal activity." See id. at 556. It does not reveal whether the informant purchased drugs from defendant, whether he saw someone purchase drugs from defendant, or whether he heard about defendant from a third party. Furthermore, this information does not imply that "the informant's knowledge . . . is derived from a trustworthy source." Ibid. Importantly, the

police never corroborated the information by staging a controlled buy.

Similar tips have not been found to create probable cause to justify warrantless home entries in other cases. In State v. Lewis, 116 N.J. 477, 479 (1989), an informant deemed reliable told police he had information about a person selling narcotics. The police met the informant who said he "recently left" the defendant's apartment where he observed "narcotics on the kitchen table and other paraphernalia." Id. at 480. The informant also stated that defendant and others were packaging drugs in the apartment for distribution. Ibid. Soon after, the police arrived at defendant's apartment, and an officer knocked on the door. Ibid. A man asked "who is it?," and the officer responded "it's Tony." Ibid. Defendant "opened the door, observed [the officer] in uniform, and attempted to close the door," but the officer "stuck his foot in the door" and entered. Id. at 480-81. The court determined that "[t]he content of the informant's tip . . . fell short of 'a clear showing of probable cause'" for several reasons, including: (1) "the informant was described as 'very' reliable without any further evidence of his credibility"; (2) "[h]is reference to 'narcotics on the kitchen table' omitted any indication of type, quantity, or value"; and

(3) "he was unable to identify any occupants of the apartment."
Id. at 486–87.

In another case, an informant told police that a "black male named Bob, dressed in blue, was selling heroin from a certain address in Newark." State v. Hutchins, 116 N.J. 457, 459 (1989). Two plain-clothed officers went to the address, and the defendant, a black male wearing a blue jogging suit, answered the door; when the officers tried to buy drugs, the defendant did not respond, but the officers noticed that defendant's right fist was clenched to possibly hide narcotics. Ibid. The officers identified themselves and defendant "turned around and fled into the house," with the officers in pursuit. Ibid. The Court "disagree[d] with the trial court's conclusion that the facts gleaned from the informant were sufficient to establish probable cause" Id. at 474.

In a recent case, we considered a citizen's call to the police "to report people arguing and selling drugs and a possible gunshot." State v. Jefferson, 413 N.J. Super. 344, 349–50 (App. Div. 2010). The citizen described a red Grand Am, told the police its license plate number, and said that "an African-American man was involved, describing his skin tone and head covering." Id. at 350. Police went to the house where the car was registered and saw the defendant peering out the front

door; they approached the door and told the defendant to show his hands. Ibid. The defendant complied and showed his hands around the door, but the officers were "still unable to see his waist area." Ibid. As the defendant stepped back from the door, it opened slightly, and one of the officers "wedged herself into the opening." Ibid. The defendant attempted to close the door, and he and the officer began to struggle. Id. at 350-51. Other officers pushed the door open, entered the hallway, and arrested the defendant. Id. at 351. We found that "the tip and corroborating evidence were not sufficient to establish probable cause." Id. at 353.

In another case, the Essex County prosecutor's office received a tip that drugs were being sold at a specific address. State v. Rice, 251 N.J. Super. 136, 137 (App. Div. 1991). Officers placed the house under surveillance and observed a man "approach the house and enter a screened . . . porch." Ibid. "A door to the interior of the house opened for . . . one minute and thereafter the" man left. Ibid. The officers then observed a couple enter the house and leave shortly thereafter. Id. at 138. Subsequently, the police knocked on the door and identified themselves after it opened. Ibid. The police heard scurrying inside the house and someone shout "police"; someone tried to push the door closed, but the police "pushed the door

open, entered the house, found drugs . . . and made arrests." Ibid. We determined that the "police did not have probable cause to believe that drugs were being sold . . . when they approached the house and knocked on the door" because their information "was limited to an anonymous telephone tip and the visits" by the man and the couple. Id. at 139. In addition, we declared that the occupants of the house had a right to close the door and "bar the police from physical or visual access to the interior of their home." Id. at 144.

These cases demonstrate that a mere tip that a person is selling narcotics, without sufficient information to determine the informant's veracity and basis of knowledge, is not enough and compels our conclusion that the officers, here, did not have probable cause to enter defendant's home.¹

¹Defendant also correctly argues that the State's claim of probable cause is not enhanced because defendant was smoking a marijuana cigarette when he answered the door. In Welsh, supra, 466 U.S. at 753, 104 S. Ct. at 2099, 80 L. Ed. 2d at 745, the Court held that "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." Our Supreme Court has recognized that disorderly persons offenses -- and possession of marijuana for personal use is a disorderly persons offense, N.J.S.A. 2C:35-10(a)(4) -- "are within the category of 'minor offenses' held by the Welsh Court to be insufficient to establish exigent circumstances justifying a warrantless home entry." Bolte, supra, 115 N.J. at 597. Thus, the "need to search for evidence of possession of marijuana or to arrest the possessors therefore d[oes] not constitute 'exigent circumstances'" justifying the warrantless entry of a

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II

A warrantless entry into a home also requires exigent circumstances. See Welsh, supra, 466 U.S. at 741, 104 S. Ct. at 2093, 80 L. Ed. 2d at 738; see also Bolte, supra, 115 N.J. at 585–86. Courts have "identified several exigencies that may justify a warrantless search of a home" as including "the need 'to prevent the imminent destruction of evidence.'" Kentucky v. King, ___ U.S. ___, ___ S. Ct. ___, 179 L. Ed. 2d 865, 875 (2011) (quoting Brigham City v. Stuart, 547 U.S. 398, 403, 126 S. Ct. 1943, 1947, 164 L. Ed. 2d 650, 657 (2006)); see also Lewis, supra, 116 N.J. at 484; Hutchins, supra, 116 N.J. at 484. This is "the most frequently relied on exigent circumstance in drug cases." Lewis, supra, 116 N.J. at 484.

"Whether exigent circumstances exist to justify a warrantless home search or seizure is highly fact-dependent," State v. De La Paz, 337 N.J. Super. 181, 195 (App. Div.), certif. denied, 168 N.J. 295 (2001), requiring consideration of the following factors:

- (1) the degree of urgency involved and the amount of time necessary to obtain a warrant;
- (2) reasonable belief that the contraband is about to be removed;
- (3) the

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home. State v. Holland, 328 N.J. Super. 1, 10 (App. Div.), certif. denied, 164 N.J. 560 (2000).

possibility of danger to police officers guarding the site of contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in narcotics traffic; (6) the gravity of the offense involved; (7) the possibility that the suspect is armed; (8) the strength or weakness of the facts establishing probable cause[;] and (9) the time of the entry.

[Id. at 195-96 (internal quotation omitted).]

Yet, police "may not rely on" exigent circumstances, such as "the need to prevent [the] destruction of evidence[,] when that exigency was 'created' or 'manufactured' by" police conduct. King, supra, __ U.S. at __, __ S. Ct. at __, 179 L. Ed. 2d at 875; see also De La Paz, supra, 337 N.J. Super. at 196 (holding that "[p]olice-created exigent circumstances which arise from unreasonable investigative conduct cannot justify warrantless home entries").

Here, if exigent circumstances existed, they were police-created. The plain-clothed officers knocked on defendant's door at approximately 11:00 p.m. Defendant answered, smoking a marijuana cigarette, and observed a police badge hanging around the neck of one of the officers, prompting his attempt to close the door and run back into the apartment. Arguably, this

created an exigent circumstance because it is likely defendant was running back into his apartment to destroy any drugs he may have had. Applying the factors in De La Paz, the police, thus, had a reasonable belief that contraband would be removed. Id. at 195. In addition, defendant was aware that police were "on [his] trail" because they were at his door and the contraband was certainly destructible. Ibid.² And the entry occurred at night. Id. at 196. However, even though it may be concluded that exigent circumstances existed, they were police-created because the exigency did not arise until the officers made their presence known. See ibid. In other words, prior to defendant seeing the officer's badge, police were not faced with "exceptional conditions" creating exigent circumstances. Lewis, supra, 116 N.J. at 488.

The order under review is reversed and the matter remanded for further proceedings in conformity 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

²"[D]rugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain." King, supra, ___ U.S. at __, ___ S. Ct. at __, 179 L. Ed. 2d at 876.