

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0032-13T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

TROY HENDERSON,

Defendant-Respondent.

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Submitted February 12, 2014 – Decided March 28, 2014

Before Judges Waugh, Nugent, and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 11-07-00437.

Geoffrey D. Soriano, Somerset County Prosecutor, attorney for appellant (Anthony J. Parenti, Jr., Assistant Prosecutor, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent (Mark H. Friedman, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

By leave granted, the State appeals the Law Division's July 18, 2013 order granting defendant's motion to suppress evidence seized following a motor vehicle stop. We affirm.

I.

We discern the following facts and procedural history from the record on appeal.

In the early afternoon of June 10, 2011, Warren Township Officer Robert Ferreiro stopped Henderson on Hillcrest Road for operating a motor vehicle with excessively tinted windows, contrary to N.J.S.A. 39:3-75. Ferreiro ascertained that Henderson's driver's license was suspended. In addition, Henderson was unable to produce a current insurance card for the vehicle.

Ferreiro described Henderson as "extremely nervous, sweating." He "observed in plain view some tobacco shavings," which he believed to be "consistent with the hollowed-out portions of a cigar which are often used to roll marijuana cigarettes." However, Ferreiro did not detect the odor of burnt or raw marijuana or any other illegal substance. According to Ferreiro, black and gray work gloves he observed on the passenger seat when he first spoke to Henderson were not there when he returned from his patrol car after running record checks on Henderson and the vehicle.

After calling for a backup officer, Ferreiro requested Henderson's consent to search the car, which was refused.

Ferreiro then issued Henderson summonses for the "tinted windows and [] driving while suspended" and "released" him.

Henderson told Ferreiro that the owner of the vehicle, his employer Carl Brown, would come to drive the car away. Ferreiro refused to allow Brown to pick up the vehicle, and told Henderson it was being impounded. According to Ferreiro, although "usually we offer people the opportunity to park their car and have someone with a valid driver's license pick up the vehicle," he "[p]robably [would] not" have allowed someone with a valid license and proof of insurance to retrieve the vehicle at that point because he "had a reasonable suspicion to suspect that there was some sort of criminal activity occurring." Ferreiro based his suspicion of criminal activity on "Henderson's extreme and unusual nervousness," the fact that his "stories were a little different," and the tobacco shavings.

Ferreiro called for a canine (K-9) unit to perform "an exterior sniff of the vehicle." Although the tow truck had arrived to transport the vehicle to police headquarters, Ferreiro kept it there until the K-9 unit arrived. The "dog indicated a positive alert for the odor of narcotics, specifically by scratching on the passenger-side door." The tow truck was then permitted to transport the vehicle.

After Brown arrived at the police headquarters, Ferreiro told him about the dog's positive indication concerning drugs in the car. Brown then consented to a search of the vehicle. The black and gray gloves, which Ferreiro testified he had initially observed on the passenger seat, were found in the glove compartment. They "contained six bricks of heroin."

Henderson was indicted for knowingly or purposely possessing heroin with an intent to distribute, contrary to N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(13). He filed a motion to suppress the heroin, arguing that there was an insufficient legal basis for Ferreiro's retention of the vehicle for a dog sniff or a search. The motion judge heard two days of testimony in June 2013. In an order and written opinion issued on July 18, the judge granted Henderson's motion and suppressed the evidence resulting from the search. We granted the State's motion for leave to appeal.

## II.

The State raises the following substantive issues on appeal<sup>1</sup>:

POINT II: THE POLICE LAWFULLY STOPPED  
DEFENDANT'S VEHICLE FOR A MOTOR VEHICLE  
INFRACTION.

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<sup>1</sup> Point I addressed the State's motion for leave to appeal.

POINT III: DEFENDANT IN THIS CASE WAS NOT UNREASONABLY DETAINED BECAUSE POLICE ISSUED HIM SUMMONSES AT THE SCENE, AND THEN DELIVERED HIM TO A LOCATION OF HIS CHOOSING.

POINT IV: THE K-9 HIT PROVIDED A REASONABLE BASIS TO REQUEST CONSENT TO SEARCH FROM THE OWNER OF THE VEHICLE.

Before addressing those issues, we outline the legal considerations that govern our decision in this case.

A.

"'[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. Mann, 203 N.J. 328, 336 (2010) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). "A trial court's findings should not be disturbed simply because an appellate court 'might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side.'" Ibid. (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). Instead, "an appellate court must defer to the trial court's findings that 'are substantially influenced by [the court's] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Id. at 336-37 (alteration in original) (quoting Johnson, supra, 42 N.J. at 161). Nevertheless, "[i]t is a well-established principle of

appellate review that a reviewing court is neither bound by, nor required to defer to, the legal conclusions of a trial . . . court." State v. Gandhi, 201 N.J. 161, 176 (2010).

"It is firmly established that a police officer is justified in stopping a motor vehicle when he has an articulable and reasonable suspicion that the driver has committed a motor vehicle offense.'" State v. Locurto, 157 N.J. 463, 470 (1999) (quoting State v. Smith, 306 N.J. Super. 370, 380 (App. Div. 1997)). "If, during the course of the stop or as a result of the reasonable inquiries initiated by the officer, the circumstances 'give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those suspicions.'" State v. Dickey, 152 N.J. 468, 479-80 (1998) (alteration in original) (quoting United States v. Johnson, 58 F.3d 356, 357-58 (8th Cir.), cert. denied, 516 U.S. 936, 116 S. Ct. 348, 133 L. Ed. 2d 245 (1995)).

However, "a police officer may not ask for consent to search a lawfully stopped vehicle or its occupants unless the officer has 'a reasonable and articulable suspicion' that the occupants are engaged in criminal wrongdoing." Elders, supra, 192 N.J. at 230 (citing State v. Carty, 170 N.J. 632, 635, modified on other grounds, 174 N.J. 351 (2002)).

"Reasonable suspicion" means that "the police officer must be able to point to

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968). "Reasonable suspicion" is "less than proof . . . by a preponderance of evidence," and "less demanding than that for probable cause," but must be something greater "than an 'inchoate or unparticularized suspicion or' 'hunch.'" United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989).

[State v. Barrow, 408 N.J. Super. 509, 517 (App. Div.), certif. denied, 200 N.J. 547 (2009).]

Although a judge should "ascribe sufficient weight to the officer's knowledge and experience and to the rational inferences that could be drawn from the facts objectively and reasonably viewed in light of the officer's expertise," State v. Arthur, 149 N.J. 1, 10 (1997), a reasonable and articulable suspicion is not subject to a singular rule and must not "'be justified merely by a police officer's subjective hunch.'" Elders, supra, 192 N.J. at 247 (quoting State v. Pineiro, 181 N.J. 13, 27 (2004)).

"The test of a justifiable use of a drug-sniffing dog is reasonable suspicion—the same test applicable to justify a request for consent to search." State v. Elders, 386 N.J. Super. 208, 228 (App. Div. 2006) (citing State v. Cancel, 256 N.J. Super. 430, 435 (App. Div. 1992), certif. denied, 134 N.J.

484 (1993)), aff'd in part and rev'd in part, 192 N.J. 224 (2007). Absent reasonable suspicion, a lawful dog sniff may only take place if it is concurrent with the underlying traffic stop, but there can be no further detention beyond that necessary to dispose of the traffic violation. Illinois v. Caballes, 543 U.S. 405, 406, 409, 125 S. Ct. 834, 836, 838, 160 L. Ed. 2d 842, 846-47 (2005) (finding dog sniff for narcotics appropriate when conducted concurrent with the police officer "in the process of writing a warning ticket").

If the driver of a stopped vehicle is unable to drive it following the stop, the Supreme Court has held that the driver should ordinarily be allowed to arrange for the disposition of the vehicle:

[I]f the circumstances that bring a vehicle properly to the attention of the police are such that its driver, even though arrested, is able to make his own arrangements for its custody, or if the vehicle can be conveniently parked and locked without constituting an obstruction of traffic or other public danger, the police should permit that action to be taken rather than impound it against the will of the driver and thereafter search it routinely.

[State v. Slockbower, 79 N.J. 1, 9 (1979).]

The Court emphasized that the "point to be made is that constitutional rights to privacy in vehicles and effects must be accorded respect by police as well as courts and cannot be



subordinated to mere considerations of convenience to the police  
short of substantial necessities grounded in the public safety."  
Id. at 12 (emphasis added).

B.

Turning to the issues raised on appeal, the primary question is whether there was a sufficient factual basis for a reasonable and articulable suspicion of criminal activity to justify detaining the vehicle and initiating the dog sniff.<sup>2</sup>

In his written decision, the motion judge determined that there were insufficient facts to support a reasonable and articulable suspicion of criminal activity.

[T]his Court notes that the K-9 unit was called immediately after defendant was asked for consent to search his car. That is, upon refusing to provide the officers with consent to search the vehicle, the defendant was advised that a K-9 sniff for narcotics will be forthcoming.

Neither of these actions (refusal to provide consent to search the vehicle nor failure to possess a driver's license, registration or insurance) provided justification, under the circumstances, as they were known to the officers, to suspect that this defendant was in possession of narcotics. This Court therefore finds that the circumstances do not rise to the level of reasonable suspicion of narcotics possession and therefore the K-9 investigation, over an hour later, was

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<sup>2</sup> The motion judge found, and we agree, that there was a sufficient factual and legal basis for the initial stop.

improper and impermissibly extend[ed] the length of the stop.[]

Furthermore, as to Officer Ferreiro's testimony regarding the workman's gloves, which were "present on the passenger seat, but then moved to an unknown location[,"] same was not mentioned in the [video taken by the camera mounted in the police car (MVR)]. As to the general demeanor of the defendant, this Court, after a thorough review of the MVR, does not find that the defendant appeared excessively nervous. Therefore, neither of these two "observations" provided the suspicion necessary to prolong the motor vehicle stop.

Our standard of review requires us to defer to the motion judge's findings of fact, which are supported in the record. The judge was present for the testimony and had an opportunity to evaluate witness credibility in person.

Although the judge did not specifically discuss the cigar shavings, we are satisfied that, absent the odor of burnt or raw marijuana, the mere presence of cigar shavings scattered on the floor of a motor vehicle is not indicative of the presence of illegal drugs. Henderson's purported change in story, which involved whether Henderson was coming from a friend's or his family's house in Jersey City, was similarly insufficient.

Even viewing all of the factors together in the totality of the circumstances, we find no basis to disagree with the motion judge's factual and legal conclusion that there was an insufficient legal basis for Ferreiro's request to Henderson for

consent to search the vehicle or the use of a dog sniff that was not concurrent with the actual stop. Ferreiro's hunch was correct, but it was nothing more than a hunch and, consequently, insufficient to warrant a request to search or a dog sniff not concurrent with the stop. Elders, supra, 192 N.J. at 247.

We reject the State's suggestion that the dog sniff was a sufficient basis for asking for Brown's consent to search. As the motion judge found, the dog sniff was not concurrent with the stop, but took place "nearly an hour or more after the initial stop." The K-9 unit was called just after Henderson refused to consent to a search, at a time when Ferreiro lacked a reasonable and articulable suspicion to ask for consent or to hold the vehicle for a dog sniff. Ferreiro departed from what would have been his usual practice, and the requirement of Slockbower, supra, 79 N.J. at 9, 11-12, to permit the owner to remove the vehicle, because of the very suspicion both the motion judge and we have concluded was insufficient. The motion judge found that there were no exigent circumstances and that, by precluding Henderson from arranging for Brown to retrieve his car, there was an impermissible detention of the vehicle. We agree.

Brown's consent to search was prompted by the improper dog sniff and cannot cure the constitutional violations that led up

to it. "A consent to search that is attributable to police misconduct involving the violations of constitutional rights may be regarded as the product of that unconstitutional conduct and an invalid basis on which to justify a search." State v. Smith, 155 N.J. 83, 101, cert. denied, 525 U.S. 1033, 119 S. Ct. 576, 142 L. Ed. 2d 480 (1998).

For the reasons outlined above, we affirm the order suppressing the evidence, essentially for the reasons articulated by Judge John H. Pursel, as supplemented in our opinion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION