SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1170-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SALEEM A. NICHOLSON,

Defendant-Appellant.

Submitted May 9, 2022 – Decided May 18, 2022

Before Judges Sabatino and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 18-01-0039 and 18-01-0040.

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

William A. Daniel, Union County Prosecutor, attorney for respondent (Milton S. Leibowitz, Assistant Prosecutor, of counsel on the brief).

PER CURIAM

After losing his motion to suppress firearms and other contraband seized from his apartment pursuant to a search warrant, defendant Saleem A. Nicholson pled guilty to second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(f), and a "certain persons" offense, N.J.S.A. 2C:39-7(b)(l).

Consistent with the plea agreement, Judge Lisa Miralles Walsh sentenced defendant to a five-year custodial term on the unlawful possession count, subject to a forty-two-month parole ineligibility period under the Graves Act, N.J.S.A. 2C:43-6. The judge also imposed a concurrent five-year term on the certain persons count. All other charges, including various narcotics offenses, were dismissed by agreement. This appeal ensued.

The narrow issue on appeal is whether the trial court erred in finding that the property manager for defendant's apartment building provided investigating police officers with valid consent to enter a common area of the building. Once inside the common area, the officers made observations that supported the issuance of the search warrant.

As expressed in the solitary point of his brief, defendant argues:

> POINT I
>
> THE PROPERTY MANAGER WAS NEVER TOLD HE HAD THE RIGHT TO REFUSE THE POLICE

> ENTERING THE COMMON AREA OF THE APARTMENT BUILDING, AND THEREFORE DID NOT PROVIDE VALID CONSENT TO SEARCH. THE EVIDENCE DISCOVERED THROUGH THE SUBSEQUENT SEARCH OF THE HALLWAY SHOULD BE SUPPRESSED.

For the reasons that follow, we agree with the trial court that the manager's consent was valid, and therefore affirm.

We summarize the pertinent facts concerning the search and seizure set forth more fully in Judge Miralles Walsh's written opinion dated August 23, 2018.

On the date in question, Detectives Michael Metz and Stephen Knox of the Plainfield Police Department were on patrol in their police vehicle. At about 4:00 p.m., they drove into the rear parking lot of the subject apartment building, which is located on Plainfield Avenue. The detectives observed a man, later identified as defendant, standing next to the driver's side window of a parked Nissan Maxima sedan. Defendant was conversing with a woman in the Nissan's driver's seat.

As the patrol car approached the Nissan, the officers could see, but not hear, the driver say something to defendant. According to Metz's testimony, defendant immediately looked in the direction of the detectives. He quickly moved towards the rear exterior of the Nissan, in an effort to conceal his body

against the side of the car. According to Metz, as the detectives continued in defendant's direction, they observed him abruptly reach towards his right leg with both of his hands.

Metz then got out of the police car and began walking towards defendant. He immediately detected the very strong odor of raw marijuana, which grew stronger as he got closer to defendant.

Metz then saw protruding from the pocket of defendant's cargo shorts an orange prescription pill bottle that, in the detective's experience, often served as a container for raw marijuana. Metz retrieved the bottle from defendant's pocket and discovered that, as he had suspected, it contained several small baggies of marijuana. Metz also removed from defendant's person some currency and a set of keys.[1]

At this point, the detectives placed defendant and the woman under arrest. The detectives advised them of their Miranda[2] rights, which the two promptly waived. According to Metz, defendant denied that he lived at the apartment building and claimed instead that he lived elsewhere on Seventh Street in

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[1] Defendant does not challenge on appeal the search of his person and his ensuing arrest, which the trial court found to be valid.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Plainfield. When asked by Metz why he was in the parking lot of an apartment building where he did not live, defendant provided no answer. Metz then asked defendant if any of the keys found on his person would access the apartment where he claimed to live on Seventh Street, and defendant said they would not.

Metz also interviewed the Nissan driver. She told the detective she lived in Apartment 2J within the building, and that defendant lived in Apartment 2H next door to her unit.

Metz next performed an Internet search to identify and contact the building's management. Metz telephoned the company, explained that he was conducting an investigation, and asked whether a manager or superintendent would be available to assist the police in the investigation.

According to Metz, within a few minutes, a man arrived in the parking lot and identified himself as the building's property manager. Metz asked the manager who lived in Apartment 2H and he responded that a Black man about the age of thirty lived there. Metz asked the manager if he would be able to identify the resident of Apartment 2H if he saw a photograph, and the manager said he could. Metz retrieved an image of defendant from an online database and showed it to the manager. The manager confirmed that defendant lived in Apartment 2H, but could not recall his name at that time.

As Metz notated in his police report, defendant shook visibly and avoided eye contact. Having observed this behavior and having confiscated the marijuana from defendant, Metz believed that defendant was hiding contraband in Apartment 2H.

As noted by the motion judge, Metz testified that the property manager then "granted [Metz and another police officer, Sergeant Christopher Fortunka] permission to enter the building." Metz could not recall if the manager escorted the officers inside the building or whether the front door was locked.

Metz and Fortunka entered the apartment building and headed towards Apartment 2H. The officers walked up the stairs to the second floor, where they smelled "a very strong odor of marijuana." Metz testified that the smell intensified the closer they walked towards Apartment 2H, and weakened as they walked away from it.

The officers knocked on the door of Apartment 2H and announced themselves. When no one answered, Metz attempted to fit the keys he had confiscated from defendant into the door lock. One of the keys fit. However, the officers did not at that point enter the apartment unit. Instead, Metz and Fortunka stood outside the apartment door to prevent others from entering, while the police applied for a search warrant.

With the help of an assistant prosecutor, the officers applied for a search warrant from a Superior Court judge on emergent duty. The judge found probable cause and issued a warrant to search Apartment 2H between 7:00 p.m. and midnight. The ensuing search of the unit revealed a gun, a rifle, ammunition, drugs, a scale, defendant's identification and passport, and other contraband.

Defendant moved to suppress the seized items. Judge Miralles Walsh denied the motion. In her detailed twenty-six-page opinion, the judge found the officers had acted constitutionally at all phases of their activity, starting with their stop of defendant and the Nissan driver in the parking lot and thereafter inside the apartment building. The judge ruled the search warrant for the apartment was properly based on probable cause, and that the fruits of that search would be admissible at trial.

In the course of her ruling, the judge found that Metz was a credible witness despite the fact that Metz's police report and warrant affidavit had not mentioned obtaining the manager's consent to enter the premises. The judge found that the officer was "forthright [about] what he could remember[,]" that he acknowledged he could not recall "the manner in which outer door was

opened," but that he was "certain that he obtained consent." We defer to the judge's credibility assessment. State v. Elders, 192 N.J. 224, 244 (2007).

As we have noted, defendant's sole argument on appeal is that the State failed to show that the property manager provided valid consent for the police to enter the apartment building and its common areas. Notably, the State contends that defendant did not argue this specific point below. That procedural contention is partially true. Defendant's suppression motion brief, which is attached to the State's brief on appeal, argued to the trial court that the police must not have been granted permission to enter the building, because they also tried to see if defendant's key worked on the lock to the door entering the hallway to the common area. That argument is different than the present one defendant makes on appeal, i.e., that the property manager was not told he could refuse consent and that it cannot be inferred from the circumstances that he willingly agreed to consent. In any event, we will reach the issue.

The applicable law is well settled. Both the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution protect citizens against warrantless police entries into their dwellings, unless a recognized exception to the warrant requirement applies. State v. Wright, 221 N.J. 456, 466 (2015). One of those recognized exceptions is where the police obtain valid consent from a

person with actual or apparent authority, such as a co-habitant or owner, to enter the premises. State v. Coles, 218 N.J. 322, 340 (2014); State v. Suazo, 133 N.J. 315, 319-20 (1993).

Under our State Constitution, consent searches are afforded a higher level of scrutiny than under the Fourth Amendment. State v. Carty, 170 N.J. 632, 638-39 (2002). The consent exception is fulfilled where it is shown "that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." State v. Johnson, 68 N.J. 349, 354 (1975). The Supreme Court's opinion in Johnson further emphasized that "the police [are] not necessarily [] required to advise the person of his right to refuse to consent to the search[;]" however, where "the State seeks to rely on consent as the basis for a search, it has the burden of demonstrating knowledge on the part of the person involved that he had a choice in the matter." Ibid.; accord Carty, 170 N.J. at 638-39. The trial court shall assess the voluntariness of consent based on "the totality of the particular circumstances of the case." State v. Hagans, 233 N.J. 30, 42 (2018) (quoting State v. King, 44 N.J. 346, 353 (1965)).

Here, the motion judge reasonably determined from the totality of the circumstances that the property manager provided valid consent to let the investigating police officers into the building and, thereafter, into the hallway's

common area. The manager promptly arrived in the parking lot only a few minutes after Metz called the building management office and explained why the officers needed assistance, and he readily offered his help. The context plainly shows the manager was freely willing to let the officers into the building.

As the judge noted in her decision, the unrefuted testimony shows the manager was "very cooperative throughout the course of the investigation, even engaging in conversation with them about [other] issues that have occurred within the building." Further, as highlighted supra, the judge explicitly noted she found Metz's testimony credible, including his certainty "that he obtained consent."

Moreover, the police used a key removed from defendant's pocket, not a key from the manager, to open the door to the apartment. They reasonably respected the tenant's privacy in his unit by refraining from entering immediately and instead procuring a search warrant based on probable cause.[3]

In sum, we concur with the motion judge that the police acted in a constitutional manner in connection with this search and seizure. We therefore

[3] Given our disposition on the consent issue, we need not reach the State's alternative argument based on a theory of inevitable discovery.

affirm the trial court's denial of the suppression motion and, consequently, defendant's conviction of the weapons offenses pursuant to his plea agreement.

Affirmed.