In The

Supreme Court of New Jersey

No. A-38-16 (077383)

STATE OF NEW JERSEY IN THE INTEREST OF J.A., *Juvenile-Appellant*	CRIMINAL ACTION ON A PETITION FOR CERTIFICATION TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1624-14T2 *Sat Below:* MICHAEL GUADAGNO, J.A.D. *and* FRANCIS VERNOIA, J.A.D. ON APPEAL FROM AN ADJUDICATION OF DELINQUENCY IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BURLINGTON COUNTY *Sat Below:* JOHN L. CALL, JR., J.S.C.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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INTRODUCTION

Amicus Curiae American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief in support of Petitioner-Appellant J.A. in the above captioned matter.

This case involves the warrantless search of a home.

That statement in itself establishes the heavy presumption against the legality of the police conduct. "Warrantless searches, particularly in a home, are presumptively unreasonable and invalid unless justified by a recognized exception to the warrant requirement." *State v. Bolte*, 115 N.J. 579, 585 (1989); *accord, State v. Wright*, 221 N.J. 456, 468 (2015) ("A warrantless search of a private dwelling is 'presumptively invalid,' and calls for "particularly careful scrutiny") (quoting *State v. Lamb, supra*, 218 N.J. 300, 315 (2014)). "[O]nly in *extraordinary circumstances* may a warrantless home arrest or search be justified." *Bolte*, 115 N.J. at 583-84 (emphasis added).

In this case, the police have at various times asserted the presence of such extraordinary circumstances based upon their assertion that: (1) the home was abandoned, (2) they were in "hot pursuit" of a cell phone snatcher by tracing his location through "Find My iPhone" technology, and (3) they procured a valid consent to the search *after* they had already entered the house and arrested J.A. None of rationalizations constitute the

extraordinary circumstances that permit the intrusion into a private home without the approval of a neutral magistrate.

STATEMENT OF FACTS[1]

Officer Serrano was dispatched to investigate a report of a "strong arm robbery" at a bus stop in Willingboro, New Jersey. *State in the Interest of J.A.*, No. A-1624-14T2, type op. 2 (App. Div. Feb. 29, 2016). The victim reported that at 9:17 a.m.[2] while he was waiting at the bus stop, a black male wearing a hooded sweatshirt and camouflouge shorts asked to use his cell phone. *Id.* When the victim produced his phone, the suspect punched him in the arm and ran off with it. The victim described the phone as a gold and white Apple iPhone with a distinctive pink glittery case. *Id.*

Officer Serrano assisted the victim in activating the *Find My iPhone* application.[3] The location indicated by the app was a few blocks from the bus stop at a house on Shelbourne Lane. *Id.* Two minutes after the app was activated, the phone was turned

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[1] ACLU-NJ draws these facts from the opinion of the Appellate Division.

[2] The time of 9:17 a.m. was apparently drawn from the juvenile complaint. *State in the Interest of J.A.*, No. A-1624-14T2, type op. 11 (App. Div. Feb. 29, 2016). It is unclear to Amicus whether that time, or the time at which Officer Serrano responded, was established by testimony.

[3] *See Find My iPhone*, http://www.apple.com/icloud/find-my-iphone.html.

off (thus deactivating the tracking feature). *Id.* at 14. Officer Serrano called for assistance and proceeded to the address.

One of the responding officers, Sharif Hewlett, noted that they were familiar with the house and believed it to be vacant based on their past experiences: "[t]here was no mail, no cars, no nothing…" *Id.* at 3. The officer also testified that there are about 1,500 vacant homes in Willingboro and "it is difficult to determine if a house is vacant because sometimes people just move out, leaving furniture and belongings." *Id.*

Upon arrival, Officer Serrano looked through a first floor window of the home where the find my iPhone application indicated where the phone would be and noticed the pink glittery phone case on a bed in a back room. *Id.* The officers knocked on the door for approximately one minute. After receiving no response, Hewlett and fellow officer William J. Spanier found an unsecured kitchen window and entered the house. Once inside, the officers encountered J.A.'s younger sister who was sleeping in another room. *Id.* When the officers asked if anyone else was home, the girl shook her head like she didn't know. *Id.* The officers then continued to search the home for, as the officer testified, the safety of the girl. *Id.*

The responding officers, Officers Hewlett and Spanier, observed the pink glittery phone case and camouflage shorts in a

back bedroom. *Id.* The officers found J.A. hiding in an upstairs bedroom. *Id.* They handcuffed him and brought him downstairs. *Id.* J.A. denied involvement in the robbery. *Id.*

Detective Edward Walker was dispatched to the location. A few minutes after Walker's arrival, J.A.'s brother, R.B., arrived, followed by J.A.'s mother and step-father. Detective Walker testified that J.A.'s mother was irate with her son and gave the officers verbal consent to search the house. J.A.'s mother told Walker she was "sick of [J.A.'s] S-H-I-T" and that she had warned J.A. that "if he comes here acting up he's got to go." After giving her verbal consent to search, J.A.'s mother signed a written consent form. *Id.* at 4.

J.A.'s brother then told the officers that the phone was probably in the younger brother's closet and the brother then went, with Officer Walker following him, to retrieve the stolen phone from the closet. *Id.* J.A. was then arrested. *Id.* The victim was then brought to the home (at 9:50 a.m.), but was not able to identify J.A. *Id.* J.A. was read his *Miranda* rights and admitted to taking the cell phone from the victim. *Id.* J.A.'s mother was not present during the confession and Officer Walker did not realize he was under 18. *Id.* J.A. then admitted to taking the iPhone.

PROCEDURAL HISTORY

J.A. was charged with committing an act that would have constituted second-degree robbery, N.J.S.A. § 2C:15-1(a)(1), if committed by an adult. J.A. filed motions to suppress statements made to police and evidence seized during the search. The trial court held a suppression hearing and heard the testimony of Officers Serrano, Spanier, and Hewlett, and Detective Walker.

At the conclusion of the hearing, the judge suppressed J.A.'s confession because the police questioned him without his mother being present. As to the seizure of the cell phone, the judge found that the officers' initial search was within the bounds of a valid "protective sweep," and that J.A.'s mother subsequently consented to the search and her consent was voluntary. The trial judge did reject the argument that the police officer's belief that the house was abandoned justified the warrantless search, and cautioned that the 1,500 abandoned or unoccupied properties in Willingboro did not give the police "carte blanche to run around, look at a house, and if there's no car in the driveway to enter the home on the theory that it is abandoned." *Id.* at 6.

Finally, the judge found that the victim's iPhone was admissible because it was seized by J.A.'s brother and handed to the police, and thus there was no state action in the seizure.

The trial judge concluded that "law enforcement did not conduct a search even though they were authorized to do so, and there is nothing in the record to suggest that the actions of [J.A.'s] brother were not totally voluntary."

At trial, the judge heard the testimony of the victim, along with Officers Serrano, Spanier, and Hewlett, and Detective Walker. J.A. did not testify and called no witnesses. The judge determined that the State had proven beyond a reasonable doubt that J.A. committed the robbery. The judge imposed a two-year custodial term at the New Jersey Training School for Boys, followed by an eight-month term of supervised release, fines, and penalties.

On appeal, the Appellate Division affirmed the denial of the motion to suppress the evidence of the iPhone. *State in the Interest of J.A.*, No. A-1624-14T2 (App. Div. Feb. 29, 2016). The Appellate Division found that the record supported the trial court's finding of both probable cause and exigent circumstances for the initial entry of the police into the home without a warrant. *Id.*, type op. at 11. The lower court found that the police acted reasonably "in entering the residence to secure the area, determine whether there was any danger to anyone in the house, and prevent destruction of the proceeds of the robbery." *Id.* at 14.

J.A. filed a Petition for Certification to this Court on

March 18, 2016, which was granted on February 2, 2017.

ARGUMENT

I. NO EXIGENT CIRCUMSTANCES WERE PRESENT TO JUSTIFY THE POLICE'S WARRANTLESS ENTRY INTO A PRIVATE HOME.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution both guarantee "[t]he right of the people to be secure in their. . . houses. . . against unreasonable searches and seizures." U.S. CONST. amend. 4; N.J. CONST. art. I, ¶ 7. "The fundamental privacy interests of *the home* are at the very core of the protections afforded by our Federal and State Constitutions." *See State v. Brown*, 216 N.J. 508, 526 (2012)(emphasis added)(citing *State v. Evers*, 175 N.J. 355, 384 (2003). "The requirement for [a] search warrant is not a mere formality but is a great constitutional principle embraced by free men." *State v. Chippero*, 201 N.J. 14, 26 (2009) (quoting *State v. Novembrino*, 105 N.J. 95, 107 (1987)). Thus, warrantless searches are presumptively unreasonable and are prohibited unless they fall within a recognized exception to the warrant requirement. *State v. Johnson*, 193 N.J. 528, 552 (2008); *State v. Wilson*, 178 N.J. 7, 12 (2003).

The search of a residence is considered among the most intrusive forms of police investigation. Absent strictly defined exigent circumstances, such a search without a warrant issued by

a detached magistrate is unconstitutional. As this Court has repeatedly observed, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *State v. Wright*, 221 N.J. 456, 467 (2015). "[T]hroughout 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.'" *Id.* (quoting *State v. Bruzzese*, 94 N.J. 210, 217 (1983)). This Court's jurisprudence expresses a clear preference for police officers to secure a warrant before entering and searching a home. *Brown*, 216 N.J. at 525 (citing *State v. Frankel*, 179 N.J. 586, 596-97 (2004)).

A. Factual Speculation that Exigent Circumstances Might Exist Is Insufficient to Excuse the Absence of a Warrant.

In this case, once the Shelbourne Lane house had been identified as the probable location of the stolen iPhone, no less than four police officers arrived at the house within minutes of being summoned. Clearly the house could have been secured and observed while an application was made to a magistrate for a warrant. The mere ability by police to procure a warrant (by establishing probable cause) does not excuse the police from actually doing so, absent exigent circumstances. "Any assumption that evidence sufficient to support a

magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson v. United States*, 333 U.S. 10, 14 (1948). "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello v. United States*, 269 U.S. 20, 33 (1925). "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant." *Payton v. New York*, 445 U.S. 573, 588 n.26 (1980).

Here, the police officers chose not to procure a warrant based on the dire but utterly speculative conjecture that that "the robber may have burst into the home of innocent civilians and may have been holding them hostage inside." *State in the Interest of J.A.*, No. A-1624-14T2 type op at 6. Alternatively, however, the police also reasoned that the home had been "abandoned" and thus was devoid of any residents. If two completely inconsistent factual assertions — the house was occupied by innocent civilians or else the house was empty - can *each* lead to a basis for the police to make a warrantless entry

into the house, then it is a sure sign that a fallacious structure of argumentation is being propounded. The contention that "anything is possible," while a truism, is inherently inconsistent with the requirement that the State bears the burden of proof in establishing exigent circumstances. *State v. Vargas*, 213 N.J. 301, 314 (2013)(quoting *Frankel*, 179 N.J. at 598). This Court should guard against even indirect acceptance of convenient "heads I win, tails you lose" rationalizations as a basis to evade the bulwark of protection that the United States and New Jersey Constitutions provide against warrantless intrusions into the home.

B. *There is No "Trashy House" Exception to the Warrant Requirement and the Police Officers' Assertion that the House was Abandoned Was Unsupportable.*

The police officers in this case emphasized their belief that the Shelbourne Lane house was "abandoned," presumably as a precursor to the argument that a defendant would have no right to challenge the search or seizure of that property. *See, State v. Johnson*, 193 N.J. 528, 548-49 (2008) ("if the State can show that property was abandoned, a defendant will have no right to challenge the search or seizure of that property"). They based that assumption on their unspecified prior knowledge about this house, and upon their general knowledge that there are 1,500 vacant homes in Willingboro.

Amicus acknowledges that neither the trial judge nor the

Appellate Division accepted this argument, nor does the State advance it. And rightly so. If the suspicion — as it turns out in this case, an incorrect one — that a house is abandoned or vacant excuses the requirement of a warrant to enter a home, then especially in contemporary contexts, the warrant requirement could become eviscerated in large swathes of New Jersey,[4] particularly in economically disadvantaged neighborhoods. Amicus does think it important to highlight this point in order to forestall any future attempts to invoke this potentially limitless exception to the warrant requirement.

In *State v. Brown*, 216 N.J. 508, this Court refused to permit a "trashy house" exception to the warrant requirement. *See id.* "[T]here simply is no 'trashy house exception' to the warrant requirement," and therefore "[i]t is unreasonable to assume that a poorly maintained home is an abandoned home." *Id.* (internal citations omitted). This Court found: "[e]stablishing an abandonment of real property is 'a difficult standard to meet' under the Fourth Amendment and should be difficult under Article I, Paragraph 7." *Brown*, 216 N.J. at 532 (internal citations omitted). This rationale would inevitably have a

[4] New Jersey had the highest number of foreclosures in 2016. *See* Craig McCarthy, *N.J. Topped the Nation Last Year in Dubious Housing Category*, N.J. Advanced Media (May 10, 2016) http://www.nj.com/news/index.ssf/2016/01/nj topped the nation last year in dubious housing category.html.

disparate impact on low-socioeconomic townships and this Court has already strongly rejected the proposition that the Fourth Amendment applies differently depending on the wealth of the neighborhood: "[t]he constitutional protections afforded to the home make no distinction between a manor estate in an affluent town and a ramshackle hovel in an impoverished city. The occupants of both structures are clothed with the same constitutional rights." *Id.* at 516.

This Court in *Brown* identified several factors to be considered to determine whether an officer has an objectively reasonable basis to believe a building is abandoned. *Id.* Notably, the Court begins the inquiry, "with the simple reality that a house or building, even if seemingly unoccupied, typically will have an owner." *Id.* (citing James C. Roberton, *Recent Development-Abandonment of Mineral Rights*, 21 *Stan. L. Rev.* 1227, 1228 (1969)). Among factors considered in determining whether the property is abandoned are: (1) reviewing the available records on ownership of the property, including tax records or utility records, (2) assessing the property's condition and whether the owner has taken measures to secure the building from intruders, and (3) the officer's personal knowledge of a particular building or surrounding area. *Brown*, 216 N.J. at 533-34.

Apparently in attempting to satisfy the second and third factors described in *Brown* (which had been decided four months before the search in this case) the police noted that there was no mail in the mailbox and there were no cars in the driveway. Almost every home, at some point in the day, will have no mail in the mailbox and no car in the driveway. Indeed, the failure of mail to accumulate is fairly reliable sign that a house is *not* abandoned. Additionally, Officer Serrano testified that the front door was locked and that he observed through a window the cell phone case on a bed. Notably, in order to gain entry into the home the police officers needed to enter through an unsecured kitchen window. The fact that the front door was locked is a factor establishing that the home was not, in fact, abandoned. *See Brown,* 216 N.J. at 521 (noting the home was secured by a lock and Defendants used a key to enter and exit the home).

The specious nature of the police officers' factual predicates that the house may have been abandoned highlight the general danger of accepting facile assertions — too easily made and too difficult to rebut — that exigent circumstances exist. The fact that these allegations were made casts a shadow on the other suggestions that exigent circumstances existed.

C. *The "Hot Pursuit" Doctrine Should Not Be Extended to Alleged Unarmed Perpetrators Who Do Not Present a Realistic Danger to the Public and Are Not Aware They Are Being Pursued.*

Since Amicus is aware that J.A. and other amici will devote significant attention to the application of the "hot pursuit" doctrine to this case, Amicus ACLU-NJ will limit its discussion to the following.

Generally, "exigent circumstances will be present when inaction due to the time needed to obtain a warrant will create a substantial likelihood that the police or members of the public will be exposed to physical danger or that evidence will be destroyed or removed from the scene." *State v. Johnson*, 193 N.J. 528, 553 (2008). The record in this case does not reveal a substantial likelihood of either condition.

First, while Amicus does not deprecate the seriousness of a "strong arm robbery," nevertheless a significant distinction must be made between such offenses (involving use of hands, fists etc.) and other forms of robbery that involve use of dangerous weapons.[5] Here, the police had no basis to believe that a dangerous weapon was involved, and there was no

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[5] According to the 2015 Uniform Crime Report, of the 9743 robberies reported in New Jersey, 4980 (51.1%) were "strong arm" robberies. 3304 (33.9%) involved firearms, 850 (8.7%) involved knives or cutting instruments, and 609 (6.3%) involved other dangerous weapons.

appreciable basis to believe that a cell phone snatcher, once he had left the scene, presented such an imminent physical danger to the general public that procuring a warrant in order to enter a home was impractical. *See, State v. Bolte* 115 N.J. 579 (1989) ("hot pursuit" doctrine does not permit warrantless entry into home for minor offenses where there was no indication that defendant posed a danger to anyone).

Second, there is no basis in the record to assert that J.A. was even aware that he was being pursued by police at the time they arrived at the home. Under those circumstances, the danger that he might, without such incentive, destroy the very evidence that he had just procured, is speculative.

The "hot pursuit" doctrine is but one variation on the general exigent circumstances exception, and depends upon a factual showing of sufficient danger to public safety or destruction of evidence that the absence of a warrant is excused. But in making that factual showing, "the State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure falls within one of the few well-delineated exceptions to the warrant requirement." *State v. Mann*, 203 N.J. 328, 337-38 (2010)(quoting *State v. Elders*, 192 N.J. 224, 246 (2007)); *see also, California v. Acevedo*, 500 U.S. 565, 589 n.5 (1991)("Because each exception to the warrant requirement invariably impinges to some extent on the protective

purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and 'the burden is on those seeking the exemption to show the need for it.')(quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

The State has not satisfied its burden that the purported dangers that underlie the "hot pursuit" exception to the warrant requirement were anything more than speculative.

D. A Consent To Search Is Not Voluntary Where The Police Have Already Invited Themselves Into The Home.

The State relies heavily on the consent to search the home given by J.A.'s mother after she arrived. It is undisputed that the mother gave her consent only *after* the police had already entered the house and indeed already handcuffed J.A. when they found him in the house. Such consent given after the fact cannot be voluntary.

In consent searches, the State bears the burden of proving the consent was given freely and voluntarily. *State v. Coles*, 218 N.J. 322, 144-145 (2014)(citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973)); *Johnson*, 68 *N.J. at* 354). To determine whether a person's consent was voluntarily given or coerced, "the proper analytical framework is whether a person has knowingly waived his right to refuse to consent to the search." *State v. Domicz*, 188 N.J. 285, 308 (2005).

This Court has recognized that people do not always feel comfortable in police presence. "Indeed, it is a sad fact that not all persons feel comfortable in the presence of the police.") *State v. Elders*, 192 N.J. 224, 251 (2007) (requiring reasonable and articulable suspicion for search of disabled vehicle). "That some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true." *State v. Tucker*, 136 N.J. 158, 169 (1994) (holding that running from the police did not justify a seizure). Thus, there is some coercive atmosphere inherent in any police request for a consent to search. *Cf.*, *State v. Carty*, 170 N.J. 632, 647 (2002)(because of the inherently coercive atmosphere of police automobile stop, an independent reasonable suspicion of criminality is required for a consent search to be valid).

Nevertheless, as this Court noted in *Domicz*, "[t]he choices are not so stark for the person who, in the familiar surroundings of his home, can send the police away without fear of immediate repercussions." *Domicz*, 188 N.J. at 306 (citing *United States v. Carter*, 378 F.3d 584, 589 (6th Cir. 2004) (stating that "a man's home is his castle," and that "police may be kept out or invited in as informally as any other guest").

But a consent search cannot be voluntary where the police have already intruded into the home. When J.A.'s mother

purportedly gave consent to search her home, four armed police officers were already in her home, her juvenile son was in handcuffs, her daughter had just been awoken from sleep by police officer entering the home through a kitchen window. If her home had been her castle, the castle walls had already been breached and the intruders were already in the castle keep.

This Court in *Domicz* held no reasonable and articulable suspicion was required for consent to search a home because a higher standard [would] not dispel whatever compulsion a person might feel when confronted by authority figures at his door." 188 N.J. at 308. Here, however, the officers were not at J.A. mother's door seeking permission to enter; they were already in the house and had been for some time. It defies belief to contend that J.A.'s mother felt free to "send the police away" when they had already forcibly intruded into her home. The police officer's subjective description of the mother as angry at her son as the motive for her consent cannot overcome the objective reality that no one could reasonably be expected to refuse consent to a search of a home that the police had already occupied.

As a result, the mother's consent was not voluntary, and evidence taken as a result of the police officer's warrantless entry is invalid, including the brother's later production of the iPhone.

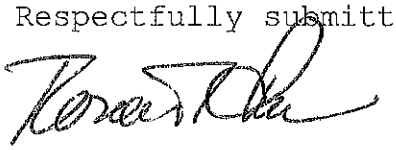
CONCLUSION

Barring imminent threat to safety, the circumstances in which this Court has validated a warrantless search of a home are rare and dramatic. And so it should be. "The unique status of the home has been recognized for centuries." Seemingly small concessions to convenience and practicality run the risk of undermining that transcendent constitutional value. "What the Court said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'" *Silverman v. United States*, 365 U.S. 505, 512 (1961).

For the reasons expressed herein, Amicus ACLU-NJ respectfully urges this Court to reverse the rulings below that denied the motion to suppress, and vacate the judgment of delinquency.

May 1, 2017.

Respectfully submitted,



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