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October 28, 2022

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-6-22 *State v. Kyle A. Smart* (087315)

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief in the above-captioned case on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ).

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Preliminary Statement

Under the Federal Constitution, the inherent mobility of automobiles, on its own, creates an exigent circumstance that justifies a warrantless search. New Jersey has never taken that approach. For more than four decades the New Jersey Supreme Court has found that the State Constitution required more under its automobile exception. Initially, in *State v. Alston*, the Court required both probable cause to search the vehicle and a determination that the police action was prompted by the "unforeseeability and spontaneity" of the circumstances giving rise to probable cause. In the years that followed, the Court refined the requirement, requiring independent exigency in addition to the probable cause and "unforeseeability and spontaneity" showings. The Court explained in *State v. Pena Flores* that the exigency showing required the State to show that it was impractical to obtain a warrant.

Law enforcement abhorred those decisions and worked for years to see them overturned. In 2015, in *State v. Witt*, their "persistence . . . paid off" and the Court reverted to its earlier standard, returning to the "unforeseeability and

spontaneity" requirement it had imposed decades earlier. In asking the Court to abandon the exigency requirement, the Attorney General anticipated the issue in this case and asked the Court to either 1) adopt the federal standard, 2) adopt a standard where "unforeseeability and spontaneity" could be met whenever the State had reasonable suspicion but not probable cause at the time of the stop, or 3) revert to the *Alston* standard. Presented with these three options, the Court chose the third, reinstating the "unforeseeability and spontaneity" requirement from *Alston*. (Point I).

For the last seven years New Jerseyans have come to rely on the principles set forth in *Witt*. Although *Amicus* disagreed with the holding in *Witt*, as binding precedent of this Court, *Witt* is entitled to respect and should not be overturned without "some special justification." Although couched in other terms, the State seeks nothing short of the undoing of precedent. No special justification exists to warrant abandoning principles of *stare decisis*. (Point II).

Indeed, not only does the State fail to present special justification to reject the *Alston* rule, it presents no justification. It may be simpler for law enforcement to rely on the federal standard, but the New Jersey Constitution is designed to protect the rights of New Jerseyans and restrain the power of the State. For four decades motorists in New Jersey have found some security in

the enhanced privacy protections of Article I, paragraph 7. There exists no reason to retreat from those safeguards now. (Point III).

Statement of Facts and Procedural History

Amicus ACLU-NJ accepts the statement of facts and procedural history contained in the Appellate Division decision, *State v. Smart*, 473 N.J. Super. 87, 90 (App. Div.), leave to appeal granted, 252 N.J. 35 (2022).

Argument

I. *State v. Witt* restored the rule from *State v. Alston*, it did not adopt the rule from *Pennsylvania v. Labron*.

In 1981, the Court determined that probable cause and the inherent mobility of automobiles was insufficient to justify a warrantless search. The State needed to additionally demonstrate that "circumstances giving rise to probable cause" were unforeseeable and developed spontaneously. *State v. Alston*, 88 N.J. 211, 233 (1981). At the time, that decision appeared consistent with federal caselaw regarding the automobile exception. *State v. Witt*, 223 N.J. 409, 414 (2015). In the years that followed, the United States Supreme Court took a different approach to automobile searches, requiring nothing more than probable cause to believe that contraband will be found and the inherent mobility of a car to justify a warrantless search under the automobile exception. *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

In 2000, this Court, invoking Article I, paragraph 7 of the State Constitution, rejected the federal standard and required an independent showing of exigency. *State v. Cooke*, 163 N.J. 657, 670 (2000). The Court reaffirmed its holding from *Cooke* in *State v. Pena-Flores*, 198 N.J. 6, 28 (2009). Under *Cooke* and *Pena-Flores*, "exigency [wa]s a necessary component for a warrantless search of a car. . . ." *Witt*, 223 N.J. at 451 (LaVecchia, J., dissenting). The State, which did "not want to have to show exigency" (*id.*) and which "want[ed] a relatively automatic exception to the general warrant requirement when it c[a]me[] to cars" (*id.*), sought to overturn *Pena-Flores* several times. *Id.* (citing *State v. Deshazo*, 208 N.J. 370 (2011); *State v. Crooms*, 208 N.J. 371 (2011); *State v. Shannon*, 208 N.J. 381 (2011), all of which were dismissed, as improvidently granted and *State v. Shannon*, 210 N.J. 225 (2012)). In *Witt* it succeeded.

Neither Mr. Smart nor *amicus* seek to relitigate *Witt*. It is now settled law. But the State appears dissatisfied with the result it pushed for in *Witt.* It now seeks to retreat from 41 years of jurisprudence and allow automobile searches whenever police have probable cause to believe a car will contain contraband. The State does not explicitly ask the Court to overrule its holding in *Witt*; instead, it contends that the Appellate Division has "misread" *Witt. See*

SBr[1] at 10-20. But a review of the State's brief in *Witt* reveals that it asked the Court to conform the automobile exception under the State Constitution to the one set forth in *Labron*. Although its point heading asked the Court to "[r]estore the [u]nforseeability-[s]pontaneity [t]est" (WBr at 59), and although it conceded that the *Alston* test was "workable" (*id* at 60), it asked the Court to "reconsider whether, in light of our own 'fractured jurisprudence,' it would make sense to adopt the federal standard." *Id.*

In the alternative, the State proposed a modification of the *Alston* standard like the one the State seeks in this case. The State asked the Court to "operationally define exigency in terms of the spontaneity with which probable cause arises, and . . . emphasize that the critical, fact-sensitive question is whether police reasonably could have obtained a search warrant before the motor vehicle encounter." *Id.* at 61. The Attorney General went on to propose how the Court should treat situations where police have reasonable suspicion at the start of an encounter but later develop probable cause. *Id.* In other words, in *Witt* the State asked for the rule it now suggests the Court crafted. But the interpretation of "unforeseeability and spontaneity" was found in the State's brief, not in the Court's opinion.

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[1] SBr refers to the State's brief in support of Leave to Appeal;
WBr refers to the Attorney General's Supplemental Brief in *State v. Witt* (74468).

The Court in *Witt* neither adopted the federal standard (*see Witt*, 223 N.J. at 447 (explaining that "an unforeseeability and spontaneity requirement is not part of the federal automobile exception. Here, we part from the United States Supreme Court's interpretation of the automobile exception")) nor modified the *Alston* standard as the State asked it to. *See id.* (explaining that the Court would now "return to the *Alston* standard, this time supported by Article I, Paragraph 7 of our State Constitution"). Instead, it did what the State asked it to do in its point heading: it reverted to the *Alston* standard. The State's brief in this case misreads *Witt* to suggest the holding came out as it had hoped rather than as it did.

II. *Stare decisis* compels adherence to the "unforeseeability and spontaneity" requirement.

Stare decisis is the presumed course "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Luchejko v. City of Hoboken*, 207 N.J. 191 (2011). *Stare decisis* is:

> the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of

> our constitutional system of government, both in appearance and in fact.
>
> [*Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).]

Thus, this Court has stressed that "*Stare decisis* carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Luchejko*, 207 N.J. at 208 (*quoting State v. Brown*, 190 N.J. 144 (2007) and *Dickerson v. United States*, 530 U.S. 428 (2000)).

Even when they have disagreed with the reasoning of a prior decision, when "that perspective did not prevail," it has been the admirable tradition of members of this Court to acknowledge that a controlling decision "nevertheless remains precedent deserving of respect," and that such "respect for *stare decisis* is the simple, and sole, reason" to concur in subsequent judgments applying that decision. *Flomerfelt v. Cardiello*, 202 N.J. 432, 462-63 (2010) (LaVecchia and Rivera-Soto, JJ., concurring). *See also Johnson v. Johnson*, 204 N.J. 529, 550 (2010) (Rabner, C.J., concurring).

While *stare decisis* may yield if "conditions change and as past errors become apparent," *White v. North Bergen*, 77 N.J. 538, 551 (1978) (*quoting and adopting dissent* of Chief Justice Vanderbilt in *Fox v. Snow*, 6 N.J. 12, 23-24 (1950)), it is also true that "every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in

society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U.S. at 266. The task of establishing a "special justification," however, must begin with a factual record.

Here, the State offers no special justification; indeed, the State does not even acknowledge that it is asking for a sweeping doctrinal change. Instead, it couches its assault on precedent with the suggestion that the Appellate Division has misread *Witt.* But the Appellate Division did not misread *Witt*.

III. There is no basis to depart from the "unforeseeability and spontaneity" requirement.

Even if *stare decisis* did not dictate the result, the State fails to explain why *Alston*'s "unforeseeability and spontaneity" requirement needs revision. In its moving brief, the State contends that interpreting *Witt* as it is written "will have a devastating impact across the State, exposing police and citizenry to lengthy roadside encounters for little or no benefit to be obtained." SBr at 10. But the facts of this case, the rarity with which cases like it have come before appellate courts, and the scant evidentiary record all demonstrate that such a claim is unsupportable.

The first portion of the State's claim is easily dispensed with: the convenience of law enforcement has never served as a basis to overcome Article I, paragraph 7's or the Fourth Amendment's warrant requirements. *See,*

e.g., *Brown v. State*, 230 N.J. 84, 118, 165 A.3d 735, 755 (2017) (Albin, J., dissenting) (quoting *Johnson v. United States*, 333 U.S. 10, 14–15 (1948) explaining that a search cannot be justified where the State offers no justification other than "the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate."); *State v. Ercolano*, 79 N.J. 25, 47 (1979) (explaining that the Constitution forbids warrantless searches justified only by the desire "to avoid the inconvenience of obtaining a search warrant."); *State v. Naturile*, 83 N.J. Super. 563, 569 (App. Div. 1964) (clarifying that the "inconvenience to the officers and the slight delay involved in processing the application for a warrant is never a convincing reason for proceeding without one").

Questions about spontaneity and unforeseeability do not come up often. Indeed, a search of cases – published and unpublished – decided in the seven years since *Witt*, where the Appellate Division held that a search supported by probable cause required a warrant because it was foreseeable or planned, revealed only two instances of suppression. *See State v. Dixon*, No. A-0396-19T2, 2020 WL 2071059, at *1 (App. Div. Apr. 30, 2020) (affirming suppression where "search for drugs was not unforeseeable and spontaneous because defendant was under police surveillance for distribution of drugs when his car was stopped, and the police had reason to believe drugs were in the

car.") (AA 01-04);[2] *State v. Morales-Rivera*, No. A-1443-20, 2022 WL 3098551, at *7 (App. Div. Aug. 4, 2022) (explaining that "law enforcement had sufficient information and probable cause to seek a search warrant" and "[g]iven the thirty-six officers involved in the planned operation, defendant's car easily could have been secured while the police obtained a search warrant.") (AA 05-10). Put differently, *Witt*'s divergence from federal law has not materially undermined police officers' ability to search cars.

The remaining question is whether delays to motorists justify overturning *Alston*'s requirement that probable case be unforeseeable and arise spontaneously. In *Witt*, among other purposes, the Court sought to eliminate the need to prolong roadside encounters while officers sought warrants; *Witt*, 223 N.J. at 446 (noting that the current approach places significant burdens on law enforcement without providing "any real benefit to our citizenry" because it provided "no discernible advancement of their liberty or privacy interests"); it also sought to prevent police officers from overusing the device of consent searches to avoid the warrant requirement. *Id.* at 443–44. First, because police

[2] These two unpublished cases are attached in *Amicus*'s Appendix. They are cited for the limited proposition that courts rarely order suppression because searches are foreseeable or planned. Counsel knows of know additional cases that support or undermine this proposition. *R.* 1:36-3.

initially sought consent to search the car, any interest the Court has in minimizing consent searches (*id.*) is at its nadir here.

To the extent the State contends that the requirements of spontaneity and unforeseeability unfairly burdens law enforcement or will cause untold delay to civilians, this case presents a strange vehicle for the State to seek to eliminate the requirements set forth in *Witt* and adopted from *Alston.* The record is devoid of *any* evidence regarding how long it would take to seek a warrant, though the Court frequently considered that exact sort of evidence as it considered the workability of *Pena-Flores*. *See, e.g.*, *Witt*, 223 N.J. at 434 (describing creation of Supreme Court Special Committee on Telephonic and Electronic Search Warrants and its report that focused on the time required for telephonic warrants); *id.* at 436 (describing pilot programs to test the length of time required for telephonic warrants); *Shannon*, 210 N.J. at 227 (finding that the motor-vehicle data submitted by the State was insufficient justify overturning *Pena-Flores*); *Witt*, 223 N.J. at 437 (considering the Office of Law Enforcement Professional Standards report on the effects of *Pena-Flores* on municipal police departments' behavior).

In *Witt* the Court explained why it was not adopting a rule where probable cause and the inherent mobility of automobiles justified searches in every case: "we do not adopt the federal standard for automobile searches

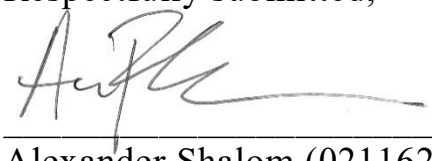
because that standard is not fully consonant with the interests embodied in Article I, Paragraph 7 of our State Constitution." *Id.* at 447. The Court held that the rule it was imposing "properly balances the individual's privacy and liberty interests and law enforcement's investigatory demands" and "does not place an undue burden on law enforcement." *Id.* Greater protection under the New Jersey Constitution should come as no surprise: "[t]he State Constitution favors the protection of individual rights and is designed to vindicate them. Under our Constitution, people have the right to be free from unreasonable searches and seizures, and they suffer real harm when their rights are violated." *State v. Carter*, 247 N.J. 488, 530 (2021).

The State seeks to disturb the balance the Court struck between law enforcement need and privacy and does so without offering any justification, other than those this Court rejected seven years ago in *Witt* when the State last asked to revert to the federal standard.

Conclusion

Although the State's contends that it seeks correction of a misreading of *Witt*, its goal is far more ambitious: elimination of *Witt*'s mandate that probable cause emerge spontaneously and unforeseeably. *Stare decisis* and the State's failure produce any evidence to suggest that additional protections embedded in the State Constitution significantly impede law enforcement or harm civilians demand that the Court reject the unspoken attempt to overturn precedent.

Respectfully submitted,



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Amicus's Appendix

2020 WL 2071059
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Appellant,

v.

Vincent L. DIXON, Defendant-Respondent.

DOCKET NO. A-0396-19T2
|
Submitted March 16, 2020
|
Decided April 30, 2020

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-05-0840.

Attorneys and Law Firms

Gurbir S. Grewal, Attorney General, attorney for appellant (Daniel Ian Bornstein, Assistant Attorney General, Trenton, of counsel and on the briefs).

Joseph E. Krakora, Public Defender, attorney for respondent (Ravi P. Shah, Assistant Deputy Public Defender, on the brief).

Before Judges Sumners and Natali.

Opinion

PER CURIAM

***1** On leave granted, the State requests we overturn the trial court's order to suppress drugs found in a warrantless search of defendant's car following a roadside stop. Before us, the State makes the single-point argument:

> THE TRIAL JUDGE COMMITTED LEGAL ERROR IN SUPPRESSING EVIDENCE THAT WAS LAWFULLY SEIZED DURING A CONSTITUTIONALLY PERMISSIBLE SEARCH UNDER THE AUTOMOBILE EXCEPTION TO THE SEARCH WARRANT REQUIREMENT.

We conclude the automobile exception to a warrant requirement did not apply to the warrantless search. A warrant to search defendant's car was necessary under State v. Witt, 223 N.J. 409 (2105), despite a drug-sniffing canine's "hit" that drugs were in the car. The search for drugs was not unforeseeable and spontaneous because defendant was under police surveillance for distribution of drugs when his car was stopped, and the police had reason to believe drugs were in the car. We therefore affirm.

I

The suppression hearing revealed the following uncontroverted testimony of the events culminating in the warrantless search of defendant's car. On November 29, 2017, acting on a tip from a reliable confidential informant, Edison Police Detective Michael Carullo along with fellow Detective Sorber[1] conducted surveillance of an Edison industrial park where they suspected drugs were being sold to warehouse employees. The detectives observed defendant: drive up to the warehouse, pick up a man wearing a warehouse uniform who had been pacing outside the warehouse for several minutes prior to defendant's arrival, and drive him for a short three-minute ride before dropping him back off at the warehouse. The detectives remained at their surveillance location during the pick-up and drop-off.

Combined with the informant's tip and his training and experience with drug-related activity, Carullo believed the observed rendezvous was a drug sale. To confirm his suspicion, Carullo radioed fellow Edison police officers to stop defendant's car, then he and Sorber joined the stop moments thereafter. Carullo's subsequent questioning of defendant, who had been removed from the vehicle and handcuffed by the other officers, led him to conclude defendant lied when claiming to have stopped at the warehouse to apply for a job and then gave someone a ride to a convenience store to buy cigarettes.[2] After defendant refused to give consent to search his car, a call was made to have a drug-sniffing canine come to the scene.

About twenty-minutes after the stop was initiated, the canine arrived and made a positive hit that drugs were in the car. Apparently, uncertain whether a warrantless search of the car should be effectuated but acknowledging it would have been easy to apply for a search warrant, Carullo revealed he sought direction from the Middlesex Prosecutor's Office. After an Assistant Prosecutor on duty advised him there was no need

for a warrant, a search of the car uncovered crack cocaine and heroin, plus Xanax and Clonazepam pills, which led to defendant's indictment for various drug offenses.

***2** The motion judge granted defendant's motion to suppress the drugs. In his oral decision, the judge relied upon the reasoning articulated in State v. Nelson, 237 N.J. 540 (2019) and State v. Dunbar, 229 N.J. 521 (2017), which the judge recognized did not specifically address the automobile exception to warrantless searches. The judge determined the State had reasonable articulable suspicion to stop defendant's vehicle based on Carullo's "very credible" testimony that defendant sold drugs to the warehouse employee he picked up and dropped back off at the warehouse. Nevertheless, the judge rejected the State's claim that the warrantless search fell within the automobile exception. The judge reasoned "the whole purpose of the stop was to investigate ... [suspected] drug activity," thus probable cause that there were drugs in the car was "not spontaneous or unforeseeable, it was rather predictable based on the [canine's] sniff." The judge further found the search problematic because there were no exigent circumstances demonstrating "some identifiable risk either to the safety to the officers, or to the destruction of evidence." Thus, a search warrant should have been sought, which "more likely than not would have been obtained."

II

In its merits brief, the State initially contends the motion judge's ruling was procedurally flawed because defendant only challenged the constitutionality of the roadside stop and detention, and the judge "should not have even considered the constitutionality of the search ...." The State thus posits "any argument pertaining to the constitutionality of the search was not properly preserved in [defendant's] motion and should be waived." Citing Witt, 223 N.J. at 418-19, the State contends had it been aware the actual search was under scrutiny, it would have been on notice to create an adequate record on the issue and argued the discovery of the drugs would have been inevitable. We discern no merit to this contention.

The State's reliance on Witt is misplaced. There, the Court rejected the defendant's challenge to a roadside stop because the defendant raised the contention for the first time on appeal and "the State was deprived of the opportunity to establish a record that might have resolved the issue through a few questions to" the investigating police officer. Id. at 419. Underscoring without a trial record, the Court acknowledged the long-standing principle that appellate review is impeded under such circumstances. Ibid. (citing State v. Robinson, 200 N.J. 1, 20 (2009)).

Here, despite defendant's failure to specifically raise the issue of the search in its motion to suppress before the court, the motion record addresses the issue. The State, being fully aware of its burden to establish the warrantless search and seizure was justified under the circumstances, State v. Mann, 203 N.J. 328, 337-38 (2010), through Carullo's testimony and its argument – without the judge's inquiry – contended the search was constitutional under the automobile exception. After the State asserted there was reasonable suspicion to effectuate a motor vehicle stop, Carullo's "first hurdle," it argued the "next hurdle" was whether the automobile exception applied to conduct a warrantless search. The State maintained after consent to search was not obtained, the canine sniff led to a hit there were drugs in a car, where upon an Assistant Prosecutor counseled Carullo a warrant was not necessary to search the car.

Further, during the suppression hearing, the State cited case law – in particular Witt – to support its position, and at no point before or after the judge's oral decision, did it indicate it was not on notice to present testimony or be prepared to address the automobile search issue. Simply put, the State addressed all legitimate factual and legal issues arising from its warrantless search. It cannot now claim foul by the motion judge on appeal.

III

Turning to the substantive issue of this appeal, the State contends, under Witt, the warrantless search of defendant's car was a proper application of the automobile exception. Based upon our interpretation of Witt, and its application that has since developed, most notably, State v. Rodriguez, 459 N.J. Super. 13 (App. Div. 2019), we disagree.

***3** Because the facts are not in dispute and the State argues the motion judge misapplied the law, we examine this legal issue de novo. See State v. Gamble, 218 N.J. 412, 425 (2014). Hence, we need not consider whether the judge's factual findings were supported by the record. See Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 50 (2012) (citing Gilhooley v. Cty. of Union, 164 N.J. 533, 545 (2000)).

The legal issue here is whether the automobile exception to the Fourth Amendment's warrant requirement applies. It is well-established that the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, require police to obtain warrants before making searches and seizures. Yet, judicially recognized exceptions to the warrant requirement allow the State to show that a warrantless search was justified. State v. Pineiro, 181 N.J. 13, 19 (2004). One such exception is the automobile exception.

In Witt, the Court "announced ... a sharp departure from a more narrow construction of the automobile exception." Rodriguez, 459 N.J. Super. at 21. As Rodriguez explains, the Witt decision observed the "multi-factor exigent circumstances test" of prior case law was "difficult to apply with consistency, particularly for law enforcement officers on patrol, and placed upon them 'unrealistic and impracticable burdens.' " Ibid. (citing Witt, 223 N.J. at 414-15). The Witt Court restated the test to authorize automobile searches where "(1) the police have probable cause to believe the vehicle contains evidence of a criminal offense; and (2) the circumstances giving rise to probable cause are unforeseeable and spontaneous." Id. at 22 (citing Witt, 223 N.J. at 447-48). Thus, Witt readopted a bright-line rule "affording police officers at the scene the discretion to choose between searching the vehicle immediately if they spontaneously have probable cause to do so, or to have the vehicle removed and impounded and seek a search warrant later." Id. at 24 (emphasis added).

Applying the Witt test, this warrantless automobile search does not pass constitutional muster. We start by recognizing there was reasonable suspicion for an investigatory stop of defendant's car based on the confidential informant's tip and defendant's picking up the waiting warehouse employee and dropping him back off three-minutes later. As did the motion judge, we take no issue with Carullo's assessment, based upon his experience and training, that drugs had just been sold. After defendant's consent to search the car was not obtained, Carullo lawfully requested the trained canine, whose hit indicated drugs were in the car, thereby establishing probable cause. See Dunbar, 229 N.J. at 538 (holding a canine sniff "does not transform an otherwise lawful seizure into a search that triggers constitutional protections"). The warrantless search then ensued.

The circumstances, however, giving rise to probable cause to search defendant's car were not "unforeseeable and spontaneous" as required by Witt to validate a warrantless search. Defendant's car was pulled over by officers after Carullo radioed a description of defendant and his car with the direction to stop him because they believed he had just sold drugs. This investigatory stop was based on surveillance of the warehouse that was initiated by the confidential informant's tip. Stopping defendant's car was not based on some traffic violation, which then led to probable cause to conduct a warrantless search. See Rodriguez, 459 N.J. Super. at 15, 25-26. The pursuit, car stop, and canine sniff were solely based on Carullo and Sorber's beliefs that defendant had drugs in his car. Under Witt, the automobile exception to a warrantless search of defendant's car does not apply as their goal was a clear and deliberate effort to uncover drugs. There was nothing spontaneous about the decision to search defendant's car. A search warrant should have been sought, and it is not speculative to state, it would have been granted under these circumstances.

***4** The State's reliance on State v. Gonzales, 227 N.J. 77 (2016) is misplaced. The State argues Gonzales applied the automobile exception where the police conducted a warrantless search after a lengthy wiretap investigation led them to suspect the defendant had drugs in his car intended to be sold. 227 N.J. at 82-86. In Gonzales, the automobile exception was applied in combination with the plain view exception because the drugs were observed in the car. Id. 104. The Court recognized:

> In Witt, ... we specifically noted that, in the case of a car suspected of containing drugs parked in a driveway, "if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies." 223 N.J. at 448 .... In short, when the police have sufficient time to secure a warrant, they must do so.
>
> [Gonzales, 227 N.J. at 104-05.]

The record here indicates insufficient time was not the reason a search warrant was not obtained. Carullo admitted he could have easily obtained a search warrant but deferred to the Assistant Prosecutor's guidance. Based on our analysis, he was wrongly advised he did not need to secure a search warrant. Under Witt and Rodriguez, the warrantless roadside search of defendant's car was unconstitutional.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2020 WL 2071059

Footnotes

1 Detective Sorber's first name is not disclosed in the record.

2 Carullo testified defendant never got out of the car, and being familiar with the area's traffic conditions, he was certain defendant's short three-minute drive was not enough time to go to a nearby store to make a purchase.

2022 WL 3098551
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent/Cross-Appellant,

v.

Jose R. MORALES-RIVERA, Defendant-Appellant/Cross-Respondent.

DOCKET NO. A-1443-20

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Argued March 14, 2022

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Remanded March 18, 2022

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Resubmitted July 19, 2022

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Decided August 4, 2022

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-04-0066.

Attorneys and Law Firms

Mazraani & Liguori, LLP, attorneys for appellant/cross-respondent (Jeffrey S. Farmer, of counsel and on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney for respondent/cross-appellant (Adam D. Klein, Deputy Attorney General, of counsel and on the briefs).

Before Judges Sabatino and Mayer.

Opinion

PER CURIAM

***1** This matter returns to us pursuant to a March 18, 2022 order temporarily remanding to the trial court "for a ruling on the applicability of the automobile exception under State v. Witt"[1] regarding a motion to suppress physical evidence filed by defendant Jose R. Morales-Rivera.

Shortly before the March 14, 2022 appellate argument date, we discovered counsel failed to supply a transcript of the March 19, 2019 suppression hearing before the trial court. After receiving that transcript, we learned the State had argued in opposition to the suppression motion that law enforcement's warrantless search of defendant's car was justified pursuant to the automobile exception to the warrant requirement under Witt. However, the trial judge did not address this specific argument.

After hearing counsels' appellate arguments, we allowed the parties to submit supplemental briefs regarding the applicability of the automobile exception under Witt to the facts of this case. Subsequently, we issued an order temporarily remanding the matter to the trial court for the limited purpose of ruling on whether the Witt exception justified the warrantless search of defendant's car.

We retained jurisdiction and allowed either party to pursue appellate review after the trial court's remand decision by filing an expanded notice of appeal on behalf of defendant or a notice of cross-appeal on behalf of the State. Consistent with our remand order, the trial judge issued an April 4, 2022 written decision, finding the Witt exception to the warrant requirement inapplicable.

Based on the judge's decision on the remanded issue, the State filed a cross-appeal. We now address the issues raised in defendant's appeal and the State's cross-appeal. For the reasons that follow, we reverse the March 21, 2019 order applying the inevitable discovery doctrine to justify the warrantless search of defendant's car and affirm the April 4, 2022 order finding the automobile exception under Witt inapplicable.

We summarize the facts from the record on defendant's suppression motion. Relying on information provided by a confidential informant, the New Jersey State Police planned a "buy-bust" operation, and arranged for an undercover detective to purchase cocaine from Jose Ventura-Guardado. On January 24, 2018, at approximately 6:00 p.m., Ventura-Guardado placed a telephone call to arrange a drug buy. Around 7:30 p.m., defendant and co-defendant Gerardo Rivera-Robles arrived by car at the apartment complex designated for the physical exchange of drugs and money. The police had no information regarding the make or model of the car being used to complete the drug transaction. Rather, the law enforcement team watched every car entering the apartment complex for indicia of the planned drug deal.

During this timeframe, an undercover officer saw Ventura-Guardado remove a package from a gray Acura driven by defendant. At that moment, the undercover officer gave the "go" signal for other officers involved in the buy-bust operation to arrest all participants.[2] Simultaneously, another officer deployed a flash-bang device to distract the participants involved in the drug exchange. Ventura-Guardado purportedly dropped a package containing drugs into defendant's car when the flash-bang device discharged. Defendant and the co-defendant were arrested as a result of the buy-bust operation.

***2** Three months after his arrest, defendant was indicted on the following charges: second-degree conspiracy to distribute cocaine and launder money, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(1), N.J.S.A. 2C:21-25(a); first-degree possession with intent to distribute cocaine, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(1), and N.J.S.A. 2C:2-6; third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1); and third-degree financial facilitation of criminal activity, N.J.S.A. 2C:21-25(a) and N.J.S.A. 2C:2-6.

Defendant moved to suppress drug-related evidence seized from his car.[3] The motion judge heard testimony on the suppression motion over three non-consecutive days in November and December 2018. Detective Sergeant Jeffrey Gauthier testified for the State. Defendant presented testimony from a private investigator, David Gamble. During the suppression hearings, the State relied on the plain view exception to the search warrant requirement to justify the seizure of the drug evidence found in defendant's car.

Two months prior to the first scheduled suppression hearing, the judge invited counsel to brief the applicability of the inevitable discovery doctrine as a separate exception to the search warrant requirement. At that time, the State maintained the seizure of the cocaine was lawful under the plain view exception.

During the suppression hearings, Detective Gauthier explained his participation in the buy-bust operation. After he received the "go" signal from the undercover officer, Gauthier drove from the off-site location where he parked his car to the apartment complex and assisted in the arrests.

The undercover officer, who did not testify during the suppression hearings, purportedly saw Ventura-Guardado drop the cocaine into defendant's car after a flash-bang device deployed. Because Gauthier was not on scene at the time, the undercover officer reported this information to Gauthier.

With this information, Gauthier turned his attention to defendant's car. According to Gauthier, because the front passenger door was ajar, he noticed cocaine on the passenger side floorboard of the car. Gauthier testified he took several photographs of the cocaine in defendant's car using a personal cell phone. The photographs were admitted as evidence during the suppression hearings. After Gauthier photographed the evidence, a different officer secured defendant's car and removed the cocaine.

Gauthier explained the police towed defendant's car to an impound location and "kept it there in evidence." Counsel stipulated the police "junk titled"[4] the car ninety-nine days after towing the vehicle to the impound lot. According to Gauthier, if he had not seen the cocaine in plain view, he was "absolutely ready for a search warrant based on the information [they] had leading up to that point."

At the next suppression hearing, Gauthier testified he deleted some photographs of the cocaine taken with his personal cell phone. He claimed the deleted photographs were either blurry or distorted. Gauthier denied moving or touching the cocaine in defendant's car while photographing the drugs.

***3** During the final suppression hearing, David Gamble, a former crime scene investigator, produced enhanced versions of Gauthier's original cell phone photographs. The enhanced photographs proffered by Gamble were "zoomed-it" and brighter than the original photographs taken with Gauthier's cell phone. Through Gamble's testimony, defense counsel argued the enhanced photographs demonstrated the cocaine was not on the floor of defendant's car. Rather, Gamble testified the drugs were on the passenger seat because the photographs displayed someone's thumb touching the black plastic bag with the cocaine on the car's seat. Gamble's testimony challenged the veracity of Gauthier's testimony regarding the location of the cocaine, suggesting the evidence had been repositioned before Gauthier photographed it.

At the conclusion of the suppression hearings, counsel presented written summations. In its written summation and during oral argument on defendant's motion, the State asserted the evidence seized from defendant's car was admissible based on the automobile exception under Witt. While the State discussed the automobile exception during the March 19 court proceeding, the judge never ruled on the State's

argument the Witt exception supported the warrantless search of defendant's car.

Based on the testimony, documentary evidence, written submissions, and oral argument, the judge issued a written decision, finding Gauthier's testimony was "contradicted" by Gamble's testimony. Relying on Gamble's testimony and his enhanced photographic evidence, the judge concluded the cocaine in defendant's car had been "located on the seat, rather than on the floor." The judge noted, "[t]he State had the opportunity to rebut Mr. Gamble's interpretation of what was depicted in the photos and they failed to offer any evidence to rebut the testimony of Mr. Gamble."

Due to "many inconsistencies ... in the testimony of Det. Sgt. Gauthier[ ], especially as to material issues pertaining to whether the CDS was observed in plain view ... on the floor in front of the front passenger seat[,]" the judge sidestepped ruling on the State's plain view exception. Rather, the judge denied defendant's suppression motion "because the evidence seized [was] admissible due to the application of the inevitable discovery doctrine."

Because defendant did not dispute the cocaine was in his car and the police towed the car to an impound lot, the judge concluded the police inevitably would have discovered the cocaine during an inventory search. The judge, relying on the two-part inquiry under State v. Mangold, 82 N.J. 575 (1980), determined an inventory search would have been reasonable under the circumstances. To invoke the inevitable discovery doctrine for a warrantless search, the State must prove: (1) impoundment of the property was justified and (2) the inventory procedure was legal. Id. at 583.

In his analysis, the judge held the State satisfied the first prong of the Mangold analysis because there was reasonable and proper justification for the impoundment of defendant's car under N.J.S.A. 2C:43-2.4(a)(5), allowing law enforcement to impound a motor vehicle used in the commission of an offense under N.J.S.A. 2C:35-10(a) or N.J.S.A 2C:25-5. Additionally, citing N.J.S.A. 2C:64-1, the judge found impoundment of defendant's car was proper because "it was subject to forfeiture in light of the fact that it was allegedly used in the course of criminal activity."

After determining impoundment of defendant's car was justified, the judge wrote, "[t]here can be no doubt that even if the contraband was hidden in the vehicle, an inventory search would have resulted in the discovery of the evidence" and "the discovery of this evidence would have occurred wholly independent of the issue of plain view." However, the State presented no evidence regarding law enforcement's procedure associated with an inventory search of impounded vehicles. Consequently, the judge made no fact findings under Mangold's second prong addressing the legality of an inventory search. Despite the absence of any evidence supporting the lawfulness of an inventory search of defendant's car, the judge denied defendant's suppression motion, declaring the evidence seized without a warrant was justified based on the inevitable discovery doctrine.

***4** Defendant moved for reconsideration of the judge's denial of his suppression motion. In an April 26, 2019 order, the judge denied the motion.

Thereafter, defendant pleaded guilty to second-degree possession with intent to distribute cocaine. Defendant reserved the right to appeal the denial of his motion to suppress evidence. In accordance with the negotiated plea, on January 11, 2021, the judge sentenced defendant to an eight-year state prison term.

On appeal, defendant argued the following:

> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AS THERE WAS [NO] TESTIMONY IN THE RECORD CONCERNING EFFORTS TO IMPOUND THE VEHICLE.

When reviewing a motion to suppress, we will "uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Handy, 206 N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). This is especially true of findings "which are substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case ...." State v. Johnson, 42 N.J. 146, 161 (1964). We review a trial court's legal conclusions de novo. Handy, 206 N.J. at 45.

To invoke the inevitable discovery doctrine, the State must clearly and convincingly show the evidence obtained from the illegal police activity would have been discovered independent of a constitutional violation. State v. Sugar (III), 108 N.J. 151, 157 (1987); see also Nix v. Williams, 467 U.S. 431, 443 (1984). Applying this standard, the State must prove that (1) proper investigatory procedures would have been followed; (2) those methods would have inevitably resulted

in the discovery of the evidence; and (3) the discovery would have occurred independent of the unlawful seizure. Sugar (III), 108 N.J. at 156-57.

Under the inevitable discovery doctrine, the State must justify both impoundment of the vehicle and an inventory search of the vehicle. Mangold, 82 N.J. at 583. Here, defendant conceded impoundment of his car was authorized by N.J.S.A. 2C:43-2.4(a)(5). Additionally, because defendant used the car in the commission of a crime, possession of drugs with the intent to distribute, defendant forfeited his property interest in the vehicle. See N.J.S.A. 2C:64-1(a)(2). The police were not required to obtain his consent to search the vehicle or allow defendant to make alternative arrangements before impounding the car. Ibid.

However, even where impounding a vehicle is lawful pursuant to a statute, we must determine whether the judge correctly applied the inevitable discovery doctrine and inventory search exception to justify the warrantless search of defendant's car. The purpose of an inventory search is "protection of the inventoried property while in police custody, shielding the police and storage bailees from false property claims, and safeguarding the police from potential danger." Mangold, 82 N.J. at 581-82 (citing South Dakota v. Opperman, 428 U.S. 364, 369 (1976)). The judge is required to scrutinize the record to determine the reasonableness of an inventory search before admitting evidence seized under this exception to the search warrant requirement. Id. at 584.

***5** To establish the inevitable discovery of evidence through a valid inventory search, we consider the following factors: "the scope of the search, the procedure used, and the availability of less intrusive alternatives ...." Ibid. "Mere lawful custody of an impounded vehicle does not ipso facto dispense with the constitutional requirement of reasonableness mandated in all warrantless search and seizure cases." Ibid. Although the State "need not establish the exclusive path leading to the discovery" of the evidence, it must "present facts sufficient to persuade the court, by a clear and convincing standard, that the [evidence] would be discovered." Sugar (III), 108 N.J. at 158.

Here, the State proffered no evidence related to the reasonableness of an inventory search of defendant's car. Despite the lack of any information regarding an inventory search, the judge concluded, "[t]here can be no doubt that even if the contraband was hidden in the vehicle, an inventory search would have resulted in the discovery of the evidence." The judge offered no explanation why an inventory search in this case would have been reasonable.

We reject the State's argument the police inevitably would have discovered the cocaine and other drug evidence in defendant's car through a lawful inventory search after impounding the vehicle. In this case, law enforcement clearly had the ability to obtain a valid search warrant as part of the buy-bust operation. The operation involved substantial advanced planning, and such planning could have included securing a vehicle suspected to be transporting drugs while law enforcement applied for a search warrant. Approximately thirty-six law enforcement officers participated in this buy-bust operation. Based on the significant number of law enforcement personnel at the scene, on-site officers could have easily secured defendant's car while another officer contacted a judge to obtain a search warrant. In fact, Detective Gauthier testified that had he not seen the cocaine in plain view on the floor of defendant's car, he was prepared to obtain a search warrant.

Based on the evidence adduced during the suppression hearings, we are satisfied the inevitable discovery doctrine did not justify the warrantless search of defendant's car because the State presented no testimony related to the procedure of the inventory search of defendant's car after it was impounded. Thus, we reverse the judge's admission of the drug evidence found in defendant's car under the inevitable discovery doctrine and related inventory search.

During the oral argument on appeal, the State contended our decision in State v. Ford, 278 N.J. Super. 351, 355-56 (App. Div. 1995) justified the warrantless seizure of the drug evidence from defendant's car because any privacy interest was extinguished when the officers saw the cocaine dropped into the car. Because the issue was not briefed, we invited the parties to submit supplemental briefs on this limited issue. Having reviewed the supplemental briefs, we reject the State's argument relying on Ford.

The Ford case involved a surveillance operation where police officers observed the defendant walking along the outside of a house, kneeling down to retrieve an item hidden in a plastic bag, subsequently returning the bag to the location outside of the house, and completing a drug transaction. Id. at 353. After the defendant's arrest, an officer retrieved a bag containing cocaine from the side of the house. Id. at 353-54. In upholding the warrantless search for drugs in Ford, we concluded the "officers' visual observations of the defendants

during [commission of the drug transaction], and given the observation of the contraband and its place of attempted concealment in an exterior portion of [a] house accessible by anyone from the outside without entering the house, no compelling constitutional interests require suppression of the seized contraband from its known location." Id. at 357.

***6** The facts in Ford differ from the facts before us on appeal. Here, while the undercover officer saw a black plastic bag dropped into defendant's car when a flash-bang device deployed, there remained a reasonable expectation of privacy in the car's interior. See State v. Hempele, 120 N.J. 182, 215 (1990) (rejecting the warrantless seizure of curbside garbage because the contents of the closed garbage bag were not exposed to the public). Once the bag dropped into defendant's car, there was no longer potential public exposure to any drug-related activities, unlike in Ford where the drugs located outside a home remained readily accessible to the public.

We next consider whether the warrantless search and subsequent seizure of drug-related evidence from defendant's car was justified under the automobile exception to the warrant requirement enunciated in Witt. On remand, the judge rejected the State's argument the warrantless search of defendant's car was permissible under Witt because the circumstances were not "unforeseeable and spontaneous." Witt, 223 N.J. at 450.

The judge found there was no evidence the location of defendant's car, in the rear parking lot of an apartment complex, posed "a risk to the travelling public as well as to the police" to invoke the Witt exception. He noted "the police had every reason to anticipate and expect that a drug transaction was to take place at or about the designated time and place." The judge made the following factual findings: "there was no threat to the police or the travelling public when the search was performed"; "[t]he search occurred in a parking lot so there was little or no traffic occurring at the time of the search"; "the scene was secured, which mitigated the risk to the travelling public and/or the officers"; and "[d]efendants were placed under arrest so the [d]efendant's detention would not cause any additional prejudice due to the time it would take for either the police to obtain a search warrant or for the vehicle to be impounded and searched." The judge further explained:

> this was a pre-arranged buy-bust operation. There is no dispute that the police fully expected a drug transaction to occur. The police knew in advance where and approximately when the transaction was going to take place. Law enforcement was prepared to immediately secure the location once the transaction did take place. In light of this, the facts fail to establish that the discovery of drugs occurred in a manner that was unforeseeable and spontaneous.

As permitted in our March 18, 2022 remand order, we allowed the State to file a cross-appeal challenging the judge's ruling on the Witt exception to justify the search of defendant's car. On the cross-appeal, the State argues:

> PROBABLE CAUSE TO SEARCH A PARTICULAR CAR AROSE SPONTANEOUSLY AND UNFORESEEABLY, AUTHORIZING THE WARRANTLESS SEIZURE OF THE COCAINE UNDER THE AUTOMOBILE EXCEPTION.

We disagree and affirm.

In Witt, our Supreme Court addressed whether the exigent circumstances test for a warrantless search of an automobile "is unsound in principle and unworkable in practice." 223 N.J. at 414. Finding the exigent circumstances test "[did] not provide greater liberty or security to New Jersey's citizens and has placed on law enforcement unrealistic and impracticable burdens," the Witt Court announced, "[g]oing forward, searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible. However, when vehicles are towed and impounded, absent some exigency, a warrant must be secured." Id. at 450.

Subsequent to the Court's decision in Witt, we decided State v. Rodriguez, 459 N.J. Super. 13 (App. Div. 2019), finding the decision in Witt "afford[s] police officers at the scene the discretion to choose between searching the vehicle immediately if they spontaneously have probable cause to do so, or to have the vehicle removed and impounded and seek a search warrant later." Rodriguez, 459 N.J. Super. at 23.

***7** Here, reasonable, articulable suspicion of a drug activity arose prior to defendant driving his car into the apartment complex parking lot. Specifically, the police suspected drug activity would take place in that parking lot based on information provided by a confidential informant and an undercover officer. The police knew the exact location where the drugs were to be purchased, the day the transaction would take place, and the approximate time of the sale. The police also pre-planned the deployment of a flash-bang device to distract the participants involved in the drug transaction.

When the flash-bang triggered, the undercover officer saw a package containing suspected drugs drop into defendant's car. At that moment, law enforcement had sufficient information and probable cause to seek a search warrant. Given the thirty-six officers involved in the planned operation, defendant's car easily could have been secured while the police obtained a search warrant. The failure to obtain a search warrant under these circumstances supported suppression of the drug evidence seized from defendant's car.

Having reviewed the record, we are satisfied law enforcement participated in a detailed, well-planned operation involving the sale and purchase of illegal drugs. Due to the nature of a buy-bust operation, the very purpose of law enforcement's action was designed to prevent the suspected sale of drugs. The decision to search defendant's car after the police detonated the flash-bang device was not unforeseeable and spontaneous simply because law enforcement did not know the make and model of the car that would be used to transport the illegal drugs. Thus, the trial judge correctly rejected the State's argument in support of the warrantless search under Witt.

The order denying defendant's motion to suppress evidence seized from his car is reversed and the judgment of conviction is vacated. The charges dismissed as part of the negotiated plea agreement are reinstated. The matter is remanded to the trial court for further proceedings regarding the State's charges against defendant.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 3098551

Footnotes

1 223 N.J. 409 (2015).

2 There were approximately thirty-six law enforcement officers on site for the planned buy-bust operation.

3 Defendant sought to suppress the following seized items: a kilo of cocaine; bank records; and cash. Law enforcement removed other evidence from defendant's car during the buy-bust operation. However, the additional evidence was not the subject of defendant's suppression motion.

4 N.J.S.A. 39:10A-8 to -12 permits the issuance of a junk-title certificate so a vehicle may be sold rather than stored forever.