

A. The warrant did not authorize police to search defendant, and his mere presence in the apartment at 6:15 a.m. did not establish probable cause to connect him to the suspected narcotics activity there.

The issuance of a warrant to search premises does not authorize police to search all persons found there. Even where a warrant permits police to search persons found at the premises, police may do so only if “there is a well-grounded suspicion or belief that an offense is taking place *and that unknown persons found on the premises are party to it.*” State v. DeSimone, 60 N.J. 319, 321-22 (1972)(emphasis added).

. . . the sufficiency of a warrant to search persons identified only by their presence at a specified place should depend upon the facts. A showing that lottery slips are sold in a department store or an industrial plant obviously would not justify a warrant to search every person on the premises, for there would be no probable cause to believe that everyone there was participating in the illegal operation. On the other hand, a showing that a dice game is operated in a manhole or in a barn should suffice, for the reason that the place is so limited and the illegal operation so overt that is likely that everyone present is a party to the offense. Such a setting furnishes not only probable cause but also a designation of the persons to be searched which functionally is as precise as a dimensional portrait of them.

. . . And, with regard to the Fourth Amendment demand for specificity as to the subject to be searched, there is none of the vice of a general warrant if the individual is thus identified by physical nexus to the on-going criminal event itself. In such setting, the officer executing the warrant has neither the authority nor the opportunity to search everywhere for anyone violating a law. *So long as there is good reason to suspect or believe that anyone present at the anticipated scene will*

probably be a participant, presence becomes the descriptive fact satisfying the aim of the Fourth Amendment.

[60 N.J. at 321-322 (emphasis added)]

Thus, a warrant to search premises suspected of being used for narcotics sales may authorize the search of persons found there only “if the search is conducted at a time when sales ordinarily take place, if the premises are not of a sort likely to be also frequented by the public for lawful purposes, and if, as a result, a person who is in the premises when the police enter or arrives there during the search is likely to be a party to the unlawful activity.” State in the Interest of L.Q., 236 N.J. Super. 464, 472 (App. Div. 1989), certif. denied, 122 N.J. 121 (1990).

The search of defendant’s person did not satisfy that test. The “black male” identified in Peters’ affidavit was codefendant Brogsdale, not defendant, who was neither described nor identified in Peters’ affidavit. The State admitted that defendant did not live in the apartment, and nothing connected him to either Brogsdale or Ms. Lang other than his mere presence on the living room couch.

Most importantly, the raid occurred early in the morning—not at a time when the suspected drug sales on which the warrant was based would have been occurring. Defendant was not encountered during the “afternoon” or “evening” hours that Peters’ affidavit stated the controlled buys had taken

place. Nothing in Peters' affidavit established probable cause to believe that a person found in the apartment at 6:15 a.m. "will probably be a participant" in the suspected criminal activity, as DeSimone and its progeny require. Nothing in Peters' affidavit "provided a firm foundation for the suspicion or belief that any person in the private premises" at that time of the morning "was involved in the overt unlawful activity" on which the search warrant was based. L.Q., 236 N.J. Super. at 471.

Probable cause obviously did not exist to connect everyone in the apartment at the time of the raid to the suspected criminal activity. Nothing in the proofs below connected Lang or her two small children to the suspected narcotics sales. The proofs did not demonstrate that police had even searched Lang or had probable cause to believe she was connected to the criminal activity.

The trial court credited Peters' testimony that defendant was sitting on the living room couch when police entered the apartment, but this observation was insufficient to connect defendant to the suspected narcotics sales at the premises. As noted above, defendant did not fit the description of the drug seller in Peters' affidavit, and nothing in the proofs showed that defendant did or said anything when the police entered that connected him to the suspected criminal activity there. Peters did not testify that he even

asked defendant why he was there or that he even tried to establish a connection between defendant's presence and the suspected narcotics sales. Instead, the police simply seized and searched defendant automatically. That's not enough under DeSimone.

Prior decisions support this conclusion. In State v. Hall, 253 N.J. Super. 84, 96 (Law Div. 1990), aff'd, 253 N.J. Super. 32 (App. Div. 1991), for example, the court held, "[t]he mere fact that Dexter Hall arrived during the search cannot support his detention, or the pat-down, much less a full search. The police should have asked defendant what he was doing at the apartment while he was outside the door. * * * If he had given an innocent explanation . . . with consistent knowledge and answers and without threat or suspicion, he should have been allowed to leave." Id.

Courts that have upheld the search of persons present at the scene of suspected criminal activity have done so because the affidavit showed sufficient surveillance and observation of traffic at the targeted residence to establish probable cause to believe that anyone arriving during the warrant's execution "was at least attempting to violate the drug laws." L.Q., 236 N.J. Super. at 472. For example, the affidavit in L.Q. specifically asked for the search to be conducted during the hours that the suspected cocaine sales were taking place, "in the mid-afternoon," and police executed the warrant

during those hours. Id. at 467. This contrasts sharply with Detective Peters' affidavit in this case, which established that cocaine sales were occurring in the "afternoon" and "evening," (Da18; Da21), yet the warrant was executed at 6:15 a.m.

Also, L.Q. stressed the importance of a prior determination of probable cause to search all persons present. The affidavit in L.Q. detailed "the quantity, quality, location and timing of traffic in and out of the target apartment" and therefore "establishe[d] probable cause to believe that a person who enters the premises during the search . . . is probably a supplier, subdealer or a customer." 236 N.J. Super. at 471. This again contrasts sharply with Detective Peters' affidavit in this case, which detailed only the "black male," who turned out to be Brogsdale, and two controlled buys during afternoon and evening hours. (Da17-27). The presence of Lang and her children when the raid was actually conducted confirm that not all persons present during the time the warrant was executed were engaged in the suspected narcotics sales on which the warrant was based.

State v. Carlino, 373 N.J. Super. 377 (App. Div. 2004), certif. denied, 182 N.J. 430 (2005) also upheld the search of the defendant present at the scene of the raid because "the search warrant was executed at about 10:30 p.m.," when it "is reasonable to infer that the time would be appropriate for

drug transactions.” The court emphasized that “[t]he time was neither necessarily too late nor too early for a drug transaction to take place.” Id. at 394. Thus, the defendant’s presence at the scene at the time of the raid connected him to the suspected drug activity taking place and established that he was probably a party to it, as DeSimone and underlying constitutional principles require. That significant factor, and several other facts that might have connected defendant to the suspected narcotics activity at issue, is notably absent from this case, as Carlino illustrates:

First, defendant appeared at the home after midnight. The time itself is not typical for roaming the neighborhood. Second, defendant walked directly into the residence, without first knocking, and opened a closed door. This suggests defendant was familiar with the home and intended to enter that particular house. Supporting this evidence is the fact that the house was the center of a crime-scene investigation where cocaine and drug paraphernalia were seized, and two individuals had been arrested.

Defendant's conduct further demonstrated that he might be involved in the illegal activity that was occurring in the home. When defendant first entered the home, he asked law enforcement officers where Jerry was. He was told that Jerry was not there. Defendant repeated his question. Again, he received the same response. It was not until another law enforcement officer appeared, who visibly wore a police badge, that defendant became nervous. Feltri observed defendant clutch the fanny bag harder. These factors indicate that defendant knew of the illegal activity that was occurring in the home and was, in fact, a party to it. Feltri's seizure of the fanny bag and the discovery of the ecstasy pills simply confirmed the officer's reasonable suspicions.

[Id. at 394-95]

Not one of those facts was present in this case.

The Fourth Amendment to the United States Constitution protects all persons from unreasonable search and seizure, providing that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The New Jersey Constitution provides the same, and in some cases greater, protection. N.J. Const. art. I, ¶ 7. The core principle behind these fundamental constitutional rights is that police must conduct searches and seizures reasonably.

Thus, Carlino upheld the search of the defendant because while the warrant did not “authorize absolute authority” to search anyone at the premises, the proofs showed that the officers had acted reasonably in executing the warrant. They asked the defendant questions to establish why he was in the apartment, and defendant “never explained why he was in the home or what he was doing there. Given the circumstances, law enforcement was justified in searching the fanny bag.” They made a reasonable attempt to “exclude persons whose presence” at the scene of the search might be “innocently explainable” and therefore complied with the

Fourth Amendment. Carlino, 373 N.J. Super. at 395 (quoting L.Q., 236 N.J. Super. at 473).

Conversely, the police in this case did not attempt to implement the search warrant in a reasonable manner. They conducted no inquiries of defendant, never asking him why he was in the apartment, how he knew Ms. Lang or Brogsdale (the suspected seller), or giving defendant any opportunity to explain his presence. Rather, as Detective Peters acknowledged below, police simply executed the warrant at 6:15 a.m., found defendant sitting on the couch, and automatically seized and searched him. Because that's not enough to satisfy DeSimone and the underlying fourth amendment rights it protects, the Court should reverse the ruling below, suppress the evidence seized from defendant's person, and vacate his resulting conviction.