

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5841-08T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANIEL A. NOVAK,

Defendant-Appellant.

Argued January 26, 2010 – Submitted February 22, 2010

Before Judges Skillman, Gilroy and
Simonelli.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Municipal
Appeal No. 7-2009.

Allan Marain argued the cause for appellant.

Robert A. Blanda argued the cause for
respondent (Blanda & Blanda, attorneys; Mr.
Blanda, of counsel and on the brief).

PER CURIAM

On January 15, 2008, Officer Matthew Kurtz of the
Sayreville Police Department was dispatched to a garden
apartment complex in response to a telephone call informing the
Department that occupants of a car in an apartment parking area

were smoking marijuana. When Officer Kurtz arrived at the apartment complex and got out of his car, he observed defendant standing in the parking lot. As Officer Kurtz approached, he heard defendant say, "Officer" and observed him "put his hands up over his head." Defendant then said, "I have something that I want you to see. . . . I have something in my pocket I want you to see. . . . [I]t is marijuana." Officer Kurtz asked defendant to show him the marijuana, in response to which defendant held open his jacket pocket. Officer Kurtz shined his flashlight into defendant's pocket and observed green leafy vegetation, subsequently identified as marijuana, rolled at the end of what appeared to be rolling paper. Officer Kurtz seized the apparent marijuana.

Defendant told Officer Kurtz that he was the one who had placed the telephone call to police headquarters that resulted in Kurtz being dispatched to the apartment complex. Defendant also "made some comments about how he felt that searches are unconstitutional and that he feels marijuana should not be prohibited through the United States Constitution[,]" and that "he thought he would get arrested and it would spur . . . change to get marijuana legalized."

Defendant was charged with possession of marijuana, in violation of N.J.S.A. 2C:35-10(a)(4). Defendant filed a motion

to suppress the marijuana seized by Officer Kurtz on the ground that the seizure violated his "Federal and State constitutional rights relating to self-incrimination." Officer Kurtz was the only witness at the hearing on the motion to suppress. The municipal court judge denied defendant's motion.

Defendant subsequently pled guilty to a violation of a municipal court ordinance pursuant to a plea bargain under which defendant preserved the right to appeal the denial of his motion to suppress.

On a de novo review based on the municipal court record, the Law Division affirmed the denial of defendant's motion to suppress by an oral opinion, which stated in relevant part:

[W]here your defense is I was intending to turn it over voluntarily, in a case of this nature where the Court finds from the record that a call clearly inferentially was made by this defendant, it's the only testimony before the Court. Upon the officer showing up, the officer was called over to this defendant by the defendant. And where that -- that gentleman then voluntarily with the officer believing this is not even a person who is getting high, shows the officer, placing in plain view the substance, the contraband, this Court finds that there, in fact, is no viable suppression motion.

Defendant's motion to suppress was based on the Supreme Court's opinion in State v. Patton, 133 N.J. 389, 395-402 (1993), which held that to preserve the constitutionality of N.J.S.A. 2C:35-10(c), any person who "voluntarily deliver[s]" a

controlled dangerous substance to a law enforcement officer in accordance with this subsection is entitled to transactional immunity with respect to offenses proscribed by N.J.S.A. 2C:35-10 and use and derivative-use immunity with respect to other offenses.

It is unclear whether the lower court judges understood that defendant's motion to suppress was based on the immunities provided by Patton to protect an accused's privilege against self-incrimination, rather than the Fourth Amendment to the United States Constitution and Article I, Paragraph 7, of the New Jersey Constitution. It is also unclear whether defendant's immunity claims were properly presented by a motion to suppress evidence rather than in the form of a motion to dismiss the charges or as a trial defense. See State v. Gredder, 319 N.J. Super. 420, 422 n.1 (App. Div. 1999). However, this case has now been pending for more than two years, and the evidence presented at the hearing on the motion to suppress, and the Law Division's findings based on that evidence, are sufficient for us to decide defendant's immunity claims. Therefore, we have elected to bypass our questions concerning the procedural route by which defendant's claim was presented to the lower courts and to decide whether defendant is entitled to immunity under the

facts testified to by Officer Kurtz, which were undisputed and accepted as credible by the lower courts.

In Gredder, supra, 319 N.J. Super. at 424, we held that in order for a "delivery" of drugs to the police to be considered "voluntary" within the intent of N.J.S.A. 2C:35-10(c), and thus entitled to the immunities established in Patton, "[t]he impetus for surrendering the CDS should come from the possessor," rather than as a "capitulation to the requests of the police."

Although defendant did not hand the marijuana in his possession to Officer Kurtz, he immediately told Kurtz he had "something" in his pocket he wanted to show him, identified that "something" as marijuana, and held open the pocket where the marijuana was located. The Law Division judge found that by these actions defendant "voluntarily" disclosed the marijuana to Officer Kurtz. Although the judge seems to have made this finding under the mistaken view that the issue before him was whether Officer Kurtz had violated defendant's rights under the Fourth Amendment to the United States Constitution and Article I, Paragraph 7, of the New Jersey Constitution, this finding is also applicable to the question whether defendant's actions constituted a "voluntary delivery" of the marijuana within the intent of N.J.S.A. 2C:35-10(c). Under this finding, it is clear that the "impetus for surrendering" the marijuana came from defendant

rather than as a result of a "capitulation" to any request from Officer Kurtz. Gredder, supra, 319 N.J. Super. at 424. We also emphasize the absence of any evidence that defendant or anyone else was using or had used any of the marijuana defendant was carrying in his pocket. Therefore, we conclude that defendant was entitled to the transactional and use immunity established in Patton.

Accordingly, the denial of defendant's motion to suppress and the judgment of conviction are reversed.

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



CLERK OF THE APPELLATE DIVISION