SUPREME COURT OF NEW JERSEY
DOCKET NO. 080851

STATE OF NEW JERSEY, Plaintiff-Appellant, **v.** **TERREL L. HYMAN,** Defendant-Respondent.	Criminal Action **On Appeal From the Superior Court of New Jersey, Appellate Division** App. Div. Docket No. A-2407-16 Sat Below: Hon. Mitchel E. Ostrer, J.A.D. Hon. Lisa Rose, J.S.C., t/a

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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Preliminary Statement

The protections of the Fourth Amendment and Article I, Paragraph 7 are at their pinnacle inside the Constitution's castle: a person's home. The State asks this Court to lower a permanent drawbridge in matters involving allegations of drug distribution. It would have this Court install presumptive probable cause to search the home of any person suspected of supplying drugs, absent observations linking drug activity to the home, based on the generic inference that evidence of such activity is likely to be found there. This proposition reduces probable cause to a hollow slogan.

Probable cause to search a certain location must be rooted in a factual nexus between the evidence sought and the place to be searched. The nexus requirement is neither novel nor onerous. But the State seeks to carve an exception to it in drug cases – one that would fling open the doors to the place that has always commanded the strictest constitutional protection. According to this exception, a finding of probable cause to search a person's home automatically attaches whenever a magistrate determines that the person is probably a drug supplier.

Eroding the nexus requirement would have dramatic and damaging implications beyond narcotics cases. It would collapse the distinction between probable cause to arrest and probable cause to search in virtually every

instance. Our homes contain troves of information about our lives. Without a robust nexus requirement, police would have effective carte blanche to conduct fishing expeditions there for evidence of any probable wrongdoing.

The State's position is untenable for another reason: it would incentivize incomplete investigations. The State touts the absence of evidence that the defendant used any location outside his home for drug activities, as if this evidentiary gap furthers the inference that he used his home for those activities. But an absence of evidence tied to the home combined with an absence of evidence tied to a place other than the home does not add up to reasonable grounds to search the home; it does not add up to anything at all. The moment a dearth of proof is an approved ingredient of probable cause is the moment the probable cause requirement ceases to impose a meaningful check on the government's power to annex the liberty and privacy of the governed.

Finally, the blanket inference that people involved in drug distribution keep evidence of their criminal activity in their homes simply does not support the departure from standard constitutional protections the State proposes here. Courts across the country have refused to accept the theory as a substitute for the type of particularized probable cause showing our jurisprudence has always required. This Court should likewise refuse to degrade the probable

cause standard for search warrants. It can do so by affirming the sound decision below.

Statement of Facts/Procedural History

Amicus curiae, the American Civil Liberties Union of New Jersey, accepts the facts and procedural history set forth by the Appellate Division in *State v. Hyman*, No. A-2407-16 (App. Div. Feb. 28, 2018) (slip op. at 1-5) and by Defendant in his brief before the Appellate Division, adding the following for clarity:

Terrel Hyman lived in Newark, New Jersey – a roughly twenty-one-mile drive from his codefendant Lakeema Holifield's apartment in Morristown. *See* Pa16-17.[1] On December 18, 2014, Officer Scott Weaver submitted an application for a warrant to search both homes, detailing four alleged drug transactions. All four transactions took place in or just outside Ms. Holifield's

[1] "Pa" refers to the appendix attached to the Petition for Certification filed on behalf of the State of New Jersey on April 27, 2018;
"Da" refers to the Appendix attached to the Appellate brief filed on behalf of Defendant Terrel L. Hyman on March 22, 2017;
"1T" refers to the Suppression Hearing transcript dated August 8, 2016;
"State Supp." refers to the Supplemental Brief and Appendix filed on behalf of the State of New Jersey on November 21, 2018;
"State Pet." refers to the Petition for Certification filed on behalf of the State of New Jersey on April 27, 2018.

apartment. Pa21-27. None took place near Mr. Hyman's Newark home. *Id.* Mr. Hyman was either not present for or not a participant in half of them. Pa21-22.

In fact, a week before submitting his December 18 warrant application, Officer Weaver had submitted another application based on overlapping events that made no mention of Mr. Hyman at all. Da18-32. A trial judge granted that application, authorizing a search of Ms. Holifield's apartment, but it was never executed. 1T 7-20 to 8-10.

The factual accounts in both applications begin with the week of November 23, 2014. One unspecified day that week, a confidential informant allegedly made a controlled purchase of heroin from Ms. Holifield inside her apartment. Pa20-21. Mr. Hyman was not there.

Next, during the week of November 30, the same informant allegedly made another controlled purchase of heroin from Ms. Holifield inside her apartment. Pa22. The December 18 application (but not the earlier, unexecuted application) mentions that Mr. Hyman was in the apartment at that time. It does not suggest that he played any part in the transaction. Pa23.

The December 18 application (but not the earlier, unexecuted application) goes on to say that Mr. Hyman left the apartment soon after the controlled purchase and started walking toward his car a few blocks away. *Id.*

As he walked, he encountered an unknown white woman and conducted what looked to an observing detective like a hand-to-hand drug deal. *Id.*

About two weeks later, a confidential informant made another controlled purchase at Ms. Holifield's apartment. Pa24-25. The informant identified Mr. Hyman as the seller on that occasion. Pa25.

On December 17, detectives surveilled Mr. Hyman. Pa26. They watched him leave home, put an object into the trunk of his car, and drive to a gas station. *Id.* He filled his tank and drove on. *Id.* He then parked behind a car driven by an "unknown black female" and put a red fuel can into his trunk. *Id.* Mr. Hyman then drove to Ms. Holifield's apartment in Morristown. *Id.* Officer Weaver does not suggest that Mr. Hyman opened his trunk or carried anything from his car inside. *Id.* Presumably, he did not. Some time later, Mr. Hyman drove back home. *Id.*

Although the search warrant applications recount no other surveillance, the State claims that law enforcement conducted "several weeks of surveillance." State Supp. at 29. Apparently, during those weeks of surveillance, Mr. Hyman did not do anything else that appeared suspicious or illegal.

Based on the December 18 application, the judge issued a search warrant for Mr. Hyman's Newark home, Ms. Holifield's Morristown home, and Mr.

Hyman's car. Da54-61. Police found heroin and a handgun in Mr. Hyman's home. Da62.

After a Morris County Grand Jury returned a ten-count indictment against Mr. Hyman, Da1-5, he filed a motion to suppress the evidence seized pursuant to the search of his home. A different trial judge denied the motion. 1T 10-12 to 42-21. Mr. Hyman pleaded guilty to two counts (third-degree possession of heroin with intent to distribute and second-degree certain persons not to have firearms) in exchange for dismissal of the remaining counts and a sentence not to exceed twelve years. Da6-11. He ultimately received a ten-year sentence with five years of parole ineligibility. Da12. On February 28, 2018, the Appellate Division reversed the denial of Mr. Hyman's motion to suppress. The State filed a Petition for Certification two months later and the Court granted Certification on September 24, 2018.

Argument

I. The Appellate Division correctly held that the warrant to search Mr. Hyman's home lacked probable cause.

In order to search a home, or any other location, the government must establish probable cause that evidence will be found there. It can do so only by demonstrating a factual nexus between criminal activity and that place.

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307 (1967). The State does not overtly refute this principle. It purports to endorse the settled "totality of the circumstances" approach to probable cause showings. State Supp. at 19-20.

But it has a problem. The only "circumstances" it points to have nothing to do with the place it wants to search. And so, implicitly, it insists on the viability of a different path to probable cause: the generalization that drug dealers keep evidence of their criminal activity in their homes. Under the "totality" banner, it proposes a rule that is anathema to holistic factual analysis. To accept its reasoning and hold the circumstances of this case sufficient to make out a probable cause nexus would be to issue a categorical instruction that judges must grant warrants to search the homes of any and all New Jerseyans whom the State suspects are drug dealers. The State's position is no ordinary "totality of the circumstances" application.

A. Probable cause requires a specific factual nexus between the criminal activity alleged and the place to be searched.

The founding generation endured a plague of "general warrants" – broad instruments that allowed British officers to rummage unrestrained through homes in the colonies. *See State v. Feliciano*, 224 N.J. 351, 366 (2016) (citing

Stanford v. Texas, 379 U.S. 476, 481 (1965)). The framers fashioned the Fourth Amendment in response. *See Riley v. California*, 134 S. Ct. 2473, 2494 (2014). With the Amendment's probable cause requirement, they radically transformed the warrant's role. What had been a sword for the powerful became a shield for the powerless. Accepting the State's position would weaponize the warrant again.

Probable cause holds the government to account by demanding particularity. To secure a search warrant, the government must establish a fair probability that evidence of wrongdoing exists in the "particular" private place the government wishes to enter. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "But this hardly means that it will always suffice that the place is described in definite and certain terms. The described place must 'match up' with the probable cause showing." 2 Wayne R. LaFave, *Search & Seizure* § 3.7(d) (5th ed. 2016). In other words, an affidavit supporting a search warrant must demonstrate a nexus between the evidence to be found and the place to be searched. *See, e.g., State v. Chippero*, 201 N.J. 14, 29 (2009).

This nexus analysis distinguishes probable cause to make an arrest from probable cause to conduct a search. "Probable cause to arrest . . . hinges on the distinct and discrete inquiry into whether the person to be arrested has committed or is committing a criminal offense." *Id.* By contrast, "[t]he

magistrate's inquiry in respect of a search warrant must assess the connection of the item sought to be seized 1) to the crime being investigated, and 2) to the location to be searched as its likely present location." *Id.* Thus, "[p]robable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person's home to the suspected criminal activity." *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998).

In turn, that additional evidence – the nexus – must be specific and concrete. As this Court emphasized in *State v. Boone*, "judges issuing search warrants must scrutinize the warrant application and tie specific evidence to the persons, property, or items the State seeks to search. Without that specificity and connection to the facts, the application must fail." 232 N.J. 417, 431 (2017). "Wholly conclusory" statements that an affiant "has cause to suspect and does believe" that contraband will be found at a location "will not do." *Gates*, 462 U.S. at 239. The issuing judge's "action cannot be a mere ratification of the bare conclusions of others." *Id.*

Likewise, an issuing judge may draw reasonable inferences from information in a search warrant application only so long as those inferences are grounded in facts rather than broad generalizations. In other words, a judge's decision to authorize a search must be based on the specific "underlying

circumstances” detailed in the warrant application. *United States v. Ventresca*, 380 U.S. 102, 108 (1965). “[G]eneralizations do not substitute for facts and investigation.” *State v. Thein*, 977 P.2d 582, 590 (Wash. 1999) (en banc).

Here, the State asks this Court to accept a generalization – that drug dealers keep evidence of their illegal activities in their homes – in place of a particularized, factual nexus between Mr. Hyman’s home and his alleged drug dealing. In effect, the State proposes a categorical rule that probable cause to search a person’s home attaches whenever a magistrate determines that the person is probably a drug dealer.

The State relies on a per se rule of this type because, without one, it cannot meet its burden. The search warrant application was utterly vacant of facts linking drug activity to Mr. Hyman’s home. The State concedes he “was not dealing drugs out of his house and was not seen carrying obvious contraband out of the house.” State Pet. at 4. The facts alleged in the warrant application – that Mr. Hyman sold drugs twice in or near a codefendant’s residence more than twenty miles from his own, that he was present in the same residence during a third transaction, and that he placed a fuel can into his trunk after driving away from a gas station – do not implicate his home at all. *See Hyman*, Slip Op. at 2-4. So instead, the State rests probable cause on the fact-bare generalization that “[w]hen the affiant officer is aware of a suspect’s

involvement in drug distribution and specifically of his role as a drug supplier . . . it is reasonable for the officer to conclude that the evidence of criminality will be discovered at the suspect's residence." State Pet. at 4.

If this type of generalization can constitute probable cause to search a home, the search warrant analysis will collapse entirely into the arrest warrant analysis. Keys to a suspect's home will come free with any showing of probable guilt, both in and beyond drug cases. Many people keep diaries on their bedsides, cellphones on their kitchen counters, computers on their desks. If a person has committed a crime, it is nearly certain that they will leave some digital or physical trace and it will always be possible to point to the home as a likely locus. As the State asserts bluntly, "Common sense dictates that people keep things in their homes." State Supp. at 1. This generalization has no limiting principle and accepting it as a substitute for a particularized, factual nexus would sanction sweeping government intrusions in the home and erode the foundation of the warrant requirement.

The State relies on another, equally unavailing nexus substitute. It suggests that the absence of evidence of drug activity at a location other than Mr. Hyman's home amounts to evidence of drug activity in his home. State Supp. at 2. This proposition is factually misleading, logically flawed, and legally unsound.

First, the claim that Mr. Hyman "was not observed using any other location for his drug activity" is oversimplified. *Id.* He was observed using his codefendant's apartment. The State seems to assume, without explanation, that Mr. Hyman's home (the site of no observed drug activity) must be where he maintained an alleged "supply," and that his codefendant's home (the site of the only observed drug activity) could not possibly be.

Second, the absence of evidence is just that: an absence of evidence. Only a deeply cynical imagination could find, in "weeks of police work" turning up "absolutely no observation" of drug activity outside a person's home, *id.* at 29, affirmative reason to suspect drugs in the home. That Mr. Hyman "was not keeping evidence anywhere else" is exculpatory, not inculpatory; "*else*" simply begs the question.

Finally, courts have refused to endorse a legal theory that would incentivize abbreviated investigations. The Washington Supreme Court found it unreasonable "to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it." *Thein*, 977 P.2d at 590. "By this rationale," the court cautioned, "lack of investigation and fewer details might result in a warrant, whereas thorough investigation revealing more about the suspect – and, therefore, potentially more places to look – would not." *Id.*

The State uses a flawed syllogism to misrepresent innocent facts as incriminating ones. According to the State's logic, any observable behavior can be used to justify a search of a suspected drug dealer's home. If the nexus requirement retains meaning and force, Mr. Hyman's unremarkable tendency to come and go without contraband from his residence does not satisfy it.

B. Courts across the country have refused to adopt the per se rule the State proposes here, which would create automatic probable cause to search the home of any person suspected of drug dealing.

The State suggests that many state and federal courts have found probable cause to search a home on facts similar to those presented here. But the picture it paints is selective, and therefore distorts the status of the law beyond recognition. In reality, jurisdictions disagree, and a number of state and federal courts have rejected the notion that the conclusory generalization the State asserts here – that drug dealers keep evidence of their illegal activities in their homes – is sufficient on its own to create probable cause to search the home of a suspected drug dealer.

For instance, when asked to decide whether "generalizations regarding the common habits of drug dealers . . . standing alone, established probable cause," the Supreme Court of Washington responded with a resounding no. *Thein*, 977 P.2d at 583. The state of Washington had essentially urged the

court to adopt "a per se rule that if the magistrate determines a person is probably a drug dealer, then a finding of probable cause to search that person's residence automatically follows," just as the State has asked this Court to do here. *Id*. at 585. The Washington Supreme Court refused to impose such a rule, as doing so would "subvert fundamental constitutional protections." *Id*. at 589.

The New Hampshire Supreme Court ruled similarly, holding that it would "not accept the State's invitation" to establish a per se rule that "the fact that a person is an active drug dealer creates a fair probability that controlled drugs or other indicia of drug dealing could be found in the drug dealer's residence." *State v. Silvestri*, 618 A.2d 821, 824 (N.H. 1992). Instead, the court explained that "some nexus between the defendant's residence and drug-dealing activities" is required to establish probable cause to search a drug dealer's home. *Id*.

In addition, a Utah appellate court held that where a supporting affidavit "ultimately relied only on a generalization about where drug dealers keep their drugs" – that is, in their homes – it was "insufficient to support a finding of probable cause." *State v. Vasquez-Marquez*, 204 P.3d 178, 182 (Utah Ct. App. 2009). The court noted that "the Fourth Amendment does not permit the State to search and seize evidence based solely on hunches, even when those intuitions are based on training and experience." *Id.*

Other state courts have also rejected the idea that the government may indiscriminately intrude upon the homes of all drug crime suspects, based only on the notion that drug dealers often hide evidence where they live. Rather, in order to establish probable cause, facts demonstrating a fair probability that evidence will be found in a specific home are required. *See State v. Cole*, No. 23058, 2009 Ohio App. LEXIS 5148, at *15 (Oh. Ct. App. 2009)[2] (holding that "probable cause to search an individual's home for evidence of drug trafficking is not present based solely upon evidence of the individual's possession of a significant quantity of drugs or other evidence of drug trafficking," but rather that "there must exist some additional evidentiary link between the suspected drug activity and the suspect's home"); *Yancey v. State*, 44 S.W.3d 315, 325 (Ark. 2001) (declining the state's invitation "to hold that a conclusory allegation . . . that an individual sells drugs would be probable cause to issue a search warrant for that individual's home because drugs are likely to be found where drug dealers live").

Even a number of the jurisdictions that the State turns to for support have treated its position with skepticism. For instance, the State attempts to employ the decision of the Wisconsin Supreme Court in *State v. Ward*, 604

[2] Pursuant to R. 1:36-3, this opinion is included in an appendix. Counsel is aware of no case that stands for the contrary proposition.

N.W.2d 517 (Wis. 2000), to its advantage. It does not point out that in that case, the court explicitly stated that "we are not suggesting that when there is sufficient evidence to identify an individual as a drug dealer . . . that there is sufficient evidence to search the suspect's home." 604 N.W.2d at 525. The Wisconsin Supreme Court rejected the notion that one's status as a drug dealer automatically creates probable cause to search one's home.

The State also relies on the Supreme Court of Maryland's decision in *Holmes v. State*, 796 A.2d 90 (Md. 2002), suggesting that it demonstrates how a court may permissibly find nexus "with very little, if any, direct evidence." State Supp. at 32. But the State ignores the fact that in *Holmes*, the search warrant application laid out evidence that the affiant officer believed "indicated narcotics transactions at" the very same residence that officers sought to search. 796 A.2d at 97. That fact makes *Holmes* entirely distinguishable from the present case, in which the State admits that the only evidence of narcotics transactions was at the apartment of a codefendant, miles away from Mr. Hyman's home.

Even more importantly, the Supreme Court of Maryland made clear in *Holmes* that its decision should not be construed to support a per se rule. As the court put it, "the mere observation, documentation, or suspicion of a defendant's participation in criminal activity will not necessarily suffice, by

itself, to establish probable cause that inculpatory evidence will be found in the home." *Id*. at 100. Rather, "there must be something more that, directly or by reasonable inference, will allow a neutral magistrate to determine that the contraband may be found in the home." *Id*.

The State also complains that the Appellate Division "ignored the federal cases" it offered in support of its argument below. State Pet. at 12. But the reality – as the Appellate Division noted – is that much of the federal case law in fact "undermine[s] the State's position." *Hyman*, Slip. Op. at 8.

For instance, the State relies on several cases from the First Circuit, but that court's holdings cannot support the per se rule the State seeks. Rather, the First Circuit has made clear that its decisions do not "suggest that, in all criminal cases, there will automatically be probable cause to search a suspect's residence." *United States v. Feliz*, 182 F.3d 82, 88 (1st Cir. 1999). Indeed, the court has specifically noted that "[a]lone, . . . generalized observations" regarding the likelihood that drug dealers hide evidence at home "may not be enough to satisfy the nexus element." *United States v. Ribeiro*, 397 F.3d 43, 50 (1st Cir. 2005). And although the State points to *United States v. Charest* for the proposition that nexus "can be inferred from the type of crime, the nature of the items sought . . . and normal inference as to where a criminal would hide" evidence (in *Charest*, a handgun), it ignores that in *Charest* itself,

the court ultimately decided that probable cause did not exist because it was unlikely that the defendant would have hidden the evidence of his crime in his own home. 602 F.2d 1015, 1017-18 (1st Cir. 1979).

The State also points to the Third Circuit's decision in *United States v. Whitner*, 219 F.3d 289 (3d Cir. 2000). In that case, the court declined to address the propriety of a per se rule like the one the State proposes, noting that "we need not decide whether the fact that [defendant] appears to be a drug dealer is sufficient . . . to conclude that he would be likely to store evidence of his drug dealing at his residence." 219 F.3d at 298. The State therefore admits – as it must – that under *Whitner*, "probable cause to arrest does not automatically provide probable cause to search the defendant's home[.]" State Supp. at 36. Because the Third Circuit specifically declined to address the question the State now asks this Court to decide, the State's reliance *Whitner* is misplaced.

Other circuits have explicitly rejected a rule that would permit the government to search the home of any and every suspected drug dealer. In *United States v. Wiley*, for instance, the Seventh Circuit explicitly stated that "it would be inappropriate to adopt a categorical rule that would, in every case, uphold a finding of probable cause to search a particular location simply

because a suspected drug trafficker resides there." 475 F.3d 908, 916 (7th Cir. 2007).

The Sixth Circuit has similarly resisted establishing any per se rule on this matter. That court has explained that its "cases teach, as a general matter, that if the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity . . . it cannot be inferred that drugs will be found in the defendant's home – even if the defendant is a known drug dealer." *United States v. Brown*, 828 F.3d 375, 384 (6th Cir. 2016). In other words, "[t]o infer permissibly that a drug-dealer's home may contain contraband, the warrant application must connect the drug-dealing activity and the residence," which will "typically . . . require . . . facts showing that the residence had been used in drug trafficking."[3] *United States v. McCoy*, 905 F.3d 409, 417 (6th Cir. 2018).

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[3] The Sixth Circuit has also noted that, under certain circumstances, probable cause to search a drug dealer's home may exist despite a lack of direct evidence connecting the home to drug activity. One panel explained that such cases were "distinct from the typical drug trafficking case . . . because the affidavits did not just establish that the defendants were drug dealers, but contained overwhelming evidence that the defendants were major players in a large, ongoing drug trafficking operation." *Brown,* 828 F.3d at 383 n. 2. Another panel characterized the case law differently, and suggested that at least some indicia of probable cause to search a drug dealer's home may exist where there is evidence beyond a single instance of drug distribution to show that the individual was engaged in continual or ongoing drug operations. *McCoy*, 905 F.3d at 417-18 & n. 5. In any event, the Sixth Circuit has approached the question of whether every suspected drug dealer's home should be automatically subject to search with notable caution.

Thus, the case law in at least two federal circuits does not support the State's suggestion that probable cause exists to search the homes of suspected drug dealers solely on the basis that they are suspected drug dealers. In those circuits, a factual basis beyond the general notion that drug dealers hide evidence at home is typically required.

Even the few federal decisions that would seem to lend the most support to the State's position are distinguishable from the case at hand. For instance, in *United States v. Angulo-Lopez*, citizen-informants had reported that the defendant was selling drugs out of his home. 791 F.2d 1394, 1396, 1398 (9th Cir. 1986). Here, a confidential informant stated that Mr. Hyman was a drug supplier, but did not provide any information regarding the location from which he might supply those drugs.

Several other cases the State cites are distinguishable because the affiant officers in those cases specifically stated in their warrant applications that they believed drug dealers generally hide evidence in their homes, and explained the basis for this belief. *See United States v. Thomas*, 989 F.2d 1252, 1254 (D.C. Cir. 1993); *United States v. Keele*, 589 F.3d 940, 944 (8th Cir. 2009). As the Appellate Division observed below, here, Officer Weaver did not articulate such a general belief, nor state any grounds to support one. *Hyman*, Slip Op. at 8-9.

This finding by the Appellate Division does not, as the State suggests, amount to a demand that search warrant applications must contain particular language or state only certain specific facts in order for probable cause to be present. Rather, the Appellate Division acknowledged that, while the State seeks to rely on the generalization that drug dealers keep evidence in their homes, the warrant application failed to so much as state that drug dealers or suppliers generally or commonly tend to do so. Instead, the application merely contained Officer Weaver's unsupported belief that evidence was likely to be found in Mr. Hyman's home in particular.

This is not to say that probable cause would have attached if the officer had referenced a generalization. But without such a reference, the case for probable cause is even weaker. If the mere conclusory assertion that a particular defendant likely hid evidence in his home could support probable cause, without reference to specific facts in support of the belief *or even* reference to a general pattern that led the officer to draw his conclusion, Fourth Amendment protections would be utterly gutted.

Finally, the State suggests that *State v. Myers*, 357 N.J. Super. 32 (App. Div. 2003), supports its view, but the case is clearly distinguishable. In *Myers*, the affidavit stated that officers had looked into the home in question through

an open door and saw what they believed to be bricks of heroin inside. Here, there was no observation of any drug activity inside Mr. Hyman's home.

The State correctly notes that the *Myers* court opined that probable cause existed once the police observed Myers engaged in drug transactions in the area of a second apartment (not his own) in which police found drugs and weapons. This statement could be read to imply that the officers in *Myers* need not have seen the heroin inside Myers's apartment in order to obtain a warrant to search it. The State's reliance on *Myers* is nevertheless unjustified for two reasons.

First, even ignoring that officers directly observed heroin inside Myers's home, the facts of *Myers* are still distinguishable from this case. Myers's apartment was located only one block from the second apartment in which drugs and weapons had already been located, and drug transactions had been observed in that same immediate area. Mr. Hyman's apartment, on the other hand, is located more than twenty miles from the apartment of his codefendant, the only place where drug transactions were observed. Second, the Appellate Division's statement that probable cause existed before the officers saw heroin inside Myers's apartment is best characterized as *dicta*, as the court ultimately held that the affidavit in question supported a finding of probable cause, and

the affidavit explained that the officers had seen heroin inside Myers's apartment.

The State not only asks this Court to adopt a broad, per se rule which will vastly expand the government's ability to access New Jerseyans' homes, but does so in spite of (and in some cases, even in reliance on) cases that either cast significant doubt upon its position, or are clearly distinguishable from the case at hand.

C. The generalization that drug dealers hide evidence at home cannot support a departure from standard constitutional protections.

Many courts at both the state and federal level have approached with skepticism the idea that any suspected drug dealer's home should automatically be subject to search. There is good reason for this skepticism. As the Appellate Division recognized below, the home is not the only location where a drug dealer might hide evidence. One might also infer that a drug dealer would choose to "use a 'stash house,' separate from his own residence to store drugs." *Hyman*, Slip Op. at 9. Indeed, law enforcement officers in this state and elsewhere have testified that people involved in the illegal drug trade purposefully use such "stash houses" to store drugs and hide other evidence, with the goal of evading investigators.

For instance, one New Jersey court summarized the testimony of a law enforcement official and narcotics investigation expert that "people who distribute narcotics commonly use multiple vehicles and a 'stash house,' instead of their own residence, to hide their drugs and thwart law enforcement." *State v. Muldrow*, No. A-5514-09T2/A-0860-10T2, 2013 N.J. Super. Unpub. LEXIS 719, *19-*20 (App. Div. Apr. 2, 2013).[4] Similarly, in another New Jersey case, an expert for the State "testified at trial that persons who distributed CDS and maintain a facility for the production of CDS often use locations other than their residences," and that such "'stash' houses are employed to avoid detection." *State v. Gaskins*, No. A-6204-09T2, 2014 N.J. Super. Unpub. LEXIS 48, at *24 (App. Div. Jan. 10, 2014).[5]

Federal courts have taken note of similar testimony. In *United States v. Blue*, the Fourth Circuit noted the opinion of an expert from the Drug Enforcement Administration that "drug traffickers sometimes utilize the homes of family members, girlfriends, or close friends to stash their drugs so they have ready access to their drugs, '[b]ut if law enforcement is following them back to where they sleep, it's not there.'" 808 F.3d 226, 233 (4th Cir. 2015).

[4] Pursuant to R. 1:36-3, this opinion is included in an appendix. Counsel is aware of no case that stands for the contrary proposition.

[5] Pursuant to R. 1:36-3, this opinion is included in an appendix. Counsel is aware of no case that stands for the contrary proposition.

Similarly, in *United States v. Cruz*, the Second Circuit took note of an agent's "opinion that, based upon his experience, narcotics dealers 'customarily' maintain apartments and other locations apart from their residences in furtherance of their business for the storage of drugs, paraphernalia, or money, or all three." 785 F.2d 399, 405 (2d Cir. 1986).

Of course, the existence of such testimony does not mean that drug dealers never keep evidence of their activities in their homes, or even demonstrate that doing so would be extremely unusual. Nevertheless, these statements show that law enforcement officers have explicitly recognized that drug dealers often purposefully hide evidence *away* from their residences. This casts doubt on the notion that the generalization the State relies upon here – that drug dealers keep evidence of criminality at home – is of such exceeding strength or obviousness that it justifies departing from the normal requirements that safeguard the homes of all New Jerseyans from unjustified law enforcement intrusion.

Just as when the State wishes to search the home of any suspected criminal, when it wishes to search the home of a suspected drug dealer, it must provide specific facts linking that home to the suspect's criminal activity, such that there is a fair probability that evidence will be found there. This requirement is not a departure from the status quo. It is not new and it does not

make probable cause showings more burdensome. It is the standard that has appropriately balanced the privacy rights of New Jerseyans with the needs of law enforcement officers for decades.

Conclusion

To preserve the warrant's role as a bulwark against unreasonable searches, the Appellate Division's decision should be affirmed.

Respectfully submitted,

____

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Counsel for *Amicus Curiae*

Dated: December 10, 2018

State v. Cole

Court of Appeals of Ohio, Second Appellate District, Montgomery County

November 20, 2009, Rendered

Appellate Case No. 23058

Reporter
2009-Ohio-6131 *; 2009 Ohio App. LEXIS 5148 **

STATE OF OHIO, Plaintiff-Appellee v. TIFFANY COLE, Defendant-Appellant

Prior History: [**1] (Criminal Appeal from Common Pleas Court). Trial Court No. 2007-CR-3997/2.

Counsel: MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Montgomery County Prosecutor's Office, Appellate Division, Dayton, Ohio, Attorney for Plaintiff-Appellee.

ANTHONY S. VANNOY, Dayton, Ohio, Attorney for Defendant-Appellant.

Judges: FAIN, J. GRADY and FROELICH, JJ., concur.

Opinion by: FAIN

Opinion

FAIN, J.

[*P1] Defendant-appellant Tiffany Cole appeals from her conviction and sentence, following a no-contest plea, to one count of Having a Weapon Under a Disability. Cole contends that the trial court erred when it overruled her motion to suppress evidence obtained as a result of the search of her apartment, pursuant to a search warrant.

[*P2] We agree with Cole and the trial court that the fact that an individual -- not Cole -- was found driving a vehicle containing illegal drugs, and that there was evidence that this individual was a resident in her apartment, without more, is insufficient to establish probable cause to believe that evidence of criminal activity might be found within Cole's apartment. But we agree with the State and the trial court that the closeness of this issue, and its novelty in Ohio, results in the searching police officers having relied, [**2] in good faith, upon the search warrant issued by a neutral and detached magistrate, who had been advised of the facts.

[*P3] Consequently, the trial court correctly determined that the evidence should not be excluded, under the good-faith-exception doctrine established in *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, and the judgment of the trial court is Affirmed.

I

[*P4] Dayton Police Officer Dan Zweisler stopped a vehicle being driven by Daniel Jackson for a minor traffic violation while on patrol one evening in September, 2007. Zweisler noticed a strong odor of

marijuana coming from the vehicle. Zweisler's drug-sniffing dog, Zorn, alerted to the driver's side door of the vehicle. A search of the vehicle resulted in the seizure of substantial quantities of marijuana, and drug paraphernalia.

[*P5] Also found in the vehicle were: a Vectren and Dayton Power and Light bill for 9941 White Court Apt. K, in Miamisburg, Ohio; a Northtown furniture receipt made out to Daniel Jackson with a delivery address of 9441 White Pine Court Apt. K; a Time Warner Cable bill showing 9441 White Pine Court Apt. K as the address; and Montgomery County Assistance paperwork in the name of Tiffany [**3] Cole, residing at 9941 White Pine Court Apt. K. [1]

[*P6] Detective Rodney Barrett prepared an affidavit for a warrant to search 9441 White Pine Court Apt. K, in Miamisburg, for evidence of sales of illegal drugs, and submitted it to Miamisburg Municipal Court Judge Robert Messham. Judge Messham signed the warrant, which was executed the same day as the stop of Jackson. The apartment was later determined to have been in Cole's name. The search resulted in the seizure of a handgun, several digital scales, two bags of marijuana, three large plastic bags with marijuana residue, a vacuum sealer with marijuana residue on it, a plastic cup and a bowl with marijuana residue on them, and substantial cash.

[*P7] Cole was arrested and charged with Having a Weapon While Under a Disability and Possession of Drug Paraphernalia.

[*P8] Cole moved to suppress the evidence, contending that it was obtained as the result of [**4] an unlawful search of her apartment. Following a hearing, the trial court overruled Cole's motion to suppress. Thereafter, Cole pled no contest to the charge of Having a Weapon While Under a Disability, and the Possession of Drug Paraphernalia charge was dismissed. Cole was found guilty, and was sentenced accordingly.

[*P9] From her conviction and sentence, Cole appeals.

II

[*P10] Cole's sole assignment of error is as follows:

[*P11] "THE TRIAL COURT ERRED IN FINDING THAT THE SEARCH OF 9441 WHITE PINE COURT WAS SUPPORTED BY THE 'GOOD FAITH' EXCEPTION TO THE EXCLUSIONARY RULE."

[*P12] The trial court, in the person of the Honorable Michael L. Tucker, analyzed the issues as follows:

[*P13] "**Probable Cause Standard**

[*P14] "The determination of probable cause under the Fourth Amendment is a fluid, common-sense, and non-technical process. *Brinegar v. U.S.* (1949), 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879. This concept was conveyed by the *Brinegar* Court as follows:

---

[1] The record contains no explanation of the discrepancies in the street numbers in the addresses. Specifically, there is nothing to indicate whether these may represent errors in the documents themselves, or errors in Barrett's affidavit, or whether there may be some other reason for the discrepancies.

> "In dealing with probable cause . . ., as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar* at 175.

[*P15] "This practical, [**5] common-sense determination is based upon the totality of circumstances, and, in the end, the decision is premised upon whether there is a fair probability contraband or other evidence of a crime will be discovered in the place to be searched. *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L. Ed. 2d 527; *State v. George* (1983), 45 Ohio St.3d 325, 544 N.E.2d 640. A fair probability, it is noted, is not to be confused with the greater weight of the evidence or any other mathematical formulation. *Illinois v. Gates*, supra.

[*P16] "The initial important factor in this case is whether, based upon the totality of circumstances presented to Judge Messham, there was a fair probability evidence of the crimes of drug trafficking and/or drug possession would, on September 20, 2007, be found at 9144 [sic] White Pine Court, Apartment K. *Sgro v. U.S.* (1932), 287 U.S. 206, 53 S.Ct. 138, 77 L. Ed. 260. This Court has not found any Ohio cases which discuss the specific issue presented, but two non-Ohio cases are helpful in the analysis of this quite interesting issue.

[*P17] "The first case is *State [of] Washington v. Thein* (1999), 138 Wn.2d 133, 977 P.2d 582. In this case the Washington Supreme Court reviewed whether probable cause to [**6] search a defendant's home was present when the supporting affidavit, in essence, outlined how the facts were consistent with how drug dealers normally operate. The affidavit also included the statements that 'it is a common practice for drug traffickers to store at least a portion of their drug inventory . . . in their . . . residences.' *Thein* at 139. The affidavit further indicated drug traffickers also routinely maintain records relating to drug trafficking in their homes.

[*P18] "The *Thein* court, though noting there is a dissenting view (citing *United States v. Pitts* (9th Cir., 1993), 6 F.3d 1366, 1369, where the Court stated 'in the case of drug dealers evidence is likely to be found where the dealers live[.]'), ruled the generalizations contained in the affidavit were not sufficient to allow the issuing judge to conclude there was a fair probability evidence of drug trafficking would be discovered in the defendant's home. The *Thein* court, instead, concluded the material presented to a judge must establish a specific factual basis (as opposed to generalities) from which the judge is able to conclude there is a fair probability that evidence of the suspected illegal activity will be discovered. [**7] Without such a factual basis, the necessary 'reasonable nexus is not established . . . .' Id. at 147. The *Thein* Court, without discussion of the good faith exception, ordered suppression.

[*P19] "The second case, *State of Arkansas v. Yancey*, generated an intermediate appellate decision (71 Ark. App. 280, 30 S.W.3d 117) and an Arkansas Supreme Court decision (345 Ark. 103, 44 S.W.3d 315). The facts in *Yancey* are close to the facts presented in this case, and the analysis of each court, though reaching different results, is helpful. In this case an Arkansas Game and Fish Officer observed the defendants (Mr. Cloud and Mr. Yancey) in a remote, wooded area watering suspected marijuana plants. The officer followed the individuals back to the highway and observed the individuals drive away in a Jeep. The officer followed the Jeep, and, ultimately, stopped the Jeep in front of Cloud's home. Cloud and Yancey told the officer they had been frogging, but the officer's observations (no frogging equipment -- whatever such equipment may be -- dry hip boots, and the presence of what appeared to be watering jugs) were inconsistent with a frogging expedition. The officer, at this point, allowed Cloud and [**8] Yancey to proceed.

[*P20] "The officer, the next day and with the help of the local Sheriff's department, traveled to the location where the officer had observed Cloud and Yancey's watering activity. Three marijuana plants were removed, with surveillance being maintained on the remaining plants. When, in three days, no one appeared, the remaining plants were harvested. The Fish and Game officer, thereafter, prepared an affidavit in order to obtain a search warrant for each defendant's home. The affidavit chronicled the above indicated facts, and, additionally, noted that Mr. Cloud, over a several year period, had been convicted for possession of 'controlled substances.' 71 Ark. App. at 285 (quoting affidavit). A municipal judge, with this information, issued a search warrant for each defendant's home. Marijuana was found at each home triggering, of course, the indictments which brought the case to the courts for review.

[*P21] "The intermediate appellate court (71 Ark. App. 280, 30 S.W.3d 117) ruled that probable cause to search the homes existed. The court's rationale for this conclusion is summarized as follows:

> "We are persuaded by the reasoning set forth in cases from the Ninth Circuit cited by the State. In *U.S. v. Pitts*, 6 F.3d 1366 (9th Cir. 1993), [**9] the court of appeals held that a 'reasonable nexus' does not require direct evidence that the items listed as the objects of the search are on the premises to be searched. The magistrate must only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit. 6 F.3d. at 1369. A magistrate may 'draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense,' *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986), and the magistrate may also rely on the conclusions of experienced law-enforcement officers regarding where evidence of a crime is likely to be found. *U.S. v. Terry*, 911 F.2d 272 (9th Cir. 1990). In the case of drug dealers, 'evidence is likely to be found where the dealers live.' Id. at 275; *United States v. Angulo-Lopez*, supra.
>
> "Other circuits have followed the Ninth Circuit's reasoning. In *United States v. Feliz*, 182 F.3d 82 (1st Cir. 1999), cert. denied, 528 U.S. 1119, 120 S. Ct. 942, 145 L. Ed. 2d 819 (2000), the First Circuit held that there was a sufficient showing of probable cause to issue a search warrant for the appellant's residence based upon drug sales [**10] made away from the residence. In so holding, the court stated:
> "The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather 'can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime] . . . '
>
> "182 F.3d. at 88, citing *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979).
>
> "Likewise, the Seventh Circuit has held that warrants may be issued even in the absence of direct evidence linking criminal objects to a particular site. See *U.S. v. Lamon*, 930 F.2d. 1183 (7th Cir. 1991); *U.S. v. Malin*, 908 F.2d. 163 (7th Cir. 1990), abrogation on other grounds recognized in *United States v. Monroe*, 73 F.3d 129 (7th Cir. 1995). In *Lamon*, the court of appeals upheld a search warrant for appellant's principal residence for drugs and drug-related items, even though there was no evidence that appellant had ever sold drugs out of that location. In *Malin*, the search warrant for appellant's house was upheld based upon the fact that marijuana was seen growing in the appellant's yard. In finding [**11] probable cause to search the house, the *Malin* Court held that probable cause deals in probabilities that are the 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Malin*, 908 F.2d. at 165-66 (quoting *Brinegar*

> *v. United States*, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949), reh'g denied, 338 U.S. 839, 94 L. Ed. 513, 70 S. Ct. 31 (1949)). 71 Ark. App. at 286-287.

[*P22] "The Arkansas Supreme Courtd (345 Ark. 103, 44 S.W.3d 315) took the opportunity to review the intermediate appellate court's decision. This review triggered, at least from the defendants' perspective, a 'bitter-sweet' conclusion. The Arkansas Supreme Court concluded the search warrant for each defendant's home was not supported by probable cause, but, under the good faith exception, suppression of the marijuana was not appropriate.

[*P23] "The Arkansas Supreme Court, after discounting any reliance upon Mr. Cloud's criminal drug history, summarized its probable cause conclusion as follows:

> "The critical element in a reasonable search is not that the owner of the property is suspected of a crime but that there is reasonable cause to believe that specific things to be searched for and [**12] seized are located on the property to which entry is sought. *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d. 525 (1978). Accord *Gates v. Illinois*, 462 U.S. at 238 (a fair probability that contraband or evidence of a crime will be found in a particular place). See also *United States v. Malin*, 908 F.2d 163 (7th Cir. 1990). The affidavit must provide facts by direct or circumstantial evidence that there is reasonable cause to believe the specific things sought are located on the property to which entry is sought.
>
> "Here, one might argue it is reasonable to infer that persons who are watering marijuana plants in amounts allowing a statutory inference of intent to deliver must be processing it somewhere, and from that inference it might seem reasonable to then infer that their homes are the most likely place for processing. General experience of law enforcement would likely bear out this deduction. However, the test is not whether it is reasonable to believe items to be seized might be found in the place to be searched, but rather whether there is evidence presented to support reasonable cause to believe the items to be seized would likely be found in the place to be searched. [**13] There is nothing in Evan's affidavit [the Fish and Game Officer] as to the maturity of the marijuana plants or whether the plants were ready to be harvested for processing. This case is further complicated because there is no direct evidence that there is any marijuana beyond that seized in the woods. The eighteen marijuana plants were seized and removed to the sheriff's office prior to the affidavit and the search warrant being issued. Thus, how may one then infer where marijuana or other evidence of crime might reasonably be kept if there is no evidence in the beginning to infer any exists?
> " . . .
>
> "The State is asking the court to hold that a conclusory allegation in an affidavit for a search warrant that an individual sells drugs would be probable cause to issue a search warrant for that individual's home because drugs are likely to be found where drug dealers live. *See U.S. v. Pitts*, supra. The rule the State proposes would expand our court's opinions and rule that probable cause to search a certain location must be based on a factual nexus between the evidence sought and the place to be searched. This we will not do.
>
> "We hold that the affidavit fails to supply sufficient evidence [**14] to satisfy Rule 13.1 and our case law. This state requires 'probable cause to believe that the place to be searched contains evidence of the crime.' *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996) (citing *Johnson v. State*, 270 Ark.

247, 604 S.W.2d 927 (1980), cert. denied, 450 U.S. 981, 101 S. Ct. 1517, 67 L. Ed. 2d 816 (1981)). 345 Ark. at 116-117.

[*P24] "The defendants, accordingly, won the probable cause battle, but, as indicated, lost, under the good faith exception, the suppression war. The Arkansas Supreme Court, that is, ultimately concluded that while probable cause was lacking to sanction the search of either defendant's home, the officers relied in objective good faith upon the issuing judge's probable cause determination making suppression inappropriate.

[*P25] "**Application of Probable Cause Standard**

[*P26] "This court, based upon the above discussion and in the absence of Ohio case law, binding or otherwise, must decide which probable cause model is appropriate. It is concluded the better approach is the approach articulated by the Washington and Arkansas Supreme Courts. This Court, that is, concludes probable cause to search an individual's home for evidence of drug trafficking is not present [**15] based solely upon evidence of the individual's possession of a significant quantity of drugs or other evidence of drug trafficking. Instead, in order to conclude there is a fair probability that drugs or other evidence of drug trafficking is located in the individual's home, there must exist some additional evidentiary link between the suspected drug activity and the suspect's home before the probable cause determination may be made.

[*P27] "The contrary approach, if taken to its logical conclusion, would allow a probable cause determination allowing a search of a person's home in virtually every situation where there is evidence the individual had engaged in drug trafficking. This, in this writer's opinion, is neither appropriate nor tenable.

[*P28] "It is, therefore, concluded the search warrant issued to search 9441 White Pine Court Apartment K was issued on less than probable cause evidence of drug possession or drug trafficking would be discovered in the apartment. Detective Barrett's Affidavit is simply not sufficient to create the necessary evidentiary link between Mr. Jackson's possession of marijuana in excess of 200 grams and a fair probability that evidence of drug possession or trafficking [**16] was located at Mr. Jackson's probable home, 944 [sic] White Pine Court Apartment K. This conclusion, however, does not end the analysis because there must still be a determination of whether the officers relied in objective good faith upon Judge Messham's issuance of the search warrant.

[*P29] "**Good Faith Exception**

[*P30] "The good faith exception is triggered when an officer objectively and reasonably relies upon a search warrant issued by a reviewing judge although it is, ultimately, determined the warrant was issued on less than probable cause. If the good faith exception is triggered, the evidence discovered as a result of the authorized search will not be suppressed. *U.S. v. Leon* (1984), 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677. The rationale for the good faith exception to suppression is that the exclusionary rule is designed to deter unlawful police behavior, and the deterrence goal is not advanced when the police objectively and in good faith rely upon a judge's probable cause determination. Id. Ohio, of course, has adopted the good faith exception within the context of a search warrant issued on less than probable cause. *State v. George* (1989), 45 Ohio St.3d. 325, 544 N.E.2d 640.

[*P31] "Objective, good faith [**17] reliance by a presumably reasonably trained police officer is the key to whether the exception is triggered. The good faith inquiry is, generally, to be confined to a

determination of whether, based upon the four corners of the affidavit, the 'officer's reliance [upon the judge's probable cause determination] was objectively reasonable.' *State v. Klosterman* (1996, Greene App.), 114 Ohio App.3d 327, 333, 683 N.E.2d. 1000. The *Klosterman* Court was faced with a search warrant issued to search a defendant's apartment based upon the defendant's fifteen year old marijuana trafficking conviction and additionally upon hearsay information provided by informants without any indication of the informants' reliability. The *Klosterman* Court concluded, under these facts, that 'a reasonably well-trained officer would have known that the information contained in [the] affidavit did not establish probable cause and could not have formed an objectively reasonable belief that it did.' Id. at 334. The *Klosterman* Court, accordingly, determined the good faith exception was not triggered.

[*P32] "It is concluded, turning to the facts of this case, that the officers objectively and in good faith relied upon Judge [**18] Messham's probable cause determination. This conclusion is reached because one cannot expect a reasonably well trained police officer to realize the information contained in Detective Barrett's Affidavit did not support a probable cause determination where, as here, the courts, under similar facts, are divided upon the probable cause decision. It is, accordingly, concluded that suppression, though the search warrant was issued on less than probable cause, is not subject to suppression." (Brackets in original.)

[*P33] We agree with both Judge Tucker's analysis and his conclusions. Furthermore, we cannot readily find any way to improve upon them. Therefore, we adopt them as the opinion of this court. Cole's sole assignment of error is overruled.

III

[*P34] Cole's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

. . . .

GRADY and FROELICH, JJ., concur.

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State v. Gaskins

Superior Court of New Jersey, Appellate Division

November 12, 2013, Argued; January 10, 2014, Decided

DOCKET NO. A-6204-09T2

Reporter
2014 N.J. Super. Unpub. LEXIS 48 *; 2014 WL 87913

STATE OF NEW JERSEY, Plaintiff-Respondent, v. DAVID GASKINS, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Certification denied by State v. Gaskins, 218 N.J. 531, 95 A.3d 257, 2014 N.J. LEXIS 830 (July 15, 2014)

Post-conviction relief denied at State v. Gaskins, 2017 N.J. Super. Unpub. LEXIS 3191 (App.Div., Dec. 28, 2017)

Prior History: [*1] On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 08-05-0729.

Counsel: Brian O'Reilly, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. O'Reilly, on the brief).

Keith E. Hoffman, Senior Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Mr. Hoffman, of counsel and on the brief).

Judges: Before Judges Yannotti, Ashrafi and Leone.

Opinion

PER CURIAM

Defendant David Gaskins was tried before a jury and found guilty of possession of a controlled dangerous substance (CDS), specifically cocaine, in a quantity of five ounces or more, with an intent to distribute, and other offenses. He was sentenced to an aggregate term of twenty-nine years of incarceration. Defendant appeals from the judgment of conviction dated July 19, 2010. We affirm.

I.

Defendant was charged with third-degree possession of a CDS (cocaine), *N.J.S.A.* 2C:35-10(a)(1) (count one); first-degree possession of a CDS (cocaine), with intent to distribute, in a quantity of five ounces or more, *N.J.S.A.* 2C:35-5(a)(1) and (b)(1) (count two); third-degree possession of a CDS (heroin), *N.J.S.A.* 2C:35-10(a)(1) (count [*2] three); third-degree possession of a CDS (heroin), in the quantity of less than one-half ounce, with intent to distribute, *N.J.S.A.* 2C:35-5(a)(1) and (b)(3) (count four); first-degree

maintaining a CDS production facility, *N.J.S.A.* 2C:35-4 (count five); second-degree possession of a weapon while committing certain CDS offenses, *N.J.S.A.* 2C:39-4.1 (count six); and second-degree possession of a weapon by certain persons not to have weapons, *N.J.S.A.* 2C:39-7(b) (count seven).

In September 2007, Detective Orlando Robinson of the Paterson Police Department (PPD) commenced an investigation of a suspected drug dealer with the street name "Divine." A confidential informant (CI) had contacted Robinson and provided him with information about Divine. According to Robinson, the CI had provided law enforcement with reliable information for ten years, and that information led to "arrest, convictions, and confiscations of drugs and drug proceeds." The CI told Robinson about Divine's CDS production and distribution activities.

The CI revealed that Divine was a black male who made deliveries of crack cocaine, that the deliveries were made from a 1991 Dodge van with a specified New Jersey plate number, [*3] that Divine operated out of specific location on River Street in Paterson, and that Divine possessed guns, specifically a "'sawed-off' shot gun and hand gun." The CI also told Robinson that he/she was willing to participate in a "controlled buy" of CDS.

Consequently, Robinson set up the transaction, with the CI making the purchase from Divine. Before the purchase, the CI was strip-searched to ensure that he/she was free of money and contraband. Robinson and the CI then took up a surveillance position with a line of sight of the River Street location and the vehicle that Divine reportedly used. The CI contacted Divine to purchase crack cocaine.

After the CI contacted Divine, Robinson observed a man exit the River Street location. The CI told Robinson that the man was Divine. Divine drove the 1991 Dodge van to the prearranged drug transaction site, and Robinson followed him. At the transaction site, Robinson parked at a distance so that he would remain undetected, but he said he was close enough to view the transaction. Robinson stated that he never lost sight of the CI when the CI met with Divine.

The CI returned from the meeting with Divine and gave Robinson a quantity of crack cocaine [*4] that he purchased with the money that had been provided to him. Another PPD officer, who had been positioned at a surveillance site near the River Street location, observed Divine return there in the Dodge van.

Subsequently, Robinson conducted a registration check on the 1991 Dodge van with the New Jersey plate number that the CI had provided to him. The registration check revealed the van was registered to Frankie Gaskins Jr., who resided on 12th Avenue in Paterson.

Robinson then accessed the Department of Corrections website and conducted a search for a photo of Frankie Gaskins, and anyone with the last name of Gaskins. During the search, Detective Robinson came across a photo of defendant, who Robinson identified as Divine. The CI was later shown defendant's photo and the CI positively identified defendant as Divine.

During October 2007, Robinson engaged in further surveillance and observed defendant on several occasions. He saw defendant leave the River Street location, enter the Dodge van, and later meet with known drug dealers. At each meeting, the known drug dealers entered the Dodge van for a short period and then exited the van. Thereafter, defendant would return to the River [*5] Street location.

Robinson set forth these facts in an affidavit and requested the issuance of a "no knock" warrant to search: the second-floor apartment and attic at the River Street location, defendant's person, and the van that defendant was seen using. The search warrants were issued and executed on November 5, 2007.

At the trial, Officer Ozzie Torres of the PPD testified about the execution of the search warrant. Torres said that he entered the building with other officers in the emergency response team (ERT) and went to the second floor. Torres said that they found defendant in the stairwell between the second floor and attic. Torres told defendant to step down the stairway. He handcuffed defendant and brought him to the living room of the apartment.

Detective Robinson testified that the officers entered the second-floor apartment and defendant was searched. A detective recovered keys from defendant's pocket. Defendant was also found in possession of about $1,027 in cash. Robinson searched the apartment with two other detectives. He said the apartment had a living room, kitchen and two or three bedrooms.

The detectives used the keys recovered from defendant to open two padlocks on [*6] a closed, closet door in the front bedroom of the apartment. Inside the closet, the detectives found a large quantity of a substance that Robinson immediately recognized as crack cocaine. They also found a gray camouflage jacket which contained documents addressed to David L. Gaskins, a handgun, and thirty-three glassine envelopes of suspected heroin.

In the same bedroom, the detectives found pieces of mail and a receipt with defendant's name. They found a letter addressed to "Divine." In addition, the detectives found drug paraphernalia, including empty plastic bags, a clear plastic bag with a loose quantity of a white powdery substance, a black plastic bag with empty plastic baggies, a digital calculator, a box of plastic sandwich bags, rubber gloves, other letters, filter masks, and a digital scale. The detectives also recovered a police scanner.

The detectives also searched a bedroom in the rear of the apartment. There, the detectives recovered sixty-one plastic bags of crack cocaine; two strainers, one with CDS residue; stirrers; two butter knives with CDS residue; a drinking glass with CDS residue; and a straight-edge razor.

The suspected CDS was tested and weighed at the New Jersey [*7] State Police laboratory. The evidence tested positive for CDS. The seized cocaine weighed more than 300 grams, or 12 ounces.

Lieutenant Daniel Bachok of the Passaic County Prosecutor's Office testified as an expert in the distribution of CDS. Bachok discussed the packaging of cocaine for both bulk and street-level purchases, and identified the items need to repackage the bulk package into street-level doses, including a razor, plastic bags, masks, baking soda and knives. He discussed the street value of a dose of crack cocaine and a glassine envelope of heroin.

Bachok was asked to assume certain facts, including the fact that the quantities of loose and powdered cocaine, a handgun, thirty-three glassine bags of heroin and drug-related paraphernalia had been recovered from an apartment. Bachok then was asked whether, based on these facts and his training and experience, the drugs found in the apartment were possessed for personal use or with intent to distribute. Bachok replied that the CDS was possessed with intent to distribute.

After the State rested its case, defendant moved pursuant to *Rule* 3:18-1 for a judgment of acquittal, arguing that the State failed to prove one of the elements [*8] of the charged offenses, specifically

possession. The trial judge denied the motion. The judge stated that, viewing the evidence in its entirety, and giving the State the benefit of all favorable inferences, a reasonable jury could find defendant guilty of the charged offenses beyond a reasonable doubt.

Audrey Jackson then testified that defendant lived with her in a residence on Sheridan Street in Paterson, and that he was only present at the River Street location to take care of a pet belonging to his cousin, Frankie Gaskins. Jackson further testified that defendant was the father of her three children.

Defendant elected not to testify, but he produced a letter from Cablevision, which identified Satome Belfield as the service recipient for the River Street location's second-floor apartment, from April 5, 2007, until September 15, 2007. The letter also identified Randy McClam as the service recipient from October 25, 2007, until February 13, 2008. Defendant also produced utilities bills for the apartment, addressed to Randy McClam.

The jury found defendant guilty on all of the charges. The trial judge denied defendant's motion for a new trial based on newly discovered evidence. The judge [*9] thereafter granted the State's motion for imposition of an extended term pursuant to *N.J.S.A.* 2C:43-6(f). As noted, the judge sentenced defendant to an aggregate term of twenty-nine years of incarceration. This appeal followed.

Defendant raises the following issues for our consideration:

POINT I
THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THERE WERE INSUFFICIENT FACTS SUPPORTING A FINDING OF PROBABLE CAUSE.

POINT II
THE COURT ERRED IN REFUSING TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT AND SURVEILLANCE POINTS.
A. The Court erred in denying defendant's motion to discover the identity of the CI.
B. The Court erred in denying defendant's motion to disclose surveillance points.

POINT III
DEFENDANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS DENIED DUE TO THE ABSENCE OF REQUIRED HEARINGS ON HIS MOTIONS TO OBTAIN DISCOVERY AND TO SUPPRESS EVIDENCE.

POINT IV
THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXPLORE THE ISSUE OF THIRD-PARTY GUILT.

POINT V

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE; THE ABSENCE OF EVIDENCE OF DEFENDANT'S POSSESSION OF ANY ITEMS IN THE BACK ROOM REQUIRED [*10] THE COURT TO SUA SPONTE STRIKE JURY CONSIDERATION OF THAT EVIDENCE. *R.* 3:18-1; *R.* 2:10-2.

POINT VI

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY-DISCOVERED EVIDENCE. *R.* 3:20-1.

POINT VII

DEFENDANT'S SENTENCE WAS EXCESSIVE.

II.

We turn first to defendant's contention that the trial court erred by denying his motion to suppress the evidence obtained in the search of the second-floor apartment on River Street. Defendant contends that Detective Robinson's affidavit did not establish probable cause to search the premises. He argues that Robinson's affidavit failed to include sufficient facts to corroborate the CI's tip, and did not credibly demonstrate that the CI was reliable. We disagree.

"When a search is conducted pursuant to a warrant, the defendant has the burden of proving the invalidity of that search . . . ." *State v. Sullivan*, 169 N.J. 204, 211, 777 A.2d 60 (2001). Appellate courts must "'accord substantial deference to the discretionary determination resulting in the issuance of the [search] warrant.'" *Id.* at 211-212 (quoting *State v. Marshall*, 123 N.J. 1, 72, 586 A.2d 85 (1991), *cert. denied*, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993)).

To issue a search warrant, [*11] the State must establish probable cause to believe that a crime has been or is being committed at a specific location or that evidence of a crime is at the place to be searched. *State v. Keyes*, 184 N.J. 541, 553, 878 A.2d 772 (2005) (citing *Sullivan, supra*, 169 N.J. at 210). Probable cause is "generally understood to mean 'less than legal evidence necessary to convict though more than mere naked suspicion.'" *Ibid.* (quoting *Sullivan, supra*, 169 N.J. at 210-11).

Information provided by an informant "may constitute a basis for probable cause." *State v. Smith*, 155 N.J. 83, 92, 713 A.2d 1033, *cert. denied*, 525 U.S. 1033, 119 S. Ct. 576, 142 L. Ed. 2d 480 (1998). A court should consider the totality of circumstances when evaluating whether the informant's tip provided a sufficient basis to establish probable cause. *Ibid.*

The reliability of an informant's tip may be shown "by demonstrating that the informant proved to be reliable in previous police investigations." *Sullivan, supra*, 169 N.J. at 213 (citing *State v. Novembrino*, 105 N.J. 95, 123, 519 A.2d 820 (1987)). However, "past instances of reliability do not conclusively establish an informant's reliability." *Smith, supra*, 155 N.J. at 94. Independent police corroboration is an essential [*12] component of the determination of probable cause. *Sullivan, supra*, 169 N.J. at 213 (citing *Smith, supra*, 155 N.J. at 95).

Here, defendant filed a motion to suppress the evidence obtained in the search of the River Street apartment, and the motion judge denied the application for reasons stated in a written opinion dated September 9, 2009. In his opinion, the judge noted that, in his affidavit, Robinson stated that he had extensive experience in narcotics investigations. The affidavit detailed Robinson's lengthy relationship with the CI, the particular information that the CI provided and its relationship to defendant, the controlled CDS purchase made by the CI, and Robinson's subsequent corroborating surveillance.

The judge rejected defendant's contention that probable cause was lacking, noting that defendant "fail[ed] to consider the numerous corroborating circumstances detailed in the affidavit." The judge stated that the CI had provided the address of defendant's location, a detailed description of his vehicle, and a description of certain guns that defendant possessed.

The judge pointed out that Robinson stated in the affidavit he had "worked with the CI for approximately [ten] years [*13] and made [numerous] arrests" as a result of the CI's tips. The judge determined that, despite defendant's claims to the contrary, Robinson had sufficiently corroborated the CI's tip and verified that defendant was engaging in illegal drug transactions with others.

The judge concluded that "there is nothing in the affidavit indicative of deficient facts to establish a basis of probable cause," and the issuance of the search warrant was justified. We agree. We are convinced there is sufficient credible evidence to support the judge's findings and the determination that Robinson's affidavit established probable cause for the issuance of the search warrant.

Defendant further argues that the motion judge erred by failing to conduct an evidentiary hearing on his suppression motion. We do not agree. An evidentiary hearing was not required because Robinson's affidavit established probable cause for the issuance of the search warrant.

III.

Next, defendant argues that the trial court erred by refusing to order the State to disclose of the identity of the CI and the points from which the police conducted their surveillance. He contends that this information was essential to his defense.

A. *Identity [*14] of the CI*

N.J.R.E. 516 provides that a witness may refuse to disclose the identity of a person who has furnished information to law enforcement purporting to disclose a violation of state or federal law, unless "(a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues."

The purpose of the "informant's privilege" codified in *N.J.R.E.* 516 "is to encourage citizens to communicate their knowledge of the commission of crimes to law enforcement officials." *State v. Williams*, 356 N.J. Super. 599, 603, 813 A.2d 1215 (App. Div. 2003) (citing *State v. Salley*, 264 N.J. Super. 91, 96, 624 A.2d 42 (App. Div. 1993)). This privilege "'has long been considered essential to effective enforcement of the criminal code.'" *Ibid.* (quoting *State v. Milligan*, 71 N.J. 373, 381, 365 A.2d 914 (1976)).

However, the privilege is not absolute. *Id.* at 604. "A court must 'balance the public interest'" in ensuring the free flow of information to law enforcement against a defendant's right to contest the charges against him. *Ibid.* (quoting *Salley, supra*, 264 N.J. Super. at 98).

In determining whether disclosure is necessary, the court [*15] should be guided by "'the particular circumstances of each case, taking into consideration the crime[s] charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'" *State v. Burnett*, 42 N.J. 377, 385, 201 A.2d 39 (1964) (quoting *Roviaro v. United States*, 353 U.S. 53, 62, 77 S. Ct. 623, 628, 1 L. Ed. 2d 639, 646 (1957)). In reviewing a trial court's decision denying disclosure, we apply an abuse of discretion standard. *Milligan, supra*, 71 N.J. at 384.

Defendant contends that disclosure of the CI's identity was essential to determine Robinson's credibility. He also contends that this information was essential to a proper defense of the case in view of what defendant claims is the State's failure to show that the CI was reliable. We cannot agree.

Here, Robinson's affidavit set forth sufficient facts to show that the CI's tip was reliable. The CI had provided Robinson with valuable information in the past, and Robinson confirmed the tip regarding defendant with his own surveillance and the controlled CDS purchase that he set up and observed. Thus, as we have determined, the search warrant was validly issued.

The validity of the search was not at [*16] issue at trial, where the key issues related to defendant's possession of the CDS and the weapon recovered from the River Street location. As the motion judge stated in his opinion of October 21, 2009, defendant was endeavoring to gather information to challenge the warrant, not the charges for which he was tried. Robinson's affidavit established probable cause for the warrant, and disclosure of the CI's identity was not required for the trial.

Defendant also contends that the State never established any "specific concern" about disclosure of the CI's identity, and the court should have conducted a *N.J.R.E.* 104 hearing to show that the application of the informant's privilege was required. As we stated previously, *N.J.R.E.* 516 provides that disclosure of a CI's identity is not required unless disclosure is essential to the defense. An evidentiary hearing was not required in this matter because the record provided a sufficient factual basis for the court's determination on the validity of the search warrant.

B. *Surveillance Points*

Defendant additionally argues that the motion judge erred by refusing to order the disclosure of the points from which the police observed defendant engage in [*17] what appeared to be illegal, CDS-related activity. Defendant recognizes that *N.J.R.E.* 515 provides a privilege against disclosure of such official information, but he contends that the motion judge erred by failing to conduct a *N.J.R.E.* 104 hearing on this issue.

The precise location of a police surveillance point is privileged because the public has an interest in protecting ongoing surveillance, and in protecting police officers and the public from reprisals. *State v. Garcia*, 131 N.J. 67, 74-75, 618 A.2d 326 (1993). Disclosure may, however, be ordered to protect a defendant's constitutional rights. *Id.* at 79-80. The defendant must make a "substantial showing" of need for the "exact" location. *Id.* at 80-81.

In this case, defendant failed to establish that disclosure of the surveillance points was required for his defense. Defendant was charged with unlawful possession of the CDS with intent to distribute, unlawful possession of a weapon and other offenses.

The charges were based on the evidence obtained when the police executed the search warrant at the River Street location, and defendant's guilt or innocence did not turn on any observations made during the

surveillance. Therefore, disclosure of [*18] the police surveillance points was not essential to presenting a defense at trial.

Moreover, it is reasonable to assume that disclosure of the surveillance points would compromise present or future prosecutions or possibly endanger lives or property. *See id.* at 78. Because the information related to the issuance of the search warrant, rather than any matter in dispute at trial, disclosure was not required.

We accordingly conclude that an evidentiary hearing on this issue was not required.

IV.

Defendant additionally contends that he was denied a fair trial because the trial judge refused to allow him to present evidence of potential third-party guilt. Again, we disagree.

At trial, defendant sought to admit a judgment of conviction for Randy McClam, who had been identified as a cable service recipient for the River Street apartment, and whose name appeared on utility-service bills for the apartment. Defendant also wanted to question witness Audrey Jackson about McClam, in an apparent attempt to show that the CDS found in the apartment belonged to McClam, rather than defendant.

A defendant in a criminal case has the right to present a complete defense. *State v. Cotto*, 182 N.J. 316, 332, 865 A.2d 660 (2005). [*19] This includes the "right to introduce evidence of third-party guilt 'if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case.'" *Ibid.* (quoting *State v. Fortin*, 178 N.J. 540, 591, 843 A.2d 974 (2004)).

Thus, a defendant's right to present evidence of potential third-party guilt is limited. *State v. Sturdivant*, 31 N.J. 165, 179, 155 A.2d 771 (1959)), *certif. denied*, 362 U.S. 956, 80 S. Ct. 873, 4 L. Ed. 2d 873 (1960). A defendant cannot introduce evidence of "some hostile event and leave its connection with the case to mere conjecture." *Ibid.* The defendant must establish that there is "some link between the evidence and the . . . crime[s]" with which he is charged. *State v. Koedatich*, 112 N.J. 225, 301, 548 A.2d 939 (1988) (citations omitted), *cert. denied*, 488 U.S. 1017, 109 S. Ct. 813, 102 L. Ed. 2d 803 (1989).

In this case, defendant failed to establish the required link between McClam's prior conviction for possession of CDS and the offenses for which defendant was charged. At trial, the State presented extensive evidence that defendant possessed the CDS found in the apartment.

Defendant was found in possession of the keys that were used to open the [*20] padlocks on the closet in the front bedroom in the River Street location. There, the detectives recovered cocaine, heroin, a handgun and documents addressed to defendant. They found the drug paraphernalia in the rear bedroom of the apartment.

The fact that McClam might have been convicted of a CDS-related offense was insufficient to establish a link between McClam and evidence recovered in the apartment. There was insufficient evidence to show that McClam's involvement in the offenses for which defendant was charged was anything other than "mere conjecture." *See ibid.*

Furthermore, additional questioning of Audrey Jackson regarding McClam's connection to the River Street apartment was insufficient to support a claim of third-party guilt. The fact that the utility and cable

service bills may have been in McClam's name did not negate the theory of the State's case, which was that defendant used the apartment as a "stash location," while he resided elsewhere. Therefore, the trial judge did not abuse his discretion by refusing to permit defendant to question Jackson further on McClam's connection to the apartment.

V.

Defendant additionally argues that the trial judge erred by denying his motion [*21] for a judgment of acquittal at the end of the State's case.

A motion for judgment of acquittal is governed by *R.* 3:18-1 which provides:

> At the close of the State's case or after the evidence of all parties has been closed, the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses charged in the indictment or accusation if the evidence is insufficient to warrant a conviction.

Moreover, the test for deciding a motion for judgment of acquittal is:

> whether the evidence viewed in its entirety, and giving the State the benefit of all of its favorable testimony and all of the favorable inferences which can reasonably be drawn therefrom, is such that a jury could properly find beyond a reasonable doubt that the defendant was guilty of the crime charged.
>
> [*State v. Tindell*, 417 N.J. Super. 530, 549, 10 A.3d 1203 (App. Div. 2011) (quoting *State v. D.A.*, 191 N.J. 158, 163, 923 A.2d 217 (2007)).]

Defendant argues that there was insufficient evidence to show that he had a connection to the CDS and items found in the front bedroom of the apartment. He says there was a complete absence of evidence that he had control or even access to the other bedroom. Defendant [*22] further argues that there was insufficient evidence to show that the River Street apartment was used continuously as a CDS-production facility.

We disagree with these arguments. Here, the State established defendant's connection to the evidence found in the front bedroom of the apartment, which included the keys recovered from defendant that opened the padlocked closet containing the CDS and documents addressed to defendant. In that room, the police also recovered items used for the packaging of CDS for distribution and additional documents addressed to defendant.

As the State maintains, the evidence found in the front bedroom was sufficient to show that defendant possessed the CDS with intent to distribute and also was operating a CDS-production facility. Moreover, the amount of CDS and the CDS-related items allowed the jury to infer that the property had been used as a CDS-production facility on an ongoing basis.

In addition, the evidence showing defendant's relationship to the apartment permitted the jury to infer that the items found in the rear bedroom were connected to his CDS-related activities. In this regard, we note that there was no evidence that Belfield had legal control [*23] of this room or the entire apartment. She was not named as a tenant under the lease.

We conclude that the trial judge correctly determined that the State had presented sufficient evidence to support the charges and defendant was not entitled to a judgment of acquittal.

VI.

In addition, defendant contends that the judge erred by denying his motion for a new trial based on certain newly discovered evidence.

In support of this motion, defendant submitted utility records for certain persons who allegedly occupied the River Street apartment. He also provided credit card statements for Frankie Gaskins, which were addressed to the River Street location. In addition, defendant presented cable television statements for September 2007 to December 2007, that were addressed to defendant at a Sheridan Avenue location in Paterson. Based on these records, defendant claimed that he resided at the Sheridan Avenue location, and Frankie Gaskins occupied the River Street apartment.

To secure a new trial based upon newly discovered evidence, defendant must show that the evidence is "1) material, and not 'merely' cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of [*24] the trial and was 'not discoverable by reasonable diligence beforehand'; and 3) that the evidence 'would probably change the jury's verdict if a new trial were granted.'" *State v. Ways*, 180 N.J. 171, 187, 850 A.2d 440 (2004) (quoting *State v. Carter*, 85 N.J. 300, 314, 426 A.2d 501 (1981)).

As the trial judge recognized, the evidence that defendant submitted in support of his motion was evidence that could have been discovered prior to trial, by the exercise of reasonable diligence. Furthermore, the evidence probably would not change the jury's verdict if a new trial was granted, because it was not inconsistent with the State's claim that defendant used the River Street apartment as a "stash location" while maintaining a residence elsewhere. Indeed, the State's expert testified at trial that persons who distributed CDS and maintain a facility for the production of CDS often use locations other than their residences. According to the expert, "stash" houses are employed to avoid detection.

We conclude that the trial judge correctly denied defendant's motion for a new trial.

VII.

In addition, defendant argues that his sentence is excessive.

Here, the trial judge determined that defendant was subject to mandatory extended-term [*25] sentencing pursuant to *N.J.S.A.* 2C:43-6(f). Defendant was convicted of possessing CDS with intent to distribute and maintaining a CDS production facility. He had previously been convicted of second-degree CDS distribution.

The judge found aggravating factors three (risk that defendant will commit another offense); six (defendant's prior criminal record and the seriousness of the offenses of which he has been convicted), and nine (need to deter defendant and others from violating the law). *N.J.S.A.* 2C:44-1(a)(3), (6) and (9). The judge noted that defendant was forty years old, and had a long history of convictions for disorderly-persons and indictable offenses. The judge also noted defendant's failed attempts at rehabilitation and his violations of probation/parole. The judge did not find any mitigating factors.

The judge merged count one (third-degree possession of CDS) with count two (first-degree possession of CDS with intent to distribute) and sentenced defendant to twenty-two years of incarceration, with an eleven-year period of parole ineligibility. The judge also merged count three (third-degree possession of

CDS) with count four (third-degree possession of CDS with intent to distribute), [*26] and imposed a concurrent five-year term, with a two-year period of parole ineligibility.

The judge additionally imposed a concurrent fourteen-year term, with a five-year period of parole ineligibility, on count five (first-degree maintaining a CDS-production facility). The judge also sentenced defendant to a consecutive seven-year term on count six (second-degree possession of a firearm while committing a CDS offense), and a concurrent term of six years, with a five-year period of parole ineligibility, on count seven (second-degree certain persons not to have weapons).

Defendant argues that he should have been given a lesser sentence. He contends that the judge erroneously failed to find mitigating factor eleven (incarceration will entail an excessive hardship to defendant or his dependents). *N.J.S.A.* 2C:44-1(b)(11).

Defendant also argues that the judge impermissibly counted his prior criminal record twice: in granting the State's motion for an extended term, and in finding aggravating factors that lengthened the sentence. He contends that there is nothing exceptional about his conduct that warrants such a lengthy sentence. He further argues that the judge did not provide sufficient reasons [*27] for the eleven-year parole ineligibility period imposed on count two.

In our view, these arguments are without sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(2).

We are convinced that the sentences are not manifestly excessive or unduly punitive, do not represent an abuse of the judge's sentencing discretion, and do not shock the judicial conscience. *See State v. O'Donnell*, 117 N.J. 210, 215-16, 564 A.2d 1202 (1989); *State v. Roth*, 95 N.J. 334, 363-65, 471 A.2d 370 (1984).

Affirmed.

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State v. Muldrow

Superior Court of New Jersey, Appellate Division

December 18, 2012, Submitted; April 2, 2013, Decided

DOCKET NO. A-5514-09T2, A-0860-10T2

Reporter
2013 N.J. Super. Unpub. LEXIS 719 *; 2013 WL 1296287

STATE OF NEW JERSEY, Plaintiff-Respondent, v. PATRICK R. MULDROW, a/k/a PATRICK R. MUDROW, PM, PAT MO, Defendant-Appellant.STATE OF NEW JERSEY, Plaintiff-Respondent, v. ROBIN MULDROW, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 08-04-0637.

Counsel: Joseph E. Krakora, Public Defender, attorney for appellants (Jacqueline E. Turner, Assistant Deputy Public Defender, on the brief in A-5514-09; Kevin G. Byrnes, Designated Counsel, on the brief in A-0860-10).

Marlene Lynch Ford, Ocean County Prosecutor, attorney for respondents in A-5514-09 and A-0860-10 (Samuel J. Marzarella, Supervising Assistant Prosecutor, of counsel; William Kyle Meighan, Assistant Prosecutor, of counsel and on the brief).

Appellant in A-5514-09 filed a pro se supplemental brief.

Judges: Before Judges Messano and Kennedy.

Opinion

PER CURIAM

Following a jury trial, defendants Patrick Muldrow and his sister, Robin Muldrow, were convicted of multiple drug and weapons offenses.[1] After a second trial that immediately followed, they were also convicted of numerous violations of *N.J.S.A.* 2C:39-7 (certain persons prohibited from possessing weapons). The judge imposed an aggregate forty-year term of imprisonment on Patrick, with a twenty-year period of parole ineligibility. As to Robin, the judge imposed an aggregate ten-year term, with a five-year period of parole ineligibility.

In these appeals, which we calendared back-to-back, Patrick raises the following points:

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[1] To avoid [*2] confusion, we use defendants' first names throughout the opinion. We intend no disrespect by this informality.

POINT I

THE TRIAL JUDGE ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE AS THERE WAS NO PROBABLE CAUSE TO BELIEVE THAT CONTRABAND WOULD BE FOUND AT THE PROPERTY LOCATED ON CLEARSTREAM ROAD.

POINT II

THE JUDGE VIOLATED DEFENDANT'S RIGHT TO SELF-REPRESENTATION WHEN HE FAILED TO CONDUCT A HEARING AFTER THE DEFENDANT[] REQUESTED TO PROCEED PRO SE.

POINT III

THE TRIAL COURT ERRED BY NOT ASCERTAINING PERSONALLY WHETHER DEFENDANT WANTED TO ABSENT HIMSELF FROM THE TRIAL, RELYING INSTEAD ON THIRD-PARTY REPRESENTATIONS, IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS . . . . (Not Raised Below)

POINT IV

THE DEFENDANT'S SENTENCE IS EXCESSIVE.

In a pro se supplemental brief, Patrick argues:

POINT I

APPELLANT CONTENDS THAT [THE] JUDGE . . . ERRED BY NOT RECUSING HIMSELF FROM THE PRE-TRIAL PROCEEDINGS DUE TO HIS INTEREST IN THE CASE, WHICH ULTIMATELY LED TO HIS RECUSAL FROM TRIAL.

POINT II

TRIAL COURT ERRED IN NOT ACCEPTING DEFENDANT'S ORAL MOTION TO DISMISS COUNSEL; BECAUSE COUNSEL STATED THAT [*3] HE WAS AFRAID OF APPELLANT AND WAS THREATENED BY HIM.

Robin raises the following points in her appeal:

POINT I

THE INDICTMENT SHOULD BE DISMISSED.

A. THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

B. THE PROSECUTION OF [DEFENDANT] FOR DRUGS FOUND IN MELVIN SHARPE'S CAMPER [GAVE] RISE TO THE APPEARANCE OF IMPROPRIETY, AS SHARPE, WHO WAS NOT CHARGED, HAD A NEPHEW IN THE INVESTIGATING POLICE DEPARTMENT WHO INTERVENED ON SHARPE'S BEHALF. (Not Raised Below)

POINT II

THE DEFENDANT'S RIGHT TO CONFRONTATION . . . AND THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW . . . WERE VIOLATED BY THE ADMISSION OF ACCUSATIONS AND OTHER EVIDENCE FROM ABSENTEE WITNESSES. (Not Raised Below)

A. THE POLICE INFORMED JURORS THAT ROBIN MULDROW WAS UNDER SURVEILLANCE FOR NARCOTICS OFFENSES, IN EFFECT INFORMING JURORS THAT ANONYMOUS SOURCES HAD ACCUSED HER OF COMMITTING DRUG CRIMES.

B. THE FACT THAT THE POLICE HAD [DEFENDANT] UNDER SURVEILLANCE FOR NARCOTICS OFFENSES HAD NO PROBATIVE VALUE AND WAS UNDULY PREJUDICIAL.

POINT III
THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW . . . WAS VIOLATED BY THE PROSECUTOR'S TACTIC OF PERSUADING THE JURY WITH CRITICAL FACTUAL MISREPRESENTATIONS. (Not Raised Below)

*POINT [*4] IV*
THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW . . . WAS VIOLATED WHEN THE STATE'S LAY WITNESS RENDERED HIGHLY PREJUDICIAL OPINIONS THAT SHOULD HAVE BEEN EXCLUDED. (Not Raised Below)

POINT V
THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW . . . WAS VIOLATED BY THE ERRONEOUS AND PREJUDICIAL INSTRUCTION ON THE LAW OF CONSTRUCTIVE POSSESSION. (Not Raised Below)

POINT VI
THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW . . . WAS VIOLATED WHEN THE TRIAL COURT FAILED TO INSTRUCT JURORS THAT THE DEFENDANT COULD BE CONVICTED OF A LESSER OFFENSE THAN THAT COMMITTED BY THE CO-DEFENDANT BASED ON DEFENDANT'S OWN CRIMINAL INTENT AND HER OWN PARTICIPATION IN THE CRIME. (Not Raised Below)

POINT VII THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW . . . WAS VIOLATED BY THE TRIAL COURT'S FAILURE TO EXPLAIN THE LAW IN THE CONTEXT OF THE FACTS OF THE CASE AFTER THE JURY ASKED FOR LEGAL GUIDANCE ON THE LAW OF ACCOMPLICE LIABILITY. (Not Raised Below)

POINT VIII
THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW . . . WAS VIOLATED BY THE CONFUSING, INCOMPLETE, AND PREJUDICIAL INSTRUCTIONS ON THE LAW OF INTENT TO DISTRIBUTE. (Not Raised Below)

A. [*5] THE INSTRUCTION ON THE LAW OF ATTEMPT WAS INCOMPLETE, CONFUSING, ERRONEOUS, AND PREJUDICIAL.
B. THE TRIAL COURT FAILED TO INSTRUCT JURORS THAT THE LAW OF ATTEMPT REQUIRES PURPOSEFUL CONDUCT AND THAT IT CANNOT FIND THAT THE DEFENDANT INTENDED TO ATTEMPT DISTRIBUTION KNOWINGLY.

POINT IX
THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES . . . WAS VIOLATED.
A. SEARCH WARRANTS WERE IMPROPERLY ISSUED BASED ON REPRESENTATIONS BY A CONFIDENTIAL INFORMANT WHO DID NOT PROVIDE A BASIS OF KNOWLEDGE AND THERE WAS INSUFFICIENT POLICE CORROBORATION.

B. THE INITIAL WARRANTLESS POLICE ENTRY INTO THE CAMPER TRAILER WAS UNLAWFUL; THE SEARCH AND SEIZURE CANNOT BE JUSTIFIED BY PLAIN VIEW.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

I.

Both defendants challenge the denial of their motions to suppress evidence seized pursuant to search warrants. The affidavit of Investigator David Fox of the Ocean County Prosecutor's Office, dated January 15, 2008, supported the issuance of search warrants for a property on Martin Luther King Drive in Lakewood (the MLK property), and a property on Clearstream Road in Jackson (the Clearstream property).

Fox, [*6] who was assigned to the Special Operations Group (SOG) of the prosecutor's office, detailed his years of training and experience in narcotics investigations. During the week of December 9, 2007, Fox met with "a reliable confidential informant" (CI) who provided him with information that an individual known as "Pat Mo" was distributing narcotics and guns. The CI provided a description of Pat Mo and his cell phone number, and said he could purchase cocaine from Pat Mo. Fox contacted Sergeant James Van de Zilver of the Lakewood Police Department. Van de Zilver was "familiar" with defendant and confirmed that he fit the CI's description and resided at the MLK property.

Fox, Van de Zilver and the CI met. The CI directed the officers to the Clearstream property and claimed that he had purchased drugs from Pat Mo at that location in the past. The CI said Pat Mo stayed there occasionally, but mainly used it as a "stash residence" for CDS and weapons. From a driver's license photo, the CI identified Patrick as being Pat Mo. Fox confirmed with the Motor Vehicles Commission that Patrick resided at the MLK property, and he checked Patrick's criminal history, which revealed seven prior arrests in [*7] New Jersey, including possession and distribution of marijuana and cocaine, and a felony arrest in New York for possession of narcotics with intent to distribute. Fox checked utility subscriber information for the Clearstream property. The utilities were in Robin's name, but Patrick was listed as the customer contact.

Surveillance of the Clearstream property began on December 21, 2007. Six days later, a surveillance team observed a pick-up truck drive into the driveway. Patrick was the passenger. The officers observed him exit the truck, walk around the property with a flashlight and remove a license plate from a car parked near the house and put it on another car, a tan Toyota Camry. Patrick placed a long, rectangular object in the trunk of the Camry before driving away. The next day, the surveillance team saw Patrick park the Camry in the driveway of the Clearstream property, exit with a cardboard box, enter the back door of the residence, return to the car, re-enter the residence and then drive away.

During the week of December 31, 2007, the CI contacted Fox and said he had spoken to Pat Mo, who was in possession of cocaine and ready to sell some. The officers arranged for a controlled [*8] buy, and surveillance units were sent to the Clearstream and MLK properties. At the Clearstream property, officers observed Patrick drive into the driveway, enter "a camper trailer" at the rear of the property, exit about twenty seconds later, enter the house and exit moments later. Patrick then drove away. The car he used, a "dark colored, four door sedan," was registered to Patrick at the MLK property.

In the presence of some of the officers, the CI called Patrick. Fox listened to the conversation and heard Pat Mo tell the CI to meet him at the MLK property to consummate the sale. Mobile surveillance teams followed Patrick, who drove directly from the Clearstream property to the MLK property.

Officers monitored the CI as he traveled to the MLK property with marked funds, exited his car, entered Patrick's car, re-entered his own car a short time later and drove away. The CI met with the officers at a pre-arranged location and gave them the white powdery substance he purchased from Patrick, which later tested positive for cocaine.

The CI informed Fox that Patrick hid guns in his vehicle and was going to Georgia in the next few weeks to purchase a large number of guns. He also reported [*9] that Patrick hid "stuff," meaning cocaine, in abandoned vehicles and buried drugs in the backyards of the two properties. During the week of January 11, 2008, the CI again contacted Patrick by cell phone. During their conversation, which Fox overheard, Patrick told the CI that he "was going to Georgia in the next couple days and that he would also have 'the other stuff' (meaning cocaine for sale)."

On January 15, 2008, the judge issued two "no-knock" warrants to search the MLK and Clearstream properties, including the residences, any vehicles, and all "outbuildings and curtilage located on the" premises.

The warrant for the Clearstream property was executed on January 22 at approximately 11:05 a.m. The officers seized drugs and other evidence from the residence. In an affidavit subsequently filed in support of additional search warrants, Fox detailed what occurred thereafter. Officers "cleared the residence . . . [and] a camper . . . located in the backyard," and, in doing so, entered the camper "searching . . . for any individual(s) . . . located inside[.]" Fox observed "numerous long firearms . . . in plain view in the bathroom shower area of the camper." Fox smelled burnt marijuana [*10] and noticed a registration for the camper on the counter in the name of Melvin L. Sharpe, of Manchester. Three other vehicles were parked in the backyard, and the narcotics K9 dog "gave a positive indication" on the rear trunk area of the cars. Fox requested a warrant to search the camper and two of the cars, and the judge issued the search warrant at 4:06 p.m. the same day. A search of the camper resulted in the seizure of various weapons and additional drugs.

After considering defendants' argument at a pre-trial hearing, Judge Wendell Daniels, who had not issued the search warrants,[2] concluded that, considering the totality of circumstances, probable cause supported issuance of the warrant for the Clearstream property. The judge also rejected any argument that the search of the camper was illegal. He explained that the initial warrant specifically permitted the search of any vehicle on the property based upon the CI's information that Patrick "kept quantities of CDS . . . hidden in abandoned vehicles." The judge concluded the "information used in the" affidavit for the warrant for the camper "was obtained through an independent source, . . . the CI's statements."

Both defendants contend that the affidavit in support of the search warrant for the Clearstream property lacked sufficient probable cause. Robin also argues that the "initial warrantless police entry" of the camper was unlawful, and the second warrant was the fruit of that illegal conduct.

"It is well settled that a search executed pursuant to a warrant is presumed to be valid and . . . a defendant challenging its validity has the burden to prove 'that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable.'" *State v. Jones*, 179 N.J. 377, 388, 846 A.2d 569 (2004) (quoting *State v. Valencia*, 93 N.J. 126, 133, 459 A.2d 1149 (1983)). "In considering such a challenge, [w]e accord substantial deference to the discretionary determination resulting in the issuance of

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[2] It appears that the [*11] judge who issued the search warrants had retired.

the [search] warrant." *Ibid.* (internal quotation marks and citations omitted) (alteration in original). Any doubt as to the adequacy of the facts offered to show probable cause should be resolved by sustaining the search. *Id.* at 388-89.

Before issuing a search warrant, the judge "must be satisfied that there is probable cause to believe that a crime has [*12] been committed, or is being committed, at a specific location or that evidence of a crime is at the place sought to be searched." *State v. Sullivan*, 169 N.J. 204, 210, 777 A.2d 60 (2001). "Probable cause . . . is 'a "well grounded" suspicion that a crime has been or is being committed.'" *Id.* at 211 (quoting *State v. Waltz*, 61 N.J. 83, 87, 293 A.2d 167 (1972)). "When determining whether probable cause exists, courts consider the totality of the circumstances, and . . . deal with probabilities." *Jones, supra*, 179 N.J. at 389 (quoting *Schneider v. Simonini*, 163 N.J. 336, 361, 749 A.2d 336 (2000), *cert. denied*, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001)).

"Information related by informants may constitute a basis for probable cause, provided that a substantial basis for crediting that information is presented." *Ibid.* (citation omitted). "'Independent corroboration is necessary to ratify the informant's veracity and validate the truthfulness of the tip' and is considered 'an essential part of the determination of probable cause.'" *Id.* at 390 (quoting *State v. Smith*, 155 N.J. 83, 95, 713 A.2d 1033, *cert. denied*, 525 U.S. 1033, 119 S. Ct. 576, 142 L. Ed. 2d 480 (1998)). Corroborating factors "may include controlled drug purchases performed [*13] on the basis of the informant's tip, [and] positive test results of narcotics obtained during a controlled purchase . . . ." *Ibid.*

Here, any claim that the warrant for the Clearstream property lacked probable cause is without sufficient merit to warrant extensive discussion. *R.* 2:11-3(e)(2). The surveillances connected Patrick to the Clearstream property and the camper. The CI provided information that was independently corroborated by a controlled purchase, which occurred immediately after Patrick visited the Clearstream property and drove directly to the site of the sale. Based upon the totality of the circumstances, there was sufficient probable cause to believe that there was evidence of a crime at the Clearstream property.

Because the initial search warrant was valid and included the residence, outbuildings and all vehicles on the Clearstream property, Robin's argument that the search of the camper was "warrantless" has no merit. Fox's decision to obtain additional warrants evidences nothing other than an abundance of caution. We affirm the denial of the motion to suppress as to both defendants.

II.

We consider the evidence adduced at trial before the jury. Joseph Reiner managed the [*14] Clearstream property for JR Management. On February 4, 2007, Patrick signed a lease for the property in which he was listed as the sole tenant. Patrick arranged to meet Reiner every month at various locations and always paid the rent in cash. Reiner never went to the Clearstream property after Patrick executed the lease and did not know who lived there.

Robert Booth, an employee of Jersey Central Power and Light (JCP&L), testified that the electric utility service at the Clearstream property was put in Robin's name on November 15, 2007, with Patrick listed as the contact person. Booth stated that because Robin "had an account before with us, all she had to do was provide her Social Security number and the account was put into her name." He also admitted it was possible for someone who had that information to call and open the account in Robin's name.

Lakewood police officer Christopher Spagnuolo testified regarding the surveillances conducted at the Clearstream property between December 19, 2007, and January 3, 2008. His testimony essentially provided greater detail to the surveillance information contained in Fox's affidavit for the search warrant, which we set forth above.[3] Although [*15] Patrick was observed at the Clearstream property on three of the six days of surveillance, Robin was never seen at the property.

Before the jury, Fox testified that on the morning of January 22, 2008, he was conducting surveillance at the MLK property, which he identified as Patrick's and Robin's residence, when he received information that Patrick was there. Members of the Lakewood police department responded and detained Patrick in the backyard, where Fox searched him and found $1350. Fox then went to the Clearstream property to assist other officers in the search.

Fox searched a kitchen cabinet and found, among the cans of food and other supplies, a white cloth bag containing a .32-caliber revolver loaded with six rounds, a box of ammunition, and cocaine. In the cabinet, he also found a black plastic bag containing a small digital scale, packaging material, small scissors, and a small bottle of inositol, which Fox described as a "cutting agent" used to increase the amount of cocaine. Fox acknowledged on cross-examination that none of the vehicles nor the camper found on the Clearstream property [*16] were registered to Robin.

Detectives Brianne Brescia, Michael Pluta, Daniel Roske, and Kenneth Hess also searched the house. Brescia could smell marijuana when she opened the well-stocked refrigerator. In the "crisper," Brescia found a blue bag from a women's clothing store, "Charlotte Russe," that held two Ziploc bags containing smaller bags of marijuana. Pluta searched a "second" cluttered bedroom, where he found male clothing, Patrick's birth certificate, mail in Patrick's name, shotgun shells and a spiral notebook with Patrick's name written on it.

Roske searched the master bedroom and found women's clothing and shoes in the closet. The bed was made, with linens and a comforter. There was an air conditioner by the bed. By a nightstand, upon which was a pink lamp, Roske found a purse and a paycheck in Robin's name, dated January 4, 2008. He also found a bank statement, other mail and a phone bill, all in Robin's name. The paycheck and one piece of mail were addressed to the MLK property. The phone bill and another piece of mail were addressed to Robin at an apartment in Asbury Park. One letter to Robin was postmarked December 20, 2007, another January 12, 2008. In the bedroom closet, [*17] Roske also found an air rifle and ammunition on a shelf next to a pair of men's jeans.

Hess recovered a knife inside a box in a kitchen cabinet. In the cluttered bedroom, he found plastic baggies, four bottles of inositol powder, and, in a cosmetic bag, ".22 long rifle bullets" and more baggies. Hess also found another digital scale as well as a motor vehicle registration and storage facility receipt, both in Patrick's name.

Fox went inside the unlocked camper and found a New Jersey registration belonging to Sharpe. Fox assisted in the search of two other vehicles on the property. Inside the trunk of an old Chevy Impala, Fox found two registrations in Patrick's name for an older model Pontiac. Inside the trunk of a 1989 Chevrolet Caprice that was also on the property, Fox found two bulletproof vests.

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[3] We note that Fox's affidavit stated the surveillance began on December 21, not December 19.

The camper was searched by Sergeant John Adams of the Ocean County Sheriff's Department. Under a bench in the kitchen area, he found: a camera bag containing crack and powder cocaine, along with two loaded handguns; a military bag containing marijuana; and a duffel bag containing an "ammo can" with assorted loose ammunition and magazines, two boxes of other ammunition, an M14 assault rifle [*18] clip, a .22-caliber revolver, a starter or blank gun, and a pellet gun that was a replica of a "P229 Sig Sauer handgun." Adams also found in the shower shotguns and a .22-caliber rifle with a scope.

William Pozalante of the Sheriff's Department, who was a member of the Criminal Investigations Unit that processed the crime scene at the Clearstream property on January 22, 2008, testified that a total of ten weapons were removed. No fingerprints were found on any of them.

While Fox and others were searching the Clearstream property, Van de Zilver, Detective Luigi Violante, and Sergeant Christopher Diaz of the SOG were searching the MLK property. In the back bedroom, Van de Zilver found: a yellow legal pad with some notations listing weights and money owed or exchanged; a box of business cards that read: "P.M. Enterprises. If you need it, I got it. Patrick Muldrow, President," and included the address of the MLK property; a storage facility receipt with Patrick's name on it; and registration receipts for eleven vehicles in Patrick's name and one in Robin's name. One of the vehicles was now registered to a Deborah Wells at the same Asbury Park address that was on the mail found in Robin's [*19] name in the Clearstream property's bedroom. He also found a coat in the hall closet containing $4000 and a receipt with Patrick's name on it. Violante recovered various receipts and papers in Patrick's name, along with a postal scale in the bedroom closet. No drugs were found at the MLK property.

Two experts from the Ocean County Sheriff's Department testified. Shantilal Patel, an expert in the field of forensic chemistry, testified that 518 grams of crack and powder cocaine, and 1516 grams of marijuana were recovered from the camper on the Clearstream property; an additional 62 grams of cocaine and 160 grams of marijuana was recovered inside the residence. Daniel Barrett, an expert in firearms, testified that he examined the ten weapons seized and all but one were operational.

Sergeant Todd Friedman of the SOG testified as an expert in narcotics investigations. Friedman concluded that the cocaine and marijuana found at the Clearstream property were possessed with the intent to distribute, and he opined as to the street value of the drugs. Friedman also explained that people who distribute narcotics commonly use multiple vehicles and a "stash house," instead of their own residence, to [*20] hide their drugs and thwart law enforcement.

Sharpe, who worked for JCP&L, testified that he first met Patrick through a mentoring program when Patrick was quite young and considered him "like a son or a brother." In the summer of 2007, Patrick told Sharpe that he had acquired the Clearstream property, and, when Sharpe mentioned that he needed to park his camper somewhere while he did home renovations, Patrick offered the property.

Patrick transported the camper to the Clearstream property. Sharpe testified that he lost the key to the camper ten years earlier so it was always unlocked. When Patrick took the camper, only a spare tire and some bottles of anti-freeze were inside, and Sharpe denied keeping any guns or drugs in the camper. On cross-examination, Sharpe acknowledged that he did not know who lived at the Clearstream property, who visited Patrick there or who had access to his camper. He also acknowledged that he learned about the investigation from his nephew, who was a Lakewood police officer, and that his nephew drove him to police headquarters where Sharpe gave a taped statement.

At the end of the State's case, defendants moved for a judgment of acquittal pursuant to *Rule* 3:18-1. [*21] The trial judge, who was not Judge Daniels, denied the motions. Defendants did not call any witnesses.

The jury found Patrick guilty on all thirteen counts. Robin was found guilty on counts one through four, which charged her with various CDS offenses, and counts five, six and seven, which charged her with possession of various weapons, specifically those found in the house, while engaged in drug activities, *N.J.S.A.* 2C:39-4.1(a). However, the jury acquitted Robin of counts eight through thirteen, all of which charged her with possession of firearms recovered in the camper.

After the verdicts, defendants were tried together on the remaining counts of the indictment charging them with violations of *N.J.S.A.* 2C:39-7, [*22] possession of weapons by certain persons. The jury found Patrick guilty on counts fourteen through twenty-two, i.e., the knife and all the firearms found at the Clearstream property. It found Robin guilty on counts twenty-three through twenty-five, involving the weapons found in the residence and not guilty on counts twenty-six through thirty-one involving the weapons found in the camper. The judge denied both defendants' motions for judgments not withstanding the verdict (JNOV).

III.

We consider the substantive points raised by Patrick, including those asserted in his pro se brief. We then address the sentencing issues.

A.

To place Patrick's claims in the proper context, we provide some additional procedural history, noting first that defendant remained in custody, having not made bail, and apparently was present in a jail detention area in the courthouse building.

At a pretrial conference on June 26, 2009, the trial judge issued *Hudson*[4] warnings, advising both defendants of the trial date and that the case would proceed in their absence. During the course of the hearing, Patrick told the judge that he wanted "to go pro se" because of complaints regarding defense counsel's performance. [*23] The judge gave Patrick until September 1 to submit a written request to proceed pro se.

The court received Patrick's pro se motion for "counsel withdrawal and reassignment" dated August 31, 2009. In the accompanying memorandum, Patrick did not ask to represent himself but, rather, sought the assignment of another lawyer. In a letter dated October 1, 2009, the judge advised Patrick that his complaints and request to have another "pool attorney" assigned had to be addressed to the Office of the Public Defender.

At a pretrial conference on January 12, 2010, the judge again reviewed his reasons for denying Patrick's motion. Patrick voiced myriad complaints about defense counsel, including that he had not seen his attorney in months. Defense counsel denied the claim by reading into the record relevant timesheets documenting his meetings with Patrick.

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[4] *State v. Hudson*, 119 N.J. 165, 182, 574 A.2d 434 (1990).

Patrick also indicated that his attorney was afraid of him. In response, the judge asked the prosecutor to place on the record several comments, which might be inferred as threats, Patrick had made in court, apparently outside the judge's presence and off the record. The judge also noted that Patrick [*24] sent a letter, dated January 7, 2010, again expressing dissatisfaction with his attorney and requesting other counsel.

Patrick's obstreperous behavior continued the next day, during which he complained about counsel's refusal to argue a motion he submitted. The judge reminded Patrick that counsel would continue to represent him, and he would be guided by counsel's decisions. The following occurred:

> Patrick: Well, Your Honor, then I can leave now and you can finish the trial without me. My attorney tells me he is going to put a defense in and I have no say in it? . . . You telling me that I have no right to pick my defense?
>
> . . . .
>
> Therefore, as soon as we leave here, I am letting you know and this is on the record, I am not coming down here no more.
>
> Like I said before, and I put it on the record yesterday, I am putting in for appeal to have the notice that I am appealing this. I am not coming down here no more.

Patrick then accused defense counsel of "feel[ing] threatened." Defense counsel responded, "[F]or the record, I don't feel threatened by [defendant]." Patrick continued:

> I am not coming back down here tomorrow, so don't even call for me and that is on the record. I refuse trial because [*25] I am not getting a fair trial so have it without me.

On January 26, the judge asked defense counsel if he wished to place something on the record.[5] Defense counsel stated, "I visited my client . . . this morning. I advised him that he had a right to be here at trial, that he could be here at trial at any time and he declined to come to trial." The judge asked, "So he's refusing to come down for trial?" Defense counsel responded, "Yes . . . ."

On February 4, the next date for which we have been supplied transcript, defense counsel advised the judge that he "went up to see [his] client, [and] he refused to come down." The judge then noted that he confirmed this by speaking to a sheriff's officer who "firsthand informed me that [Patrick] told her that he did not want to come down."

The trial commenced, and, during his preliminary instructions, the judge told the jury:

> I will remind you [*26] again, as you are aware, that the defendant . . . is absent from this trial. You should not speculate about the reason for his absence. You are not to consider for any purpose or in any manner at arriving at your verdict the fact that Patrick . . . is not present at trial. The defendant is entitled to have the jury consider all evidence presented at trial, the defendant is presumed innocent even if he is not present at trial.
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> On the next trial day, February 9, the judge began by stating outside the jury's presence: "I just want to confirm that I spoke to Officer Levers upstairs at the Ocean County Jail, he's in the tower, he confirmed that . . . Patrick . . . this morning told him . . . he is refusing to come down to court." On the next trial day, February 16, defense counsel again confirmed that Patrick was "refusing to come down

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[5] We have not been provided with any transcripts for dates between January 13 and 26, yet it is apparent there were proceedings in the interim because the January 26 transcript reflects that the jury had been selected and was empanelled. We do not know if defendant was present in court during jury selection.

this morning," and the judge noted he independently confirmed that by contacting one of the sheriff's officers at the jail. During his final jury charge, delivered on February 17, the judge again admonished the jury not to consider Patrick's absence during trial.

B.

Before us, Patrick contends the judge erred by not conducting a hearing on his request to proceed [*27] pro se. We disagree.[6]

A "[d]efendant possesses both the right to counsel and the right to proceed to trial without counsel." *State v. DuBois*, 189 N.J. 454, 465, 916 A.2d 450 (2007). In *State v. Crisafi*, 128 N.J. 499, 509, 608 A.2d 317 (1992), the Court explained that a defendant may "exercise the right to self-representation only by first knowingly and intelligently waiving the right to counsel." "The need for an *unequivocal* request for self-representation by a defendant is a necessary prerequisite to the determination that the defendant is making a knowing and intelligent waiver of the right to counsel." *State v. Figueroa*, 186 N.J. 589, 593 n.1, 897 A.2d 1050 (2006) (emphasis added).

"Of course, there is a difference, constitution-wise, between the right of self-representation and the right of a defendant to secure counsel of his own choice." *State v. Harris*, 384 N.J. Super. 29, 59, 894 A.2d 8 (App. Div.), *certif. denied*, 188 N.J. 357, 907 A.2d 1016 (2006). "The latter is not absolute [*28] and cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice and deprive such courts of the exercise of their inherent powers to control the same." *Ibid. See also State v. Coon*, 314 N.J. Super. 426, 438, 715 A.2d 326 (App. Div.), *certif. denied*, 157 N.J. 543, 724 A.2d 802 (1998) ("The right to assigned counsel is not the right to pick an attorney of one's own choosing, nor the right to select counsel who will completely satisfy a defendant's fancy as to how he is to be represented.").

Here, there was no violation of defendant's right to self-representation. Although he made a request to proceed pro se at the June 2009 conference, Patrick's follow-up motion sought only dismissal of his public defender and appointment of new counsel. He never again made a request to represent himself at any other proceeding. In the absence of an unequivocal request, the judge did not err by failing to hold a hearing on the issue.

Patrick also contends for the first time on appeal that the judge erred in trying him in absentia based upon representations by third parties that he did not wish to attend trial. This argument is procedurally barred because *Rule* 3:20-2 requires "[a] motion for a new [*29] trial based on a claim that the defendant did not waive his or her appearance for trial shall be made prior to sentencing." No such motion was made. "[T]he failure to make the appropriate motion before the trial court constitutes a second waiver pursuant to *Rule* 3:16(b)." *State v. Finklea*, 147 N.J. 211, 221, 686 A.2d 322 (1996), *cert. denied*, 522 U.S. 837, 118 S. Ct. 110, 139 L. Ed. 2d 63 (2007).

The argument is also unpersuasive on its merits. It is axiomatic that criminal defendants have a constitutional right to confront witnesses against them, *see U.S. Const*. amend. VI; *N.J. Const.* art. I, ¶ 10, and "[e]ssential to that guarantee is the right of the accused to be present in the courtroom at every stage of the trial." *State v. Luna*, 193 N.J. 202, 209, 936 A.2d 957 (2007). The right to be present at trial,

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[6] In his pro se brief, Patrick makes a similar point, contending that he should have been permitted to represent himself because his trial counsel "was afraid of . . . and was threatened by him." Our discussion encompasses consideration of that separate, but related, argument.

however, is not absolute, *id.* at 210, and a defendant may waive his right to be present. *Hudson, supra*, 119 N.J. at 182.

Rule 3:16(b) provides in relevant part:

> Nothing in this Rule . . . shall prevent a defendant from waiving the right to be present at trial. A waiver may be found either from (a) the defendant's express written or oral waiver placed on the record, or (b) the defendant's conduct evidencing a [*30] knowing, voluntary, and unjustified absence after (1) the defendant has received actual notice in court or has signed a written acknowledgment of the trial date, or (2) trial has commenced in defendant's presence.

After a defendant has received actual notice of a scheduled trial date, absent a showing of justification, nonappearance is deemed a waiver of the right to be present at trial. *Finklea, supra*, 147 N.J. at 213, 218-22.

Patrick repeatedly told the judge he did not wish to attend trial, i.e., he made an express oral waiver of his right to be present. Thereafter, the judge confirmed with members of the sheriff's staff and defense counsel that defendant's wish continued. There is nothing in the record supporting a contrary conclusion. Certainly, defendant was free to revoke his waiver, but never did. *See Luna, supra*, 193 N.J. at 211 ("A defendant can always reclaim the right to be present by appearing in court on the rescheduled date."). Indeed, defendant's failure to file a motion under *Rule* 3:20-2 implies his express waiver continued.

In his pro se brief, Patrick contends that Judge Daniels erred by failing to recuse himself from pretrial proceedings. Although no motion was ever [*31] made, at the June 2009 conference before the trial judge, Patrick claimed Judge Daniels had recused himself because of a conflict of interest. Patrick stated that Judge Daniels was the assistant prosecutor who handled a prior criminal case against him, and the judge lived in close proximity to the Clearstream property, something Patrick advised the judge of in a letter. There is nothing in the record to confirm either assertion, and none of the trial attorneys or the judge confirmed Judge Daniels had actually recused himself after ruling on the suppression motions.

In *State v. Tucker*, 264 N.J. Super. 549, 553-55, 625 A.2d 34 (App. Div. 1993), *certif. denied*, 135 N.J. 468, 640 A.2d 850; 135 N.J. 468, 640 A.2d 850 (1994), we held that recusal was mandatory where the trial judge, while an assistant prosecutor, had presented two cases involving the defendant to a grand jury. However, in *State v. McNamara*, 212 N.J. Super. 102, 109, 514 A.2d 63 (App. Div. 1986), *certif. denied*, 108 N.J. 210, 528 A.2d 30 (1987), we held that reversal of the defendant's conviction was not required where the trial judge, the First Assistant Prosecutor of the county at the time the defendant's indictment was returned, had not personally prosecuted the defendant.

The merits of the issue Patrick [*32] has belatedly raised cannot be determined on this record, and we therefore conclude it is more appropriately addressed in a petition for post-conviction relief. In that framework, defendant is free to raise the claim and supply additional documentation supporting same. We affirm Patrick's convictions.

C.

Patrick contends the sentence imposed was excessive because it exceeded the minimum extended term of twenty years and included the maximum permissible period of parole ineligibility, i.e., twenty years. We find no reason to disturb the sentence.

Prior to sentencing, the judge granted the State's motion for a mandatory extended term pursuant to *N.J.S.A.* 2C:43-6(f) based on Patrick's prior drug conviction in New York. The judge found aggravating factors three, "[t]he risk that the defendant will commit another offense," six, "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted," and nine, "[t]he need for deterring the defendant and others from violating the law." *N.J.S.A.* 2C:44-1(a)(3), (6) and (9). The judge also found mitigating factor eleven, "[t]he imprisonment of the defendant would entail excessive hardship to himself [*33] or his dependents," noting defendant was obligated to make support payments to two children. *N.J.S.A.* 2C:44-1(b)(11). The judge imposed an extended term of thirty-years' imprisonment with a fifteen-year period of parole ineligibility on the first-degree charge of possession with intent to distribute more that five ounces of cocaine. He ran all other sentences concurrent to that.[7]

"Appellate review of the length of a sentence is limited." *State v. Miller*, 205 N.J. 109, 127, 13 A.3d 873 (2011). We assess whether the aggravating and mitigating factors were based upon "competent credible evidence in the record." *Ibid.* (quotations and citation omitted). We do not "'substitute [our] assessment of aggravating and mitigating factors' for the trial court's judgment." *Ibid.* (quoting *State v. O'Donnell*, 117 N.J. 210, 215, 564 A.2d 1202 (1989)).

Finding Patrick eligible for an extended term under *N.J.S.A.* 2C:43-6(f), which defendant does not contest, the judge could have imposed a sentence ranging from twenty years to life. *N.J.S.A.* 2C:43-7(a)(2). Pursuant to *N.J.S.A.* 2C:43-6(f), [*34] the court must impose a sentence which includes a minimum term "fixed at, or between, one-third and one-half of the sentence imposed." In determining parole ineligibility, the court balances the same aggravating and mitigating factors used to determine the length of a sentence, but must be "'clearly convinced that the aggravating factors substantially outweigh the mitigating' factors." *State v. Abdullah*, 184 N.J. 497, 509, 878 A.2d 746 (2005) (quoting *N.J.S.A.* 2C:43-6(b)).

Here, the aggravating and mitigating factors were supported by the record. The judge expressly concluded he was clearly convinced that the aggravating factors substantially outweighed the mitigating factors. In sum, the sentence does not "shock the judicial conscience." *State v. Roth*, 95 N.J. 334, 365, 471 A.2d 370 (1984).

We affirm Patrick's sentence.

IV.

A.

Robin contends that the judge erred in denying her motion for acquittal, first made after the State rested and asserted again immediately after the verdict. Whether made before the verdict, *Rule* 3:18-1, or after, *Rule* 3:18-2, the standard for deciding a motion for acquittal is the same. *State v. Speth*, 323 N.J. Super. 67, 81, 731 A.2d 1232 (App. Div. 1999). We conduct our review de novo, applying the same [*35] standard used by the trial judge, *State v. Bunch*, 180 N.J. 534, 548-49, 853 A.2d 238 (2004), namely:

> [W]hether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences

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[7] The judge imposed a consecutive sentence on the certain persons offenses, but Patrick makes no argument regarding that portion of the aggregate sentence.

which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

[*State v. Reyes*, 50 N.J. 454, 459, 236 A.2d 385 (1967).]

Robin argues that the evidence was sufficient only to prove that she was "at the residence" on the Clearstream property, but insufficient to prove beyond a reasonable doubt that she possessed either the drugs or weapons found there. We disagree.

An object may be actually or constructively possessed. *State v. Spivey*, 179 N.J. 229, 236, 844 A.2d 512 (2004). A person actually possesses an object when he or she has manual or physical control of it. *Ibid.* "A person constructively possesses an object when, although he lacks 'physical or manual control,' the circumstances permit a reasonable inference that he has knowledge of its presence, and intends and has the capacity to exercise physical control or dominion over it during a span of time." *Id.* at 236-37 (quoting [*36] *State v. Schmidt*, 110 N.J. 258, 270, 540 A.2d 1256 (1988)). Actual or constructive possession can be jointly shared by several persons with equal criminal responsibility. *State v. Morrison*, 188 N.J. 2, 14, 902 A.2d 860 (2006).

The jury surely could infer Robin's presence at the Clearstream property, and, although not present during the surveillance or at the time of the warrant's execution, the mail found demonstrates the likelihood she was there in the months of December and January, not some remote time in the past. In *State v. Brown*, 80 N.J. 587, 404 A.2d 1111 (1979), the Court considered some of the totality of factors permitting a jury to infer constructive possession of drugs in an apartment.

One such factor, although not dispositive, was the defendant's presence at the apartment. *See id.* at 594 ("In the context of the evidence, as presented, one can readily draw the inference that the occupant of such premises would have knowledge and control of its contents."). The *Brown* court cited other factors upon which a permissible inference that the defendant constructively possessed the drugs could rest, including "the presence of other heroin-related materials in the apartment" and that the drugs were "found in rooms commonly [*37] lived in or used by an occupant . . . ." *Id.* at 595-96.

In this case, marijuana was found in the refrigerator inside a bag from a women's clothing shop. Cocaine and a gun were found in a kitchen cabinet that was stocked with foodstuffs. There was paraphernalia including scales and cutting agents in open view. An air gun and ammunition were found in a bedroom that bore indicia of Robin's personal use. Although the surveillance never placed Robin in the camper, the testimony was undisputed that the camper was open and could not be locked. Based upon the totality of the evidence, we conclude a jury could find beyond a reasonable doubt that Robin possessed the drugs and guns jointly and constructively with Patrick.

Robin also argues for the first time on appeal that the State's failure to charge Sharpe with any crime created an appearance of impropriety requiring her conviction be reversed. The argument lacks sufficient merit to warrant discussion in this opinion. *R.* 2:11-3(e)(2).

B.

We next consider Robin's arguments alleging errors in the conduct of the trial and the judge's jury charge. They are all raised for the first time on appeal, necessitating application of the plain error standard. [*38] *See R.* 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .").

(i)

Robin contends the judge erred by allowing Fox to testify that he went to the MLK property to conduct surveillance and Violante to provide an opinion about the postal scale he found there. She also contends the prosecutor's summation comments amounted to reversible error. We disagree.

On direct examination, the prosecutor asked Fox where he was around 10:00 a.m. on January 22, 2008. Fox replied: "I was conducting surveillance on . . . Martin Luther King Drive in Lakewood." There was no further reference to surveillance of the MLK property and, as noted, no objection. Violante, who was not qualified as an expert witness, testified that he recovered a postal scale but no mail to be weighed at the MLK property. The prosecutor then asked: "Based on your training and experience, what would that scale be used for?" Violante replied: "Weighing out CDS."

Even if these statements were improper -- Violante's was not permissible lay opinion, *see State v. McLean*, 205 N.J. 438, 459, 16 A.3d 332 (2011) (holding that a lay witness [*39] may not offer opinion on a matter "not within [the witness's] direct ken . . . and as to which the jury is as competent as he to form a conclusion[.]") (quotation marks and citation omitted) -- they were fleeting in nature and did not, either singularly or collectively, bring about an unjust result.

We do not think the prosecutor's summation comment was improper at all. Talking about Patrick, he said:

> What if the police are watching, which they were, what if, more importantly, a rival is watching, somebody wants to rip you off . . . . You don't want somebody stealing it from you, so you're going to hide it. You're going to hide it someplace where you don't think anybody will be able to find it and you're going to protect it, and you're going to protect it because you're going to arm yourself *and you're going to have somebody at the house at all times like Robin Muldrow living there*.
> [(Emphasis added).]

Robin claims this comment misstated the evidence which showed, instead, that she lived at the MLK property and was never at the Clearstream property.

Prosecutors are afforded considerable leeway in delivering their summations, and are expected to make vigorous and forceful closing arguments [*40] to the jury. *State v. Daniels*, 182 N.J. 80, 96, 861 A.2d 808 (2004). When they limit their comments to the facts shown by or reasonably inferred from the evidence, there is no error. *State v. Wakefield*, 190 N.J. 397, 437, 921 A.2d 954 (2007), *cert. denied*, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). As we already noted, there was sufficient evidence to permit the jury to infer that, even if Robin did not "live" at the Clearstream property, she spent sufficient time there so as to constructively possess the drugs and narcotics found. There was no error in the prosecutor's comments.

(ii)

Robin argues that the judge's final jury charge was fraught with errors. As explained by the Court:

> In the context of a jury charge, plain error requires demonstration of "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result."

> [*State v. Burns*, 192 N.J. 312, 341, 929 A.2d 1041 (2007) (quoting *State v. Jordan*, 147 N.J. 409, 422, 688 A.2d 97 (1997)).]

Robin claims that the constructive possession charge failed to tell the jurors that to [*41] be guilty, she must have intended to have control over the items in question. This misrepresents the full charge given by the judge, which tracked the Model Jury Charge and provided:

> Constructive possession means possession in which the person does not physically have the item on his or her person but is aware that the item is present and is able to exercise intentional control or dominion over it. So someone who has knowledge of the character of an item and knowingly has both the power *and the intention at a given time to exercise control over it*, either directly or through another person or persons, is then in constructive possession of the item.
> [(Emphasis added).]

Robin next claims the judge failed to properly instruct the jury that she could be found guilty of a lesser offense based on her own intent and participation in the crime. During deliberations, the jury asked: "Cocaine, can we charge Robin with [a] lesser amount than Patrick of possession with intent, does the law allow this?" The court reviewed its response with counsel, who had no objections, and told the jury: "[Y]ou may find that Robin Muldrow possessed a lesser amount of cocaine with intent to distribute than Patrick [*42] Muldrow if you find that as a matter of fact."

Robin acknowledges the court correctly instructed the jury that she could be convicted of possessing a lesser amount of cocaine and to consider her guilt separately. She claims, however, that the jury's question suggested they "still did not know" if she could be convicted of lesser offenses than those committed by Patrick and suggests the jury needed to be instructed on accomplice liability. These arguments lack sufficient merit to warrant any further discussion. *R.* 2:11-3(e)(2). We only add that Robin's reliance upon our decision in *State v. Bielkiewicz*, 267 N.J. Super. 520, 524-25, 632 A.2d 277 (App. Div. 1993), is misplaced because she was not charged, nor was it the State's contention, that she was vicariously liable as Patrick's accomplice.

(iii)

Lastly, Robin argues that the court erred by failing to instruct the jury on the law of attempted distribution and to inform the jury that if it relied on an "attempt theory," it must find that she acted purposely. The court's instruction tracked *Model Jury Charge (Criminal)*, "Possession of a Controlled Dangerous Substance with Intent to Distribute" (2008), which defines "distribute" as "the transfer, actual, [*43] constructive or attempted, from one person to another of a controlled dangerous substance." The actual distribution need not take place because the State need only prove that it was a defendant's intent to do so, i.e., "a resolution to do a particular act or accomplish a certain thing." *Ibid.*

As the Court has said, "model jury charges should be followed and read in their entirety to the jury." *State v. R.B.*, 183 N.J. 308, 325, 873 A.2d 511 (2005). "The process by which model jury charges are adopted in this State is comprehensive and thorough; our model jury charges are reviewed and refined by experienced jurists and lawyers." *Ibid.* A reading of the model jury charge is "a persuasive argument in favor of the charge as delivered." *State v. Angoy*, 329 N.J. Super. 79, 84, 746 A.2d 1046 (App. Div.), *certif. denied*, 165 N.J. 138, 754 A.2d 1214 (2000).

The judge followed the model charge which, by defining "distribute," did not create some alternative theory of culpability. Robin was charged with a crime defined by possession with a specific intent, i.e., to distribute the drugs involved. The jury did not need to differentiate whether the distribution occurred or was attempted but failed.

Affirmed.

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