

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3662-12T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AKILAH N. MURPHY,

Defendant-Appellant.

Argued April 22, 2015 – Decided June 3, 2015

Before Judges Fuentes, Ashrafi and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment No.
12-01-00024.

John Douard, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender,
attorney; Mr. Douard, of counsel and on the
brief).

Joseph A. Glyn, Deputy Attorney General,
argued the cause for respondent (John J.
Hoffman, Acting Attorney General, attorney;
Mr. Glyn, of counsel and on the brief).

PER CURIAM

A Union County grand jury returned an indictment against
defendant Akilah N. Murphy charging her with fourth degree
possession of marijuana, N.J.S.A. 2C:35-10a(3), third degree

possession of marijuana with intent to distribute, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(11), third degree possession of marijuana with intent to distribute within 1000 feet of a school zone, N.J.S.A. 2C:35-7, third degree possession of heroin, N.J.S.A. 2C:35-10a(1), second degree possession of heroin with intent to distribute, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(2), and third degree possession of heroin with intent to distribute within 1000 feet of a school zone, N.J.S.A. 2C:35-7.

Defendant moved to suppress the evidence seized by officers of the Plainfield Police Department from her apartment. At the motion hearing, defendant argued the information provided to the court to support the issuance of the search warrant was obtained by the police through an unconstitutional warrantless entry of her residence and thus irreparably tainted the fruits of this illegal search. Alternatively, defendant requested that the trial court conduct an evidentiary hearing under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), to enable her to impeach the testimony of the police officer who provided the information relied on by the court to find probable cause for the issuance of the search warrant.

The trial court denied defendant's motion to suppress without conducting an evidentiary hearing. After reviewing the

report of the incident, the motion judge determined exigent circumstances existed to justify the police officer's warrantless entry into defendant's apartment. Because he found the initial entry was lawful, the judge concluded "the subsequent, full search of that apartment was conducted pursuant to a valid search warrant, founded on probable cause."

Defendant thereafter negotiated a plea agreement with the State through which she pled guilty to second degree possession of heroin with intent to distribute and third degree possession of heroin with intent to distribute within 1000 feet of a school zone. The State agreed to recommend the court sentence defendant within the third degree range on both offenses. Pursuant to the plea agreement, the court sentenced defendant to an aggregate term of four years with an eighteen-month period of parole ineligibility.

On appeal, defendant argues the motion judge erred in finding there were exigent circumstances justifying the police officer's warrantless entry into her home. We agree. Based on the facts reflected in the police report authored by the officer who was at the scene, there were no constitutionally justifiable reasons for the officer to have entered defendant's home without a warrant. The search warrant that led to the discovery and seizure of the evidence against defendant was expressly and

exclusively predicated on this unconstitutional warrantless entry of defendant's residence. Such a direct causal link also requires the suppression of the evidence gathered by the police pursuant to the search warrant.

I

We derive the following facts from the police report authored by Plainfield Police Officer B. Baber.¹ At approximately 10:45 a.m. on Wednesday, August 17, 2011, the Plainfield Police Department received a call reporting "a suspicious person who has been lingering in the area [of the 500 block of West 8th Street] for the last 5 days." Officer Baber indicated "the complainant did not believe he lived in the area." According to Baber, the caller described this person "as a black male with long dread-lock hair wearing a white t-shirt and blue pants with white stripes down the sides."

Baber drove to the area indicated by the caller in a marked patrol car "to check for the suspect." As he passed by a residence located in the 500 block of West 8th Street,² Baber saw three individuals in the driveway of this residence. A person

¹ Officer Baber's first name is not disclosed in the record.

² The record includes the precise address of the residence. We have opted not to include the address in this opinion to protect the privacy of the residence.

sitting next to "a younger male" fit the caller's description. Baber continued to drive past the house, made a U-turn, and entered the residence's driveway. As he approached "the group" in his patrol car, the man who fit the caller's description, who was then standing, "ran into the residence." According to Baber, when he stepped out of the patrol car and approached the two remaining individuals, he "could detect a strong odor of burnt marijuana in the air."

Baber asked the two persons in the driveway if they knew the man "that just ran into the residence." Both of them answered "no." Baber noted in his report that at this specific point in time he "was unaware if the group was currently involved in some illegal activity, and if other individuals [were] also in the apartment."³ Baber noted a "younger male"⁴ who was sitting on the stairs. Next to him "was a small bag of what appeared to be marijuana, two cell phones, and some cash." The

³ This reference to other individuals potentially inside "the apartment" does not logically flow from Baber's description of events up that point. Baber did not indicate in his report seeing the "suspicious man" go into any particular apartment when he ran inside the residence. In fact, Baber specifically states he was outside in the driveway area where the group was sitting on the steps of the residence when he saw the man run inside the building.

⁴ Baber's report identified the "younger male" by name and date of birth. This revealed he was, at the time, an eleven-year-old boy. We will thus not disclose his name or any other personal information.

second person was an adult. He told Baber he was a private physical instructor who was there waiting for a client.

Although Baber noted that "neither individual provided any information to me," he nevertheless believed that the individual who ran inside the building "may have entered the residence illegally." He thus requested "additional Officers to respond so I can conduct a search for this individual." We note that Baber did not provide any explanation for believing the individual who ran inside the building was illegally inside any particular residence.

The record does not disclose the precise number of officers the Plainfield Police Department dispatched in response to Baber's request; the record also does not indicate the time it took for these additional officers to arrive at Baber's location. Baber only mentioned in his report that a sergeant "secured the items that were found on the stairs" and later turned these items over to him.

We describe what transpired next by quoting verbatim from Baber's report.

Upon entering the residence I found that there was a second door that led into a common hallway that went to 9 other apartments and a basement. While other officers checked the common areas and the basement, myself and Lt. J.T. Plum continued to search the apartment. While entering the hallway that leads from the kitchen to the

living room I found a burnt still smoldering cigar, commonly known as a "blunt." You could smell the odor of burnt marijuana coming from this cigar. While in the living room searching for this individual I could detect a strong odor of raw marijuana. Lt. Plum was checking a wall closet located in the living room and observed cash and what appeared to be narcotics. (See Lt. Plum's supplement for further [information].)

The rest of the apartment was searched for the individual with negative results.

[(Emphasis added).]

Defendant arrived sometime after the Plainfield Police Department had entered and searched her home without a warrant. According to Baber, "[s]he appeared visibly shaken." She informed the officers that the only persons who resided in the apartment were herself and her child. Baber does not mention in his report whether defendant was asked if she knew anyone matching the description of the "suspicious man."

At 2:30 p.m. that same day, a Union County Assistant Prosecutor presented the sworn testimony of Plainfield Police Detective Adam Green to a Union County Superior Court Judge in support of the State's application for a search warrant to complete the search of defendant's home. It is undisputed that Detective Green was not one of the officers who responded to Baber's request for backup. In fact, Green's testimony was based entirely on hearsay information he received from the

officers at the scene. It is equally clear that Green's testimony was elicited by the Assistant Prosecutor through a series a leading questions that for the most part required Green to give the equivalent of a "yes" or "no" response.

Green's testimony deviated from Baber's account of events on several material details. For example, Baber indicated that the individual matching the description of the "suspicious person" was standing after Baber made the U-turn to approach the area where the three individuals were previously sitting; as Baber approached the group, the man "ran into the residence where he once was sitting in front of." By contrast, Green provided the following information in response to the prosecutor's question: "And upon [Baber] arriving to the area did the individual who matched that description immediately take off running into an apartment?" Green responded: "Yes he did."

Baber indicated he "believed the individual that ran may have entered the residence illegally." However, Baber did not provide a rationale for his "belief" or explain how he was able to see the individual enter any particular apartment when he was standing outside the building at the time. Detective Green's testimony describing this event was materially different:

PROSECUTOR: And at that time, was the officer concerned that the individual [who] ran into the apartment may have not had a right to run into the apartment, correct?

GREEN: That is correct.

PROSECUTOR: And that is based upon the numerous home burglaries that have [taken] place within that area of Plainfield recently?

GREEN: That is correct.

PROSECUTOR: Did the patrol officer then proceed towards that apartment?

GREEN: Yes sir.

PROSECUTOR: And in fact he entered through a front doorway that led to a foyer, correct?

GREEN: That is correct. It's on the east side with a front foyer that leads directly into that apartment.

PROSECUTOR: And in that foyer, on the other side of that foyer, there is one door for the apartment, correct?

GREEN: Yes sir.

PROSECUTOR: So that individual could have only run into one apartment after he ran through that foyer, correct?

GREEN: Yes sir.

PROSECUTOR: And upon reaching the threshold of the apartment, did an officer also smell a strong odor of marijuana?

GREEN: Yes that is correct.

As the following question illustrates, through this series of leading questions the prosecutor also misrepresented the

sequence of events that led Baber to request the assistance of additional officers:

PROSECUTOR: And so at that point, based upon the odor of raw marijuana, the fact that the individual ran into the apartment of which he may not have had a right to be in, did an officer then radio for back up and then enter that apartment with back up units?

GREEN: Yes he did. (Emphasis added).

This is not consistent with Baber's account of events. According to Baber, he requested additional officers "so I can conduct a search for this individual." His request for additional officers was not predicated on the odor of raw marijuana emanating from defendant's apartment. Based on Baber's report, all of the contraband the police officers discovered in defendant's apartment came from visual inspections and olfactory sensations the officers experienced after they had entered defendant's residence without a warrant.

Finally, Green testified that while searching the living room closet, Lieutenant Plum

immediately observed a large quantity of United States currency as well as a McDonald's bag which contained, inside of it, a freezer bag, a freezer dry bag that contained a significant amount of suspected marijuana.

PROSECUTOR: And that bag was actually opened, the officer didn't have to actually open the bag, that the bag was opened, he

was able to observe those contraband items in that bag, correct?

GREEN: That is correct.

PROSECUTOR: And the illegality was immediately apparent to the officer, correct?

GREEN: Absolutely.

PROSECUTOR: And.

GREEN: Additionally he observed on the floor next to the United States currency a brown cardboard box which from my training, education and experience is found to be part of paraphernalia used to distribute CDS. Likewise underneath the brown box, in view, was a glassine, a new unused glassine wax paper fold.

PROSECUTOR: And the individual you described here under oath that ran into that apartment, was not found in that apartment, correct?

GREEN: No he was not.

Based on Green's testimony, the judge found probable cause to search defendant's apartment and issued the warrant. A search of defendant's apartment conducted that same day yielded a large quantity of illicit drugs.

II.

Against this record, defendant appeals raising the following arguments:

POINT I

THE JUDGE ERRED IN FAILING TO CONDUCT A HEARING ON WHETHER DETECTIVE GREEN KNOWINGLY OR RECKLESSLY PROVIDED FALSE STATEMENTS IN HIS SEARCH-WARRANT APPLICATION. IN ANY EVENT, THE APPLICATION FAILED TO PROVIDE PROBABLE CAUSE TO ENTER AND SEARCH MS. MURPHY'S APARTMENT.

POINT II

THE FOUR-YEAR PRISON SENTENCE, WITH AN 18-MONTH PERIOD OF PAROLE INELIGIBILITY, WAS MANIFESTLY EXCESSIVE, BECAUSE MS. MURPHY HAD NO PRIOR CONVICTIONS, HAD STABLE EMPLOYMENT, AND HAS TWO CHILDREN IN HER CARE.

The right to be protected against unlawful or unwarranted entries by the police into one's home is one of the most precious and fundamental liberties guaranteed by both the national and the State's Constitutions. The first clauses of both the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution, provide that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7.

Writing for a unanimous Court, Chief Justice Rabner has recently reaffirmed and explained in detail the principles that must guide judicial review of a warrantless entry by the police of a person's home.

[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.

The unique status of the home has been recognized for centuries. And throughout our nation's history, one of our most protected rights . . . has been the sanctity and privacy of a person's home. Those interests are entitled to the highest degree of respect and protection in the framework of our constitutional system.

The United States Supreme Court recently reaffirmed the heightened status of the home under the Constitution. The Court observed that when it comes to the Fourth Amendment, the home is first among equals and stands at the Amendment's very core.

This Court also recently emphasized the preeminent position of a private residence when it held that the community-caretaking doctrine, standing alone, could not justify a warrantless search of a home.

The law, thus, expresses a clear preference for police officers to secure a warrant before entering and searching a home. A warrantless search of a private dwelling is presumptively invalid, and calls for particularly careful scrutiny. To overcome that presumption, the State must show that a warrantless search falls within a recognized exception to the warrant requirement.

[State v. Wright, ___ N.J. ___, ___ (2015) (slip op. at 21-22). (Internal citations omitted).]

Because both our federal and constitutional jurisprudence has expressed an explicit preference for the police to secure a warrant before searching a person's home, a warrantless entry of

a home is presumed invalid absent the State proving by a preponderance of the evidence that the search falls within one of the recognized exceptions to the warrant requirement. State v. Lamb, 218 N.J. 300, 315 (2014). See also Riley v. California, ___ U.S. ___, ___, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430, 439 (2014).

In State v. Bolte, 115 N.J. 579, 585-86 (1989), our Supreme Court noted that "exigent circumstances in conjunction with probable cause may excuse police from compliance with the warrant requirement." However, the nature of the underlying offense determines the applicability of the "exigent circumstances" exception to the warrant requirement, especially when the matter concerns the warrantless entry of a home. The exigency must be rationally connected to a police investigation of a serious or potentially dangerous criminal activity, and the circumstances must lead a reasonable police officer to conclude that delaying in order to obtain a warrant would carry an unreasonable risk that the evidence would be destroyed. The key to this analysis is finding evidence that indicates a police officer had an "objectively reasonable basis to believe that prompt action is needed to meet an imminent danger[.]" State v. Edmonds, 211 N.J. 117, 133 (2012) (citation omitted).

A warrantless entry into a home may be constitutionally permissible in a case in which the police officer is in hot pursuit of a suspect who the officer reasonably believes poses an immediate threat to himself or members of the public. Bolte, supra, 115 N.J. at 584. However, the "hot pursuit" must be supported by probable cause to believe the person being pursued has committed a serious offense. Stated differently, "the exigencies of the situation must [make that course] imperative." Ibid. Thus, our Supreme Court has upheld the warrantless entry of a home by police officers who were in hot pursuit of an armed suspect who entered the residence to evade capture. State v. Walker, 213 N.J. 281, 292 (2013), (citing State v. Hutchins, 116 N.J. 457, 464 (1989)).

Conversely, our Supreme Court made clear in Bolte that the police cannot rely on the exigent circumstances or hot pursuit exceptions to the warrant requirement to justify a warrantless entry of a home to investigate minor offenses or apprehend a suspect who may have committed a minor offense. Justice Stein explained this principle in Bolte by adopting the admonitions of the United State Supreme Court in Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S. Ct. 2091, 2099, 80 L. Ed. 2d 732, 745 (1984): "[I]t 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." Bolte, supra, 115 N.J. at 592.

Here, the State argued Baber and the other Plainfield Police Officers' warrantless entry into defendant's home was "objectively reasonable" because their actions were "in response to exigent circumstances, i.e., to prevent the fleeing man from eluding arrest, and to prevent the destruction of evidence." The motion judge accepted the State's argument.

[T]he court finds that exigent circumstances did exist, and justified the officers' initial entry of the apartment. Most significantly, Detective Green's testimony established that the officers were in hot pursuit of an individual who had just immediately fled into the premises of [describes the address]. Here, during a response to a community call regarding a suspicious individual, officers observed an individual matching the description provided by the caller. That individual fled into [describes the address] upon seeing a marked police vehicle's stop near his location. Secondly, Detective Green testified that the officers were concerned about whether the individual had permission to enter the residence. He furthermore testified about a recent incidence of home burglaries in the immediate area. As such, the immediacy of the action would indicate a high degree of urgency with regards to any police action in pursuit of the individual.

The motion judge also found "the police⁵ had probable cause to believe an individual who had just committed a narcotics offense had fled into the apartment."

These findings are not supported by the record as described by Baber in his report. Baber did not see the man who matched the caller's description and ran inside the apartment building to commit a serious narcotics offense. Viewing the facts in the light most favorable to the State, Baber may have had probable cause to believe the individual who ran inside the building was in constructive possession of "a small amount of marijuana." This would constitute a disorderly persons offense under N.J.S.A. 2C:35-10(a)(4). Such a minor offense does not constitute grounds to justify the warrantless entry of defendant's home. Walker, supra, 213 N.J. at 292.

The record also shows Baber was not in a position to observe where the suspicious man ran once he entered the building. His focus on defendant's apartment as the place where the man allegedly entered is therefore unsupported by evidence. Green's testimony expounding on Baber's account on this point is not supported by competent evidence because Green did not

⁵ In this reference to "police" we presume the judge was referring to Baber since he was the only officer who actually saw the suspect.

disclose the basis for this material deviation from the description provided by the officer at the scene.

Under the totality of the circumstances we have described, the action taken by the Plainfield Police Department seems unwarranted and overzealous from its inception. A police officer was dispatched to the area where defendant resided based only on an anonymous call reporting a "suspicious person who has been lingering in the area for the last 5 days and the [caller] did not believe he lived in the area." Green described the area where defendant's apartment is located as a "quiet residential block," where you would not see people "milling about." When Baber arrived, he immediately focused his attention on the man who matched the caller's physical description.

However, nothing about the information provided by the caller was objectively suspicious. We do not know why the caller believed the man did not live in the area. We do not know what the caller meant by "lingering in the area." The only specific information the caller provided to the police was the man's race, hairstyle, and clothing. Without more, a citizen should not be labelled "suspicious," subject to law enforcement investigation. By Baber's own description, he only saw a man run into an apartment building at the sight of a marked police

vehicle.⁶ Yet despite the absence of any reasonably objective basis to believe a serious crime may have been committed, Baber proceeded in a manner that ultimately led him to enter defendant's residence without a warrant.

Accepting as truthful Baber's account of what transpired up to this point, none of this is objectively "suspicious." Under these circumstances, Baber did not have any objectively reasonable grounds to believe any illegal activity had occurred. Two men and a young boy sitting on the steps of a multi-family building is not inherently suspicious; "milling about" in the middle of a summer day should not be viewed by any reasonable police officer as indicative of criminality or untoward conduct. However, before he allegedly detected the odor of burnt marijuana in the air, Baber believed these facts were sufficient to constitute suspicious behavior.

We hold that the Plainfield Police Officers who entered defendant's apartment on August 17, 2011, without a search warrant violated defendant's rights against unreasonable searches and seizures under both the Fourth Amendment of the Constitution of the United States and Article I, Paragraph 7 of the New Jersey Constitution. The facts known to these officers


⁶ Detective Green described the building where defendant's apartment was located as a three story, multi-family apartment building.

at the time they entered defendant's home without a warrant were insufficient, as a matter of law, to constitute exigent circumstances and did not establish probable cause that the man who allegedly entered defendant's residence had committed a serious offense and was attempting to elude capture. Any and all evidence seized by the State from this unlawful entry into defendant's residence is suppressed and cannot be used by the State to prosecute defendant on the charges contained in this indictment.

We further hold that the search warrant issued by the trial court on August 7, 2011 was based on facts directly gathered by the Plainfield Police Department from the unconstitutional warrantless entry of defendant's residence and search conducted thereafter. As such, any and all evidence seized by the State from the execution of this search warrant is suppressed and cannot be used by the State to prosecute defendant on the charges contained in this indictment.

Reversed and remanded. 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