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July 28, 2022

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

**Re: A-50-21 *State v. Cornelius C. Cohen* (084493)**

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

As a result of the legalization of cannabis, going forward, police are not authorized to search a car based on the alleged odor of marijuana (Point I). So, in a sense, this case presents only a limited question: for searches that occurred before the effective date of legalization, what sorts of searches are justified by the smell of marijuana? But the case also presents an opportunity to clarify that the nature of the probable cause dictates the scope of authorized automobile searches (Point II).

Specifically, the Court should clarify that, as a general rule, when probable cause spontaneously develops such that police may search a car, that probable cause only allows them to search the passenger compartment, including the glove compartment and the center console, and, perhaps, the trunk. In order to search other areas – like the engine, the spare tires, the door panels, or the seatbacks – law enforcement must be able to point to specific probable cause to support the additional invasion (Point II, A). Importantly, whenever the search invades the structural integrity of the car – that is, causes damage to the car – police must have specific probable cause to support that sort of search (Point II, B).

In this case, police did not have anything more than a general hunch that the car contained marijuana (Point II, C). The odor of marijuana – unlike other forms of probable cause – cannot be easily verified by extrinsic sources like police body cameras. Judges are left to simply take officers' word about the presence of an

odor. Because of the unverifiable nature of the suspicion, to the extent it creates probable cause, the odor of marijuana is entitled to minimal weight (Point II, C, 1). Here, officers claimed to have smelled marijuana and did not find any in the passenger compartment. They explained that it was *possible* that the smell came from marijuana stored in the engine compartment, the smell of which wafted through the air conditioning vents. But possibility does not equate to probability. The mere possibility that something could happen does not provide the requisite probable cause to support a search (Point II, C, 2).

If the Court reaffirms these core principles of search and seizure jurisprudence, it can provide valuable instruction to police officers in situations certain to occur, even under a system of legalized marijuana.

## Statement of Facts and Procedural History

*Amicus* ACLU-NJ accepts the statement of facts and procedural history contained in the unpublished Appellate Division decision. *State v. Cohen*, No. A-2354-18T2, 2020 WL 1908520 (App. Div. Apr. 20, 2020).

## Argument

### I. As a result of the legalization of cannabis, going forward, the smell of raw marijuana, without more, will not justify even a limited search of a car.

When the Legislature passed and the Governor signed L. 2021, c. 16, the New Jersey Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act (CREAMMA), they anticipated the question this Court must consider: whether, and to what extent, may the smell of marijuana justify the search of a car? The Legislation answers the question clearly and explicitly: "The odor of marijuana or hashish, or burnt marijuana or hashish, shall not constitute reasonable articulable suspicion to initiate a search of a person to determine a violation of" drug laws. L. 2021, c. 16, para. 56(b)(1). Had the stop of Mr. Cohen's car occurred after the effective date of CREAMMA, the alleged smell of raw marijuana would have undoubtedly been insufficient to allow police to search the car.

In his supplemental brief, Mr. Cohen persuasively argues for the retroactive application of CREAMMA's bar on the use of the odor of marijuana in criminal investigations (*see* DSBr[1] 5-6, citing L. 2021, c. 16, para. 61). *Amicus* does not opine on the question of retroactivity, but instead argues that, even under then-existing law, police exceeded the scope of a permissible search.

[1] DSBr refers to Defendant's Supplemental Brief dated March 18, 2022.

## II. Even searches that are lawful at their initiation may become unreasonable based on their scope.

Although some Appellate Division cases suggest otherwise (*see, e.g.*, *State v. Nunez*, 209 N.J. Super. 127 (App. Div. 1993) (holding that observation of burnt marijuana cigarettes in car ashtray justified a full search of the vehicle, including a concealed compartment under the rear window)), under New Jersey law, a "police officer must not only have probable cause to believe that the vehicle is carrying contraband" before searching a car, and "the search must [also] be reasonable in scope." *State v. Patino*, 83 N.J. 1, 10 (1980). This is so because "a search, although validly initiated, may become unreasonable because of its intolerable intensity and scope." *Id.* at 10-11.

In *Patino*, a driver was pulled over and later arrested for driving without a license and possession of a small amount of marijuana. *Id.* at 12. Police then engaged in a thorough search of the car, including the trunk, where they found cocaine. *Id.* at 6. The Court explained that the motor vehicle offense only justified a search of the portions of the car where driving credentials are likely to be found. *Id.* at 12; *cf. State v. Terry*, 232 N.J. 218, 248 (2018) (Rabner, C.J., dissenting) (questioning the legal foundation of the so-called driving credentials exception to the warrant requirement and urging it be "reconsider[ed] rather than reinforce[d]"). The Court also held that the presence of a small amount of marijuana does not "produce facts which lead a trooper to conclude that the search of the entire vehicle

was based upon probable cause." *Id.* at 13. Specifically, the Court determined that "the presence of a small amount of marijuana, consistent with personal use, does not provide a trooper with probable cause to believe that larger amounts of marijuana or other contraband are being transported." *Id.* Thus, police were not entitled to search the trunk or to "extend the zone of the exigent search further than the persons of the occupants or the interior of the car." *Id.* at 14-15.

This makes sense. When police have probable cause and exigent circumstances allowing a search of a home, they cannot search the entire property – home, yard, shed, garage, cars – unless the probable cause and exigency themselves justify the further invasion. *Cf. State v. Rockford*, 213 N.J. 424, 433 (2013) (noting that police sought a search warrant with the suspect's home, shed, and vehicles listed separately);*State v. Dispoto*, 189 N.J. 108, 117 (2007) (explaining that officers sought a search warrant specifically for defendant's garage). That does not mean that police can never expand the scope of a search (*see, e.g.*, *State v. Garbin*, 325 N.J. Super. 521, 526–27 (App. Div. 1999) (authorizing warrantless entry into garage under community caretaking exception to the warrant requirement)); it simply means that authority to search a home does not *necessarily* justify a search of all nearby structures. That is, the scope of the search will be dictated by the nature of the probable cause (or the exigency).

### A. As a general rule, probable cause justifying a search of the passenger compartment of a car will not justify a search of the engine compartment.

There can be a reasonable debate about whether, as a general rule, probable cause justifying the search of a car also allows officers to search the trunk of a car. *Compare Patino*, 83 N.J. at 10 (holding the probable cause generated by presence of marijuana cigarette did not authorize search of trunk) *and United States v. Carter*, 300 F.3d 415, 422 (4th Cir. 2002) ([P]robable cause must be tailored to specific compartments and containers within an automobile") *with State v. Guerra*, 93 N.J. 146, 148 (1983) (allowing search of trunk of impounded vehicle) *and United States v. Rickus*, 737 F.2d 360, 367 (3d Cir. 1984) (stating that police do not need independent reason to search a trunk).

But engine compartments are different. Whereas trunks are primarily used to store and transport objects, the engine compartment's main use is, as the name suggests, to house the engine. The officer in this case explained that he searched that area because "[m]arijuana can fit in the engine compartment." *Cohen*, 2020 WL 1908520 at *2 (alteration in original). But the mere *possibility* that something can happen does not create probable cause justifying a search. *State v. Demeter*, 124 N.J. 374 (1991), illustrates that point. There, a police officer who stopped a van observed a film container in plain view. *Id.* at 378. Because the officer believed that a "high percentage of film containers, when found without cameras,

contained narcotics," (*id.* at 379), he opened it and discovering marijuana residue. *Id.* at 378. In ordering the drugs suppressed, the Court held that the officer's subjective belief about the likelihood of finding contraband did not amount to probable cause. *Id.* at 383. Had the State presented evidence of "regularized police experience that objects such as the film canister are the probable containers of drugs" (*id.*, at 385-86) the result might have been different. But here the State did not even present evidence comparable to that which was rejected as insufficient in *Demeter*: no one testified that marijuana is frequently transported in engine compartments – just that it plausibly could be.

Searches under Article I, Paragraph 7 have never been justified because they *might* turn up contraband; the Constitution demands both probable cause and an exception to the warrant requirement. Here, the State can only rely upon the automobile exception, most recently modified by this Court in *State v. Witt*, 223 N.J. 409 (2015). In that case the Court explained that:

> The United States Supreme Court has identified three rationales for the current automobile exception: (1) the inherent mobility of the vehicle; (2) the lesser expectation of privacy in an automobile compared to a home; and (3) the recognition that a Fourth Amendment intrusion occasioned by a prompt search based on probable cause is not necessarily greater than a prolonged detention of the vehicle and its occupants while the police secure a warrant.
>
> [*Witt*, 223 N.J. 409, 422–23 (citations omitted).]

Although the automobile exception in New Jersey differs from the exception under the Federal Constitution, (*id.* at 447 (explaining that "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")), the rationales that animate them remain the same. Whatever one thinks of the third rationale – that roadside searches are generally no more invasive than securing a vehicle while seeking a warrant – that calculus must change if every automobile search invites not only a search of the passenger compartment, but also the trunk and the engine compartment and presumably the door panels, seat backs, and any other nook or cranny. If every roadside search authorized police to painstakingly poke through peoples' engines, dismantle their door panels, and remove their spare tires, that undermines the rationale that we can dispense with warrants in order to allow motorists to promptly proceed on their way when the search in reality could become anything but prompt.

### B. A search that interferes with a car's structural integrity is unreasonable absent specific probable cause that contraband will be found in a particular portion of the vehicle.

No matter what the Court determines about the permissibility of searches of engine compartments based on the purported smell of raw marijuana, certain maximally invasive searches must not be authorized by generalized probable cause

justifying a search of the car. Specifically, whenever a search interferes with a car's structural integrity, it can only be allowed when there exists not only probable cause to support a search of the automobile, but also specific probable cause to support the idea that contraband will be found in the particular area of the car being disassembled.

This rule breaks no new ground. In *State v. Murray*, 151 N.J. Super. 300 (App. Div.), *certif. den.*, 75 N.J. 541 (1977), the Appellate Division explained that where "the only basis for the search is an empty roach clip and a vial containing traces of marihuana, a search which interferes with the structural integrity of the vehicle itself is fatally excessive in its scope." *Id.* at 308. That case did not create a *per se* rule. Instead, it held that "[w]hether the trunk of the vehicle may properly be opened and searched depends entirely on the factual circumstances apparent to the searching officer." *Id.* The New Jersey Supreme Court approved of *Murray*'s logic in *Patino*. 83 N.J. at 11.

Under long-standing New Jersey search and seizure principles, the Court should, at a minimum, reaffirm that searches that invade the structural integrity of an automobile require specific probable cause that contraband will be found in the particular area to be searched.

### C. Here, police lacked even a reasonable belief that the engine compartment contained contraband.

Applying those principles of law to the circumstances here compels suppression. The facts of the case, set forth in great detail in the Appellate Division opinion, create a lot of noise that can distract from the simplicity of the constitutional analysis. For example, in other contexts – such as an application for a search warrant – the confidential informant's tips about Mr. Cohen's alleged weapons trafficking, (*see Cohen,* 2020 WL 1908520, at *1), would be relevant. But, because the State relies on the automobile exception, which requires not only probable cause but also spontaneity and unforeseeability, (*Witt*, 223 N.J. at 447-48) the only salient facts are those that involved the motor vehicle violations and the officers' later observations.

Trooper Travis, observed a car "'swerve[] over the lines' 'several times' as it 'entered the turnpike northbound,' leading him to suspect that the driver was operating the vehicle under the influence of alcohol." *Cohen,* 2020 WL 1908520, at *2. The Trooper also believed that he observed the E-Z Pass reader indicating the car had not paid the toll. *Id.* Trooper Travis testified that once he stopped the car, he "detected '[a] strong odor of raw marijuana' emanating from the vehicle and observed 'multiple air fresheners hanging from the rearview mirror,'" which he believed were designed to mask the smell of marijuana. *Id.* Finally, Trooper Travis saw some "greenish-brown vegetation" on Mr. Cohen's beard, which he believed

was marijuana residue. *Id.* Another detective, seemingly unknown to Trooper Travis, appeared to confirm the smell of marijuana. *Id.* On that basis, officers began to search the car. They found a spent shell casing inside the glove compartment, but no marijuana. *Id.* at *2, *3. Then, having found no marijuana and having not even undertaken a search of the trunk, Det. Travis popped the hood and began to search the engine compartment. *Id.* at *2.

None of those facts justifies a search of the engine compartment.

**1. Where the police rely on an unverifiable suspicion to justify a search, such as marijuana odor, that suspicion is entitled to only minimal weight and should be evaluated with extreme caution.**

The moving violation and the E-Z Pass violation presumably provided the reasonable suspicion required to justify a stop of the vehicle. But they provide no basis for a search of the car. *See Patino*, 83 N.J. at 12 (holding that driving without a license violation does not authorize a search of the car beyond where driving credentials might be found). There is simply no basis to believe that a search of any portion of the car would produce evidence of unpaid tolls. To the extent that Mr. Cohen's failure to maintain a lane elicited suspicion that he was driving under the influence, that unverified suspicion alone does not justify a search of the car. *See State v. Jones*, 326 N.J. Super. 234, 244-45 (App. Div. 1999) (finding that odor of alcohol on driver's breath, even with nervousness and admission of consumption insufficient to justify search of car for open containers of alcohol);

*but see State v. Irelan*, 375 N.J. Super. 100, 110 (App. Div. 2005) (holding that intoxication of the driver, verified by roadside sobriety tests, provided probable cause to search the vehicle for open containers). Troopers took no steps to confirm or dispel their suspicion about his intoxication; instead they undertook a full-blown search of the car. Having taken no steps to verify their concerns about intoxication, they cannot justify the search on that basis.

Thus, the operative question is whether the smell of raw marijuana justifies a search of the vehicle and, if so, how invasive may that search be? There is little debate that – at least before the legalization of cannabis (*see* Point I, supra)[2] – the smell of raw marijuana provides sufficient probable cause to search an automobile. *Cohen,* 2020 WL 1908520, at *5 (collecting cases for the proposition that "New Jersey courts have [long] recognized that the smell of marijuana itself constitutes probable cause that a criminal offense ha[s] been committed and that additional contraband might be present." (alterations in original)).

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[2] Insofar as New Jersey courts have found that the smell of drugs other than marijuana can create probable cause, the question in this case is certain to persist despite cannabis legalization. *See, e.g.*, *See, e.g.*, *State v. Kearse*, No. A-4059-12T3, 2015 WL 10791400 (App. Div. May 9, 2016) (PCP) (appended as AA1-AA8); *State v. Munguia*, No. A-3395-03T4, 2006 WL 2069174 (App. Div. July 27, 2006) (cocaine) (appended as AA9-17); *State v. Malia*, 287 N.J. Super. 198 (App. Div. 1996) (alcohol). Other jurisdictions have similarly upheld warrantless car searches based on the smell of other substances. *See, e.g.*, *State v. Lloyd*, 263 P.3d 557 (Utah Ct. App. 2011) (crack cocaine); *United States v. Shepherd*, 714 F.2d 316 (4th Cir. 1983) (moonshine); *United States v. Wilson*, 96 F. App'x 640 (10th Cir. 2004) (ether, used for manufacturing meth).

It bears noting, of course, that despite two troopers claiming to smell marijuana, none was found. The trial court gave weight to the "unsolicited" corroboration by another trooper because "there [was] no evidence to suggest the two [troopers] preplanned the conversation to support the search as a result of the notice." *Id.* at *3. But the fact remains that the only element relied upon to supported probable cause could not have been corroborated by the troopers' body cameras and was not corroborated by any subsequent discovery of marijuana. In a world where officers know that their narratives in support of probable cause are often verifiable by extrinsic evidence (*see, e.g.*, *State v. Elders*, 192 N.J. 224, 245 (2007) (requiring deference to motion court's factual findings where they were based on both testimony and a videotape); *State v. Caronna*, 469 N.J. Super. 462, 496 (App. Div. 2021) (evaluating officer's tone of voice, relying on body camera footage)), exclusive reliance on unverifiable forms of suspicion should be evaluated with extreme caution.

To the extent that the unverified and unverifiable odor creates probable cause sufficient to search the car, the Court should be loathe to allow it to do even more than that.

### 2. Police had no basis to believe that the engine compartment contained contraband.

The Appellate Division appropriately held that "[t]he scope of a warrantless search of an automobile is defined by the object of the search and the places where

there is probable cause to believe that it may be found." *Cohen*, 2020 WL 1908520, at *6 (internal citations omitted). But the panel then made an inappropriate logical leap: after detecting "a strong odor of raw marijuana in the car's interior" and being unable "to locate the source after searching the interior" the panel held that troopers were "justified [in] extending the search to the trunk *and the engine compartment*[.]" *Id.* (emphasis added). But as discussed above (Point II, A, *supra*), unlike trunks, engines are not designed primary to store objects and therefore should not be subjected to search absent particularized suspicion that contraband is present there. In this case, troopers indicated that the smell of marijuana *could* travel through air vents from engine compartments. A possibility does not create probable cause.

Because the troopers had no specific basis to search the engine compartment, and because the smell of marijuana does not authorize invasive searches beyond the passenger compartment and, perhaps, the trunk,[3] the contraband seized must be suppressed.

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[3] It cannot be ignored that troopers searched the engine *before* searching the trunk. This unusual approach suggests that when troopers pulled over the car, they intended a full-blown search of the entire car, including the engine compartment, in search of firearms. As the Appellate Division correctly noted, courts must evaluate objective behavior not subjective intent of officers. *Cohen*, 2020 WL 1908520, at *6. But it is one thing for the Court to tolerate pretextual stops; it is another altogether to encourage them. A rule that allows full searches of engine compartments based on the odor of marijuana will encourage police to rely on that

## Conclusion

Searches of cars must both start and remain reasonable. Although troopers were authorized to pull over Mr. Cohen's car and to search the passenger compartment for marijuana, the search of the engine compartment without probable cause that there was marijuana there violated Article I, Paragraph 7. As a result, the Court must order suppression of the evidence seized there.

Respectfully submitted,

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justification whenever they wish to search engine compartments (or any other portion of a car).

# Amicus's Appendix

2015 WL 10791400
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,

v.

Andre KEARSE, a/k/a Kearse Andre, Defendant–Appellant.

A-4059-12T3

Submitted Oct. 19, 2015.

Decided May 9, 2016.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 11–01–0068.

**Attorneys and Law Firms**

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Deborah A. Hay, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges SIMONELLI and SUMNERS.

**Opinion**

PER CURIAM.

*1 Defendant Andre Kearse appeals from the denial of his motion to suppress, his conviction for drug offenses, and his sentence to a twenty-year prison term with ten years of parole ineligibility. Counsel for defendant argues:

*POINT I*

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE STATE'S IMPROPER USE OF THE DEFENDANT'S ALLEGED BAD CHARACTER TO PERSUADE THE JURY TO CONVICT HIM. (Not Raised Below)

*POINT II*

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE ADMISSION OF OTHER–CRIME EVIDENCE WITHOUT A LIMITING INSTRUCTION. (Not Raised Below)

A. THE TRIAL COURT ERRONEOUSLY ADMITTED OTHER–CRIME EVIDENCE.

B. THE TRIAL COURT FAILED TO INSTRUCT JURORS ON THE PERMISSIBLE AND IMPERMISSIBLE USES OF THE OTHER–CRIME EVIDENCE.

*POINT III*

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE IMPROPER ADMISSION OF OPINION EVIDENCE BY A LAY WITNESS. (Not Raised Below)

A. THE WITNESS DID NOT HAVE FIRST–HAND KNOWLEDGE OF THE FACTS.

B. THE STATE'S KEY LAY WITNESS RENDERED A HIGHLY PREJUDICIAL EXPERT OPINION WITHOUT PROVIDING NOTICE OF HIS EXPERTISE, WITHOUT PROVIDING AN EXPERT WITNESS REPORT, AND WITHOUT QUALIFYING AS AN EXPERT AT TRIAL.

*POINT IV*

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE

CONFUSING, INCOMPLETE, AND PREJUDICIAL INSTRUCTIONS ON THE LAW OF INTENT TO DISTRIBUTE CDS. (Not Raised Below)

*POINT V*

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE ACCUMULATION OF TRIAL ERRORS. (Not Raised Below)

*POINT VI*

THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. I OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE UNLAWFUL DETENTION OF THE DEFENDANT.

*POINT VII*

THE SENTENCE IS EXCESSIVE.

A. THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

B. THE COURT MADE FINDINGS OF FACT TO ENHANCE THE SENTENCE.

In his pro se supplemental brief, defendant contends:

*POINT I*

THE COURT ERRED IN AMENDING A DEFECTIVE INDICTMENT [WHERE] THE GRAND JURY COULD NOT INDICT AS A SCHEDULE II CONTROLLED DANGEROUS SUBSTANCE IN ACCORDANCE TO *N.J.S.A.* 2C:35–5(b)(3), WHERE SUBSECTION OF [STATUTE] DOES NOT INCLUDE PHENCYCLIDINE THUS IN VIOLATION OF DEFENDANT'S RIGHT TO INDICTMENT BY GRAND JURY IN VIOLATION OF *N.J. CONST.* ART. I ¶ 8 AND *U.S. CONST.* AMENDMENT 14 DUE PROCESS.

*2 *POINT II*

POLICE OFFICER LACKED REASONABLE AND ARTICULABLE SUSPICION THAT DRIVING WHILE ON A CELL PHONE WAS A MOTOR VEHICLE VIOLATION 4–YEARS PRIOR TO *N.J.S.A.* 39:4–97.3 TAKING EFFECT ON JULY 1, 2014, THUS RENDERING THE STOP ILLEGAL AND THE EVIDENCE MUST BE SUPPRESSED AS FRUITS OF THE [POISONOUS] TREE AND IN VIOLATION OF THE *N.J. CONST.* ART. I ¶ 7, AND *U.S. CONST.* AMEND 4TH AND 14TH. (Not Raised Below)

Having considered these arguments in light of the applicable law and facts, we affirm.

I

We discern the following facts from the record. On October 5, 2010, at approximately 11:20 p.m., New Brunswick police officers Daniel Mazan and Brandt Gregus were patrolling in a marked police cruiser in the vicinity of Lee Avenue and Redmond Street, a high crime area known to be "an open air drug market." The officers witnessed defendant's vehicle cross in front of their patrol car while defendant was talking on his cell phone, in violation of *N.J.S.A.* 39:4–97.3. Based on that observation, the officers conducted a motor vehicle stop.

After pulling defendant's vehicle to the side of the road, the officers exited their vehicle, and approached defendant. Within moments, Mazan smelled the odor of phencyclidine (PCP); he noticed that the scent grew stronger as he got closer to defendant's vehicle. Mazan was familiar with the odor of PCP from his training and experience working on narcotics investigations. Both Mazan and Gregus approached the driver's side, where they encountered defendant, nervous and sweating. Familiar with the dangerous effects of PCP, such as violence, incredible strength, and an increased tolerance to pain, Mazan asked defendant to step out of the vehicle in order to perform a pat-down search for weapons. Defendant complied, and Mazan recovered a bottle containing nineteen grams of PCP from defendant's waistband. Defendant was placed under arrest, and the search incident to arrest revealed a bag containing 1.91 grams of marijuana and $28 in defendant's pants pocket. The arrest took place near the New Brunswick Public Library and the Roosevelt Elementary School.

Middlesex County Indictment No. 11–01–0068 charged defendant with third-degree possession of a controlled dangerous substance (CDS), *N.J.S.A.* 2C:35–10(a)(1) (count one); first-degree possession of less than one-half ounce of CDS with intent to distribute, *N.J.S.A.* 2C:35–5(a)(1) and

*N.J.S.A.* 2C:35–5(b)(3) (count two); third-degree possession of CDS with intent to distribute within 1000 feet of school property, *N.J.S.A.* 2C:35–7 (count three); and second-degree possession of CDS with intent to distribute within 500 feet of a public building, *N.J.S.A.* 2C:35–7.1 (count four).

On April 20, 2012, the motion court took testimony, allowed cross-examination, and heard argument on defendant's motion to suppress.[1] Prior to doing so, at the State's request and with no objection from defendant, the court clarified a clerical error in the indictment: count two was amended from charging defendant with a violation of *N.J.S.A.* 2C:35–5(b)(3), which does not involve PCP, to a violation of *N.J.S.A.* 2C:35–5(b)(6), which does involve PCP.

***3** The State's sole witness, Mazan, testified that he knew of defendant's reputation for violence, which, combined with what he knew about the effects of PCP, increased his caution and concern for his personal safety so as to explain his patting-down defendant for weapons. Defendant did not present any witnesses. The court reserved decision.

On May 25, 2012, the judge issued an oral opinion denying the motion. Citing *State v. Cargill*, 312 *N.J.Super.* 13, 17 (App. Div.), *certif. denied*, 156 *N.J.* 408 (1998), she determined the search was legal. The judge found Mazan had probable cause to stop defendant because defendant violated a motor vehicle offense by talking on his cell phone while driving, and when Mazan smelled PCP as he approached and arrived at defendant's vehicle, Mazan had the right to conduct a pat-down search, finding PCP in defendant's pants pocket.

A jury trial was scheduled to start after a pre-trial conference on October 15, 2012. When defendant did not appear at the pre-trial conference, the judge stayed the proceedings, giving defense counsel twenty-four hours to find his client. In addition, with the consent of defense counsel, the court granted the State's request to amend count two of the indictment from "PCP in a quantity of less than one-half ounce" to "PCP in a quantity of more than 10 grams" in order to reflect the statutory amendment made to the charge at the motion hearing.

After defendant could not be located, the trial proceeded in his absence on October 17 and 18. The State called Mazan to testify, and he reiterated the facts noted above. On cross-examination, Mazan stated that the $28 found on defendant were drug proceeds, based upon the denominations of the bills. The State also presented Investigator Rodney Blount as an expert witness in the field of street-level distribution, packaging, and sales of narcotics. Blount testified as to the effects of PCP, and that in his opinion, someone with the volume of PCP and marijuana, and the amount of cash retrieved from defendant, possessed CDS with the intent to distribute. The defense presented no witnesses.

At the close of the State's case, defense counsel made a motion for a judgment of acquittal of all counts, which was denied. During closing arguments, defense counsel referenced the small amount of currency found on defendant, explaining that defendant was not a drug dealer, but was in fact a drug addict —that the drugs found on defendant were for his personal use, and therefore, he did not possess CDS with the intent to distribute. To the contrary, the State argued that defendant's possession of marijuana, over ten grams of PCP, and the currency, was proof that he had the intent to sell drugs.

Following summations, the trial court instructed the jury. The jury unanimously found defendant guilty of all counts.

On November 30, 2012, the trial judge granted the State's motion to sentence defendant to an extended term of imprisonment as a prior drug distribution offender pursuant to *N.J.S.A.* 2C:43–6(f). The judge found aggravating factors three, six, and nine. *N.J.S.A.* 2C:44–1(a)(3) (the risk to commit another offense); –1(a)(6) (prior record and seriousness of offense); and –1(a)(9) (need for deterrence). Defendant did not argue for any mitigating factors, and the judge did not find that any applied. Concluding that the aggravating factors substantially outweighed the mitigating factors, the judge merged counts one, three, and four with count two, and sentenced defendant to a twenty-year term of imprisonment with a ten-year period of parole ineligibility. In sentencing defendant, the judge rejected the State's request for a forty-year period of incarceration with a twenty-year period of parole ineligibility. This appeal followed.

II

***4** Initially, we note that the majority of the arguments raised by defendant were not raised below. Consequently, our standard of review requires that we find plain error, meaning that defendant must demonstrate that an error was "clearly capable of producing an unjust result." *R.* 2:10–2. In other words, the error was " 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.' " *State v. Taffaro*, 195 *N.J.* 442, 454 (2008)

(quoting *State v. Macon*, 57 *N.J.* 325, 336 (1971)). Defendant must prove that a plain error was clear and obvious and that it affected his substantial rights. *State v. Chew*, 150 *N.J.* 30, 82 (1997) (citation omitted).

Based upon our review of the record, none of defendant's claims constitute plain error. We address the arguments in the order presented.

*Reference to Defendant as a Drug Dealer*

In Point I, defendant asserts that the prosecutor's multiple remarks in summation that defendant was a drug dealer was plain error, because by using a character trait to prove defendant had the intent to distribute CDS, he violated *N.J.R.E.* 404(a). We disagree.

*N.J.R.E.* 404 governs the admissibility of character evidence. Subpart (a) generally prohibits "[e]vidence of a person's character ... including a trait of care or skill or lack thereof ... for the purpose of proving that the person acted in conformity therewith on a particular occasion[.]" *N.J.R.E.* 404(a). However, the prosecution presented no testimony or evidence that defendant was a drug dealer or that defendant had dealt drugs in the past. It was the prosecutor's closing remarks, not a witness's testimony, which referred to defendant as a drug dealer.

In essence, defendant's argument is that the prosecutor's conduct prejudiced his right to a fair trial by contending that he was guilty because he was a drug dealer. To warrant reversal of defendant's conviction, " 'the prosecutor's conduct must have been clearly and unmistakably improper, and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense.' " *State v. Wakefield*, 190 *N.J.* 397, 438 (2007) (quoting *State v. Smith*, 167 *N.J.* 158, 181–82 (2001)), *cert. denied*, 552 *U.S.* 1146, 128 *S.Ct.* 1074, 169 *L. Ed.*2d 817 (2008). One factor to consider is whether there was a proper and timely objection to the comment, *State v. Jackson*, 211 *N.J.* 394, 409 (2012), because the lack of any objection indicates defense counsel "perceived no prejudice." *State v. Smith*, 212 *N.J.* 365, 407 (2012). Yet, where "a prosecutor's arguments are based on the facts of the case and reasonable inferences therefrom, what is said in discussing them, 'by way of comment, denunciation or appeal, will afford no ground for reversal.' " *Smith*, *supra*, 167 *N.J.* at 178 (quoting *State v. Johnson*, 31 *N.J.* 489, 510 (1960)).

***5** We conclude there was no prejudice to defendant's right to a fair trial. First, defendant's failure to object suggests that the prosecutor's comment was not considered prejudicial. Next, when placed in the context of responding to defense counsel's summation that defendant was a drug addict and the nineteen grams of PCP was for personal use, the prosecutor's remarks were fair comment. Furthermore, the trial judge instructed the jury that the argument by counsel was not evidence.

*Other Crimes Evidence*

In Point II, defendant contends that the trial court committed plain error when it violated *N.J.R.E.* 403 and 404(b) by improperly allowing Mazan's testimony that the $28 recovered from defendant were drug proceeds. Defendant maintains that the testimony prejudiced him because he was not charged with selling CDS and it implies that he had committed prior drug sales. Moreover, defendant argues that the trial court failed to instruct jurors on the limited purpose for which other-crime evidence was admitted. We are not persuaded.

Here, not only was there no objection to Mazan's testimony, but it was defendant who elicited the testimony that the seized money was proceeds from the sale of drugs. On direct examination, Mazan merely stated that the money was seized incident to defendant's arrest. It was during defense counsel's cross-examination that Mazan was prompted to provide the disputed testimony. The colloquy was as a follows:

> Q: And in your report, you wrote that the currency was confiscated because it was drug money. Right?
>
> A: Drug proceeds, right.
>
> Q: Drug proceeds from distribution and selling of drugs?
>
> A: Yes.
>
> Q: Right. And I forgot, how many thousands was it?
>
> A: It was $28,000.
>
> Q: $28,000?
>
> A: $28.
>
> Q: $28?
>
> A: Yes.

Q: $28. And it was your determination that that was a result of selling PCP?

A: Yes, due to the denominations of the bills.

To further attempt to undermine Mazan's assertion that defendant had sold drugs or intended to do so, defense counsel reaffirmed Mazan's testimony in his summation when he argued, "I found it interesting when Officer Mazan put into his report, which he testified to there on the stand, that he found $28 [on defendant] which was the proceeds of drug money."

Given that defendant elicited the testimony, his claim is barred by the doctrine of invited error. "Under that settled principle of law, trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal.' " *State v. A.R.*, 213 *N.J.* 542, 561 (2013) (quoting [830] *State v. Corsaro*, 107 *N.J.* 339, 345 (1987) (citation omitted)). As our Supreme Court held in *State v. Williams*, "[t]he doctrine of invited error does not permit a defendant to pursue a strategy of allowing a substitute witness to testify—hopefully to his advantage—and then when the strategy does not work out as planned, cry foul and win a new trial." 219 *N.J.* 89, 101 (2014), *cert. denied*, —— *U.S.* ——, 135 *S.Ct.* 1537, 191 *L. Ed.*2d 565 (2015).

*Mazan's Inadmissible Testimony*

***6** Defendant contends in Point III that since Mazan was not qualified as an expert in drug trafficking and never witnessed defendant conduct a drug transaction, Mazan's testimony that the seized $28 represented drug proceeds was inadmissible opinion evidence pursuant to *N.J.R.E.* 602. In support, defendant cites *State v. Odom*, 116 *N.J.* 65 (1989), and *State v. McLean*, 205 *N.J.* 438 (2011), for the proposition that Mazan was not qualified as an expert to opine there was a connection between the money seized and a drug transaction. Defendant further argues that Mazan's testimony regarding the effects of PCP and its overpowering odor should have been excluded as impermissible lay opinion testimony.

Having concluded defendant's challenge to Mazan's testimony regarding the seized $28 was invited error, we similarly reject his contention that the testimony was improper lay opinion for the same reasons. Besides, defendant's reliance on *Odom* and *McLean* are misplaced.

In *Odom*, our Supreme Court held that under *N.J.R.E.* 702, only an expert could opine as to whether a person was distributing CDS if the question was presented as a hypothetical. *Odom, supra*, 116 *N.J.* at 81–83. In *McLean*, the Court held an arresting police officer conducting surveillance was not qualified to testify that a transaction between two individuals was a suspected drug sale. *McLean, supra*, 205 *N.J.* at 463.

In this case, Mazan, testifying as a fact witness, did not testify that he observed defendant sell CDS, or that defendant had the intent to distribute CDS. Consequently, his testimony was not contrary to *N.J.R.E.* 602, which provides that a witness can only testify regarding his personal knowledge of a particular matter. It was the State's expert, Blount, who opined that defendant had the intent to distribute CDS based upon an hypothetical question involving the same amount of PCP and money possessed by defendant. Thus, the requirements of both *Odom* and *McLean* were satisfied through Blount's testimony.

As for Mazan's testimony regarding PCP, he related his knowledge concerning the odor and effects of PCP with his observations. As Mazan approached defendant's car, his smell of PCP explained his actions leading to defendant's arrest. *See State v. Bealor*, 187 *N.J.* 574, 589–90 (officer may testify concerning observational evidence, such as demeanor and smell of alcohol, to establish basis for arrest). Mazan, therefore, gave permissible testimony.

Moreover, defendant did not object to Mazan's testimony. Accordingly, we conclude Mazan's testimony was not plain error. *R.* 2:10–2.

*Intent to Distribute Jury Charge*

In Point IV, defendant argues that because the trial court instructed the jury that defendant could be found guilty of intent to distribute CDS based upon an attempt to transfer CDS, it was necessary to provide the jury the definition of attempt. Defendant maintains that the trial court violated *State v. Rhett*, 127 *N.J.* 3 (1992), by allowing jurors to convict the defendant of intent to attempt distribution of CDS based upon a knowing, rather than, purposeful, state of mind. Therefore, under *State v. Federico*, 103 *N.J* 169, 176 (1986), even absent defendant's request, the failure to give such instruction amounts to prejudicial error.

***7** We are mindful of some well-settled principles. " '[A]ppropriate and proper charges to a jury are essential for a fair trial.' " *State v. Collier*, 90 *N.J.* 117, 122 (1982) (quoting *State v. Green*, 86 *N.J.* 281, 287 (1981)). A defendant is

entitled "an adequate instruction of the law." *State v. Pleasant,* 313 *N.J.Super.* 325, 333 (App.Div.1998) (citation omitted), *aff'd,* 158 *N.J.* 149 (1999). However, where a "defendant did not object to the jury instructions at trial, we must apply the plain error standard." *State v. Burns,* 192 *N.J.* 312, 341 (2007) (citing *R.* 2:10–2; *State v. Torres,* 183 *N.J.* 554, 564 (2005)). With regard to 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." *Ibid.* (alteration in original) (quoting *State v. Jordan,* 147 *N.J.* 409, 422 (1997)).

An "error in a jury instruction that is 'crucial to the jury's deliberations on the guilt of a criminal defendant' is a 'poor candidate[ ] for rehabilitation' under the plain error theory." *Ibid.* (alteration in original) (quoting *Jordan, supra,* 147 *N.J.* at 422). Nevertheless, any such error is to be considered "in light of 'the totality of the entire charge, not in isolation.' " *Ibid.* (quoting *State v. Chapland,* 187 *N.J.* 275, 289 (2006)). Moreover, "any alleged error also must be evaluated in light 'of the overall strength of the State's case.' " *Ibid.* (quoting *Chapland, supra,* 187 *N.J.* at 289).

Defendant's reliance on *Federico* to support reversal is misplaced. In *Federico,* our Supreme Court rejected the defendant's objections that the jury instructions were missing required elements. The defendant contended that the trial court did not instruct the jury that the State had the burden to disprove the unharmed release of the victim, an element of first-degree kidnapping, *N.J.S.A.* 2C:13–1(c). *Federico, supra,* 103 *N.J.* at 176. The Court reversed the conviction, reasoning that to "mold the verdict to constitute a conviction for second-degree kidnapping" would "force [it] to speculate about how the jury would have determined the matter if it had been properly charged." *Id.* at 176–77 (citation omitted).

Here, the court gave the proper model jury charges regarding possession of CDS with the intent to distribute. As there was no allegation that defendant distributed or attempted distribution of CDS, it was not necessary to instruct the jury regarding the law of actual or attempted distribution. Unlike the situation in *Federico,* we are not forced to speculate as to what the jury would have decided if it had been given the definition of attempt. Furthermore, defendant's possession of marijuana and nineteen grams of PCP, in an area where open drug sales was prevalent, were more than sufficient evidence to support a verdict of possession with the intent to distribute.

*Cumulative Errors*

***8** In Point V, defendant contends that the cumulative effect of the impermissible testimony served to unduly prejudice defendant and requires reversal. We disagree.

When multiple errors are alleged, "the predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair." *Wakefield, supra,* 190 *N.J.* at 538. Given our conclusion that there were no errors with respect to the disputed testimony, the argument of cumulative prejudice fails.

III

In Point VI, defendant contends the court erred in denying his motion to suppress evidence based upon an unlawful stop of his motor vehicle by the police. Specifically, defendant argues that only under *N.J.S.A.* 39:3B–25, which prohibits talking on a cell phone while driving a school bus, could he be subjected to a motor vehicle stop. Additionally, in his pro se supplemental brief, defendant asserts that *N.J.S.A.* 39:4–97.3 did not take effect until July 1, 2014, nearly four years after he was stopped for using a cell phone while driving, and therefore did not justify the stop. We disagree.

We begin by noting our standard of review. It is well understood that when considering a trial court's ruling on a motion to suppress evidence, "[w]e conduct [our] review with substantial deference to the trial court's factual findings, which we 'must uphold ... so long as those findings are supported by sufficient credible evidence in the record.' " *State v. Hinton,* 216 *N.J.* 211, 228 (2013) (quoting *State v. Handy,* 206 *N.J.* 39, 44 (2011)). "When ... we consider a ruling that applies legal principles to the factual findings of the trial court, we defer to those findings but review de novo the application of those principles to the factual findings." *Ibid.* (citing *State v. Harris,* 181 *N.J.* 391, 416 (2004), *cert. denied,* 545 *U.S.* 1145, 125 *S.Ct.* 2973, 162 *L. Ed.*2d 898 (2005)).

In this case, the parties agree that the sole issue is a question of law: whether the police had the right to stop defendant because he was talking on his cell phone while driving. Thus, our review is de novo.

The stop of a motor vehicle is lawful if the authorities have a reasonable and articulable suspicion that violations of motor vehicle or other laws have been or are being committed. *State v. Carty*, 170 *N.J.* 632, 639–40, *modified on other grounds*, 174 *N.J.* 351 (2002). At the time defendant was stopped for talking on his cell phone while driving, *N.J.S.A.* 39:4–97.3(a) provided: "the use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free[.]"

Here, there is no challenge to the trial judge's finding that there was reasonable and articulable suspicion that defendant was talking on his cell phone while operating a motor vehicle. Thus, we conclude the motion to suppress was properly denied as there was a lawful detention of defendant's motor vehicle followed by a subsequent legal search and seizure.

IV

***9** Turning to defendant's challenge to his sentence, he argues that the record does not support an extended-term sentence, and that his sentence was excessive. Specifically, defendant contends that the trial court improperly balanced the aggravating and mitigating factors, and made findings of fact to support the imposition of an enhanced sentence not found by the jury. Defendant also argues that the court performed no psychological risk analysis test nor cited any evidence other than the instant conviction and defendant's prior record to indicate support of aggravating factor three, and that since factor nine is applied in all sentencing courts, it has lost its value as a meaningful factor. *N.J.S.A.* 2C:44–1(a)(3) (the risk of re-offense); and –1(a)(9) (the need for deterrence). Further, defendant contends that mitigating factors one and twelve should have been applied. *N.J.S.A.* 2C:44–1(b)(1) (conduct neither caused nor threatened serious harm); and –1(b)(12) (willingness of the defendant to cooperate with law enforcement authorities).

We begin by noting that review of a criminal sentence is limited. A reviewing court must decide "whether there is a 'clear showing of abuse of discretion.' " *State v. Bolvito*, 217 *N.J.* 221, 228 (2014) (quoting *State v. Whitaker*, 79 *N.J.* 503, 512 (1979)). Under this standard, a criminal sentence must be affirmed unless: "(1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.' " *Ibid.* (alteration in original) (citation omitted). If a sentencing court properly identifies and balances the factors and their existence is supported by sufficient credible evidence in the record, this court will affirm the sentence. *See State v. Carey*, 168 *N.J.* 413, 426–27 (2001); *State v. Megargel*, 143 *N.J.* 484, 493–94 (1996).

We are not persuaded that the court erred in sentencing defendant. First, we address defendant's argument concerning his extended-term sentence. Upon the State's motion, a trial court shall impose an extended-term sentence in accordance with *N.J.S.A.* 2C:43–6(f) which provides:

> A person convicted of ... possessing with intent to distribute any ... controlled substance ... under *N.J.S.A.* 2C:35–5, ... who has been previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog, shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by subsection c. of *N.J.S.A.* 2C:43–7, notwithstanding that extended terms are ordinarily discretionary with the court.

In sentencing a defendant to an extended term pursuant to *N.J.S.A.* 2C:43–6(f), the court may impose a prison term between twenty years to life for convictions of first-degree crimes. *N.J.S.A.* 2C:43–7(a)(2). In this case, the judge granted the State's extended-term motion for possession with the intent to distribute PCP based upon defendant's three prior CDS distribution convictions in 1989, 1993, and 2002. The judge exercised her discretion to impose the minimum prison term of twenty years with a ten-year period of parole ineligibility. In doing so, she rejected the State's request for twice the amount of prison time.

***10** In accord with the record, the judge appropriately weighed the aggravating and mitigating factors. We find support for the aggravating factors that were applied, and no basis for the mitigating factors asserted by defendant. The sentence does not shock the conscience. Therefore, we shall not second-guess and disturb the trial court's findings. *See State v. Bieniek*, 200 *N.J.* 601, 608–09 (2010); *State v. O'Donnell*, 117 *N.J.* 210, 215–16 (1989).

V

Lastly, defendant contends in his pro se supplemental brief that the court erred in amending the indictment because *N.J.S.A.* 2C:35–5(b)(3) does not include PCP as a CDS, and by doing so, the court elevated the offense from a third-degree offense to a first-degree offense. We disagree.

On the return date of the motion to suppress, the court agreed, with no objection from defendant, to the State's request that the indictment be amended to correct a typographical error. Although count two stated the offense being charged was first-degree, it erroneously stated defendant was charged with a violation of *N.J.S.A.* 2C:35–5(b)(3), a third-degree offense which does not include PCP, instead of the correct *N.J.S.A.* 2C:35–5(b)(6), a first-degree offense which does include PCP. The amendment did not elevate count two from a third-degree crime to first-degree, as it was clear that defendant was charged with a first-degree offense. Such correction was in conformity with *Rule* 3:7–4, which provides in part that a court "may amend" an indictment

> to correct an error in form or the description of the crime intended to be charged or to charge a lesser included offense provided that the amendment does not charge another or different offense from that alleged and the defendant will not be prejudiced thereby in his or her defense on the merits.

Thereafter, when defendant failed to appear at trial, defense counsel agreed with the State's request that count two be further amended to reflect that defendant was in possession of "more than 10 grams" of PCP as set forth in *N.J.S.A.* 2C:35–5(b)(6), rather than possession with intent to distribute PCP "less than one-half ounce," the language of *N.J.S.A.* 2C:35–5(b)(3), which had been deleted from the indictment. Permitting the late amendment of the indictment, the trial court explained:

> Since there is no objection and the [c]ourt finds that the fact that the wording indicates or should reflect more than 10 grams as opposed to the fact that it reflects less than one-half ounce, that it does not impact or [change] the degree of the crime or in any way increases any penalty or anything of that nature.
>
> So that even though [defendant], again, is not here today, his [a]ttorney is here. He is schooled in the ways of the legal profession[,] and I see no reason why his non-objection to the amending of the wording of the statute should not be given credence.

Both amendments reflect the facts alleged against defendant. *See, e.g., State v. Witte*, 13 *N.J.* 598, 607 (1953) ("The critical inquiry is whether the amendment would charge an offense not presented by the grand jury."), *cert. denied*, 347 *U.S.* 951, 74 *S.Ct.* 675, 98 *L. Ed.* 1097 (1954). Thus, we conclude that the amendments were consistent with *Rule* 3:7–4.

***11** Affirmed.

**All Citations**

Not Reported in A.3d, 2015 WL 10791400

Footnotes

1 The court also heard argument on defendant's motion to compel discovery. The motion was denied, and is not an issue on appeal.

2006 WL 2069174
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,

v.

Mario MUNGUIA, Defendant-Appellant.

Submitted Jan. 11, 2006.

Decided July 27, 2006.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 00-10-0594.

**Attorneys and Law Firms**

Yvonne Smith Segars, Public Defender, attorney for appellant (Cynthia McCulloch DiLeo, Designated Counsel, on the brief).

Peter C. Harvey, Attorney General, attorney for respondent (Frank Muroski, Deputy Attorney General, of counsel and on the brief).

Before Judges STERN, PARKER and MINIMAN.

**Opinion**

PER CURIAM.

*1 Following the denial of his motion to suppress, defendant was tried and convicted of first degree possession with intent to distribute cocaine in a quantity of five ounces or more, *N.J.S.A.* 2C:35-5a(1) and *N.J.S.A.* 2C:35-5b(1) (count one); possession of cocaine, *N.J.S.A.* 2C:35-10a(1) (count two); possession of a firearm while possessing a controlled dangerous substance with the intent to distribute, *N.J.S.A.* 2C:39-4.1a (count three); possession of a handgun without a permit, *N.J.S.A.* 2C:39-5b (count four); and possession of a defaced firearm, *N.J.S.A.* 2C:39-3d (count five). After the merger of convictions, defendant was sentenced to an aggregate term of twenty-two years with seven years to be served before parole eligibility.

On this appeal, defendant argues:

POINT I THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION TO SUPPRESS THE WARRANTLESS SEARCH OF MR. MUNGUIA'S VAN.

POINT II PURSUANT TO *N.J.[R.E.]* 410 THE TRIAL COURT ERRED IN ALLOWING STATEMENTS MADE BY THE DEFENDANT DURING AN UNSTIPULATED POLYGRAPH EXAM WHICH THE STATE AGREED NOT TO USE FOR ANY PURPOSE AT TRIAL. (NOT RAISED BELOW.)

POINT III THE STIPULATED STATE POLYGRAPH WAS IRREPARABLY TAINTED BY THE UNCONSTITUTIONAL INTERROGATION OF THE DEFENDANT IMMEDIATELY FOLOWING THE EXAM, THEREFORE THE RESULTS SHOULD HAVE BEEN EXCLUDED FROM TRIAL. IN THE ALTERNATIVE, THE DEFENSE SHOULD HAVE BEEN ALLOWED TO QUESTION THE VALIDITY OF THE STATE'S EXAM WITH ITS OWN EXPERT.

POINT IV THE SENTENCE IMPOSED ON THE DEFENDANT IS SO EXCESSIVE AS TO CONSTITUTE AN ABUSE OF DISCRETION.

In addition, in his supplemental *pro se* brief, defendant argues the following points:

*POINT I*

NEW JERSEY'S SENTENCING STATUTES ARE UNCONSTITUTIONAL BECAUSE THEY ASSIGN TO JUDGES THE TASK OF FINDING AGGRAVATING FACTORS UNDER THE PREPONDERANCE-OF-THE EVIDENCE STANDARD IN ORDER TO IMPOSE A SENTENCE HIGHER THAN THE ONE AUTHORIZED SOLELY BY THE JURY'S VERDICT.

A. *N.J.S.A.* 2C:44-1(f)(1) IS UNCONSTITUTIONAL BECAUSE IT MANDATES IMPOSITION OF A PRESUMPTIVE TERM BUT PERMITS JUDGES TO IMPOSE A HIGHER SENTENCE BASED ON JUDICIAL FACT-FINDING UNDER THE PREPONDERANCE OF THE EVIDENCE BURDEN OF PROOF.

1. THE PRESUMPTIVE SENTENCE SPECIFIED IN *N.J.S.A.* 2C:44-1f(1) IS THE ONLY ONE AUTHORIZED BY A JURY'S VERDICT.

2. THE LEGISLATURE CLEARLY INTENDED TO FIND, BY A PREPONDERANCE OF THE EVIDENCE, THE STATUTORY AGGRAVATING FACTORS THAT RESULT IN A SENTENCE HIGHER THAN THE PRESUMPTIVE TERM.

*POINT II*

THE VERDICTS WERE SHARPLY AGAINST THE WEIGHT OF THE EVIDENCE, NECESSITATING REVERSAL.

Our careful review of the record convinces us that these contentions are without merit and do not warrant reversal of the convictions, and that only the following discussion is warranted. *R.* 2:11-3(e)(2).

I.

On October 2, 2000, at around 3:00 p.m., Detective Joseph Walsh of the Somerset County Prosecutor's Office met with Marcos "Mickey" Fontanez, who had been arrested and charged with CDS offenses, and became a "confidential informant contracted by the Somerset County Prosecutors Office." Facing a maximum sentence of ten years imprisonment with up to five years of parole ineligibility for possession of two ounces of cocaine with intent to distribute, Fontanez signed a contract with the Somerset County Prosecutor's Office agreeing to provide information regarding drug activity in exchange for the prosecutor's "recommendation to the sentencing judge, based on the contract informer's cooperation[.]" Thereafter, Fontanez was released from jail on bail and assisted the Prosecutor's Office in developing cases against drug dealers.

***2** Detective Walsh met with Fontanez "almost daily" between September 25, 2000, and October 2, 2000. During this period, Fontanez provided information to Detective Walsh which led to two arrests before the transaction in question. As such, Detective Walsh considered Fontanez to be a reliable informant.

On October 2, 2000, Fontanez told Detective Walsh that he could arrange a "delivery of cocaine" by a man named "Mario" from whom he had "bought cocaine ... on previous occasions."[1] Fontanez described Mario as a "short," "stocky," Hispanic male with a "[t]hin-outlined goatee" and a "bald head." He said Mario was from New Brunswick and drove a blue Ford "work type" van with "ladder type racks on it." Fontanez stated that he had purchased drugs from Mario on several occasions in the past, and that Mario "was seen with a handgun" on some of these occasions.

At Detective Walsh's instruction, Fontanez called defendant on his cell phone and arranged for defendant to deliver 500 grams of cocaine to the ShopRite Plaza on Route 27 between 6:30 and 7:00 p.m. that evening. Detective Walsh asked Fontanez to speak to defendant in English so Walsh "could hear what was going on," but Fontanez "drifted" into Spanish at some points during the conversation.

After his meeting with Fontanez, Detective Walsh returned to the narcotics task force office to report to his supervisors, who authorized him to proceed with the operation that evening. However, due to the "risk" posed to the undercover officers by the possible handgun and the amount of drugs and money involved, they "decided not to do a drug purchase."

At approximately 6:00 p.m. that evening, undercover police cars containing six officers established surveillance in the ShopRite parking lot to await the blue van. At 6:45 p.m., Fontanez called defendant to determine when he would arrive. After this conversation, Fontanez informed the officers that "Mario was en [ ]route to [the] location" and "that there was another person in the van ... with Mario" because he heard a voice in the background while they were on the phone.

At 7:00 p.m., Detective Francisco Roman informed Detective Walsh, by radio transmission, that a blue work van with "ladder racks" had arrived at the Plaza. A man matching the description of "Mario" exited the van and walked into the ShopRite. Detective Roman parked behind the van to block it in. Although it was after nightfall, the parking lot was "well-lit."

Several moments after defendant exited the van, the lights inside the van shut off. The van appeared too old to have courtesy lights, which reaffirmed the officers' suspicion that there was someone else with defendant. Detective Walsh and his partner, Investigator Price, approached and shined their flashlight inside the van to ascertain if anyone was inside. They "couldn't see anyone through there" but could not see all areas of the van.

Meanwhile, Sergeant Christopher Shea and Detective Lewis DeMeo of the Prosecutor's Office approached defendant as he exited the ShopRite. They verbally identified themselves as officers, and also wore "raid" jackets and badges around their necks. In this way, defendant had no time to draw a weapon in anticipation of the drug transaction. According to the officers, defendant assumed a "boxing stance" as though he were ready for a fight. Therefore, Detective DeMeo brought defendant to the ground and Sergeant Shea handcuffed him. Detective DeMeo patted defendant down and found a small bag of marijuana in his sock. He then placed defendant under arrest. Defendant told the officers that his name was "Luis Rivera ." However, Sergeant Shea retrieved defendant's wallet from his pocket and found identification in the name of "Mario Munguia," as well as a driver's license in the name of "Luis Rivera."

***3** Sergeant Shea took the van keys from defendant's pocket and gave them to Detective Walsh. Defendant was taken to the van. In the interim, Fontanez was driven by, and positively identified defendant as the target of the investigation.

Detective Walsh opened the front passenger door of the van and found that no one was inside. He immediately detected a "very acrid, pungent odor" in the van, which he recognized from his experience to be indicative of large volumes of cocaine. Investigator Eric Goleskie came over to assist Detective Walsh and also detected the odor.

Investigator Goleskie searched the van. From underneath the dashboard on the passenger side, he pulled out a black plastic shopping bag containing six clear-plastic bags. The bags contained powdered cocaine. Investigator Goleskie then pulled out a nine millimeter handgun wrapped inside a T-shirt. The gun was loaded but had no bullets in its chamber. The serial number had been removed. A cellular phone was also recovered from the van.

The handgun was later tested, and defendant stipulated that it was determined to be "fully operational." The suspected cocaine was also tested and confirmed to be cocaine in the amount of 14.91 ounces. At trial, Sergeant Shea, who was qualified as an expert in narcotics distribution, testified that the cocaine had a wholesale value of approximately $11,000 to $13,000, and a street or resale value of approximately $30,000. Sergeant Shea stated that in his expert opinion, one who possessed cocaine under such circumstances did so with the intent "to distribute."

After the State presented its case, defendant asked the State to produce Fontanez as a witness. The State declined. Defendant then sought permission to call Fontanez as an adverse witness, and to introduce certain records pertaining to Fontanez' contract with the State and his role in defendant's arrest. The trial court denied defendant's motion, holding that the jury already knew Fontanez' background, and that the documents sought did not "go to the credibility" of the defense. However, the court concluded that defendant was entitled to a *Clawans* jury charge based on the State's failure to produce Fontanez as a witness. *See State v. Clawans*, 38 *N.J.* 162 (1962).

Defendant testified in his own defense. He admitted to knowing that the cocaine and handgun were in his van on the day he was arrested, and to lying during a stipulated State polygraph examination. However, he claimed that he was entrapped into possessing the cocaine by Fontanez and the police as part of a plan to help pay for the healthcare needs of Fontanez' father, whom defendant testified was a good friend of his. According to defendant, it was "the only way that this man can continue living," and he "want[ed] to help [Mikey's] father."

Defendant also admitted that he did not have a permit for the handgun, and that he carried a driver's license bearing the name "Luis Rivera" because he did not have a license of his own. Finally, defendant admitted that he had previously been convicted of receiving stolen property in 1992.

***4** The jury was given the *Clawans* charge and instructions on entrapment. No error is assigned to the charge.

II.

Defendant asserts that his motion to suppress should have been granted, and that the drugs and handgun found in his van should have been suppressed, because the police failed to obtain an "anticipatory warrant" in advance of the anticipated transaction at the ShopRite Plaza. We reject this contention.

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...." *U.S. Const.* amend. IV; *see also N.J. Const.* art. 1, ¶ 7. "Probable cause for a search or arrest exists where a police officer has a well-founded suspicion or belief of guilt." *State v. Foreshaw*, 245

*N.J.Super.* 166, 172 (App.Div.) (internal citations omitted), *certif. denied,* 126 *N.J.* 327 (1991). The search of defendant's van was without a warrant and the van was not within defendant's reach at the time of his arrest.

There is no dispute that "search warrants are strongly favored" under the federal and New Jersey constitutions, *State v. Malik,* 221 *N.J.Super.* 114, 118 (App.Div.1987), and that "[t]he requirement that a search warrant be obtained before evidence may be seized is not lightly to be dispensed with...." *State v. Cooke,* 163 *N.J.* 657, 664 (2000) (quoting *State v. Alston,* 88 *N.J.* 211, 230 (1981)). In fact, "[a] warrantless search is presumed invalid unless" the State can establish that the search fell "within one of the recognized exceptions to the warrant requirement." *Ibid.; State v. Patino,* 83 *N.J.* 1, 7 (1980).

The trial judge rejected defendant's argument that the search was invalid for lack of an anticipatory warrant. The judge concluded that the police could not have obtained an anticipatory warrant because "probable cause [only] arose once the police observed a blue Ford van, work van with ladders, driven by the Defendant, matching the identifying information supplied by the informant, arrive at ShopRite at seven o'clock." According to the judge, "[b]y that time, it was too late and not practical to obtain a warrant," and, therefore, "the search did not require a warrant," particularly because the police suspected that another person, and perhaps a handgun, were in the van.

Before us, defendant argues that the warrantless search was invalid because "[i]n situations such as this, where probable cause exists [by virtue of information received from a reliable informant] at 3:00 p.m. for a search that is to take place at 7:00 p.m., the police are encouraged to procure an anticipatory warrant."

Defendant relies on *State v. Williams,* 168 *N.J.Super.* 352 (App.Div.1979). In *Williams,* the police received an anonymous telephone call at 10:00 a.m. to report a theft from a warehouse. *Id.* at 355. The caller provided detailed information about the crime, including the license plate number of the van being used to transport the stolen goods, the van's location in the warehouse parking lot, and the fact that it would be driven out of the lot at 3:00 p.m. that day. *Ibid.* The police waited until 4:30 p.m., when the owner of the van returned and began driving out of the parking lot, before stopping the van and conducting a warrantless search. *Id.* at 356. The Williams Court found that "probable cause clearly existed at 2:00 p.m.", at which time the van was parked in the lot, the police confirmed its presence and that it matched the information received, and a warrant could have been obtained. *Id.* at 357. Hence, "the failure to obtain a warrant was fatal to the search." *Id.* at 358.

***5** *Williams* is distinguishable because the van was parked and unoccupied for several hours after the police had probable cause to search it, and the police failed to obtain a warrant during that time. *Id.* at 356-58. Here, defendant's van was not accessible or observable to the officers until 7:00 p.m., when defendant arrived in the ShopRite parking lot, and probable cause arose when the informant's tip was corroborated at that time.

Defendant also relies on *State v. Ulrich,* 265 *N.J.Super.* 569 (App.Div.1993), *certif. denied,* 135 *N.J.* 304 (1994). In *Ulrich,* we approved the use of an anticipatory warrant where "there is a 'reasonable probability that the contraband will reach its destination before execution of the warrant because of the controlled delivery by the authorities.' " *Id.* at 574 (quoting *State v. Mier,* 147 *N.J.Super.* 17, 21 (App.Div.1977)). At the same time, however, we cautioned that "it is only the strong probability that the seizable property will be on the premises when searched that distinguishes the anticipatory warrant from the hated general writs of assistance of pre-Revolutionary times." *Id.* at 575 (internal citations and quotation marks omitted). We therefore required that the warrant condition the search "to be executed only if and when the specifically described event which gives rise to probable cause actually occurs." *Id.* at 576. We limited our holding, stating that "we need not here, and hence do not, endorse the use of an anticipatory warrant in circumstances other than the controlled delivery of contraband [.]" *Ibid.*

It is notable that *Ulrich* concerned a home, and not a vehicle which may or may not have arrived at the designated time and place to confirm the tip. Accordingly, we find no need for an anticipatory warrant in this case. *See Foreshaw, supra,* 245 *N.J.Super.* at 178-79 (search of vehicle at 4:30 p.m. based on informant's tip at 10:00 a.m. upheld because probable cause to search did not exist until police corroborated tip and assessed informant's veracity at 4:30 p.m.); *State v. Probasco,* 220 *N.J.Super.* 355, 358-59 (1987) (search of vehicle at 9:00 p.m. based on informant's tip at 5:30 p.m. upheld because probable cause to search did not exist until police stopped the vehicle and corroborated the tip), *certif. denied,* 117 *N.J.* 72 (1989); *State v. Bell,* 195 *N.J.Super.* 49, 55, 58 (App.Div.1984) (police "did not act unreasonably when they

searched [an] automobile without an anticipatory warrant" even though they were acting on a corroborated tip from a reliable informant because it is "well established that there is no requirement that the Government obtains a warrant at the first moment probable cause exists." (internal citations omitted)); *State v. Mier*, 147 *N.J.Super.* 17, 21-23 (1977) (noting the dangers attendant upon the issuance of a warrant prior to the consummation of a crime, but upholding the use of anticipatory warrants in the specific context of a controlled delivery).

*6 In addition to holding that an anticipatory warrant was not required, the trial court held that the search fell under the automobile exception to the warrant requirement and was also a search incident to arrest. Stating that the "[s]earch of the van was permissible under the auto exception," the court explained:

> [T]he police had reason to believe the vehicle contained drugs and a handgun. And also, reasonable basis to believe there was the second person still afoot. The confidential informant confirmed in conversation that the Defendant would deliver the cocaine at about seven o'clock at Shop Rite. The informant advised the task officers that the Defendant would attempt to hide the drugs in the van. He alerted the police that he had personally seen the Defendant in possession of a handgun in the past and also thought, based on the phone call, the second phone call, that there was a second person in the van, at least at the time of the phone call.
>
> The Defendant responded to the [informant's] phone call, arriving at approximately the time given. The information now was sufficient for probable cause to be established as to the Defendant. And as to the vehicle, the courts are convinced the exigent circumstances were sufficient to require an immediate search of the vehicle.
>
> The degree of exigency is heightened when the police are involved in an ongoing investigation of events occurring close in time to the search....
>
> The task force believed that another may be in the vehicle due to the information received.
>
> ....
>
> Further, the [informant] alerted the officers that the Defendant was known to carry a gun. The time period between the establishment of the probable cause and the arrival of the Defendant was instantaneous. These were rapidly occurring events and, in this circumstance, the Police were dealing not only with illegal drugs, but a situation where a person was reported to be armed, which made the situation extremely dangerous. So dangerous that the police had to change their tactics in how to deal with this particular case, and change from a purchase to a delivery situation, so that the undercover officer would not be put at risk.
>
> So I find that the evidence seized from the van would be admissible. That the officers took reasonable action under the circumstances of the case.

We agree with this analysis. "[A] search warrant [is] unnecessary when the police stop an automobile on the highway and have probable cause to believe that it contains contraband or evidence of a crime." *State v. Alston*, 88 *N.J.* 211, 230-31 (1981). The automobile exception applies to "moving or readily movable vehicle[s,]" including parked cars on public streets as well as cars stopped on highways. *Cooke, supra*, 163 *N.J.* at 667 (quoting *Patino, supra*, 83 *N.J.* at 9). "The primary rationale for this exception lies in the exigent circumstances created by the inherent mobility of vehicles that often makes it impracticable to obtain a warrant." *Alston, supra*, 88 *N.J.* at 231. Thus, under the New Jersey Constitution, a warrantless search of an automobile requires both probable cause *and* exigent circumstances that make it "impracticable" to obtain a warrant. *Cooke, supra*, 163 *N.J.* at 670.

*7 In this case, probable cause is not in dispute, as recognized by defendant's belief that an anticipatory warrant could have been obtained. Defendant argued at the suppression hearing that:

> [T]he only thing that the police had to be concerned about in dealing with this situation was their own safety, based upon the potential possibility of a weapon being present and the potential possibility of another individual being involved.... *But they certainly had probable cause to get a warrant to search the car.*
>
> [Emphasis added.]

However, defendant argues, as he did before the trial court, that the second requirement of the automobile exception-exigent circumstances-was not met because the circumstances were not spontaneous or unforeseeable.

"Exigent circumstances" arise from the " 'unforeseeability and spontaneity of the circumstances giving rise to probable cause, and inherent mobility of the automobile....' " *Cooke,*

*supra*, 163 *N.J.* at 672 (quoting *Alston, supra*, 88 *N.J.* at 233). They exist when it is "impracticable to obtain a warrant when the police have probable cause to search the car." *Id.* at 676.

In *Cooke*, the Supreme Court upheld a warrantless search of a parked car after its owner was observed placing drugs in the car but was arrested elsewhere, and was already "taken ... into" custody at the time of the search. *Id.* at 661. In so holding, the Court affirmed that "exigent circumstances do not dissipate simply because the particular occupants of the vehicle may have been removed from the car, arrested, or otherwise restricted in their freedom of movement." *Id.* at 672 (quoting *Alston, supra*, 88 *N.J.* at 234). As Justice Verniero noted in *Cooke*, "it may be impracticable to require police officers, while awaiting a warrant, to guard vehicles stopped on an open highway or parked on a public street" and it can be "unduly burdensome and unreasonably restrictive to require the police to post a guard and repair to the courthouse for a warrant once they [have] probable cause to search the car." *Id.* at 674 (internal quotations marks and citations omitted). Thus, in *Cooke*, the exigency and impracticability of obtaining a warrant, together with probable cause and the lesser expectation of privacy in an automobile, "tip[ped] the balance in favor of condoning the warrantless search." *Id.* at 676.

Similarly, in the present case, there were exigent circumstances due to "the inherent mobility of vehicles" and the possible destruction of evidence. Indeed, in ruling that exigent circumstances existed that made it impracticable to obtain a warrant, the judge noted that a second person may have been in the van, which was unforeseen until shortly before defendant arrived, and that the police had cause to believe that, in addition to the illegal narcotics, the van also contained a deadly weapon that could have been accessed by a second occupant of the vehicle. *See Cooke, supra*, 163 *N.J.* at 671; *State v. Wilson*, 362 *N.J.Super.* 319, 331 (App.Div.2003). We agree that there were both probable cause and exigent circumstances presented in this case, and the search of the van was lawful on that basis.[2]

III.

***8** Prior to trial, after reporting the favorable results of a defense-administered polygraph examination, defendant consented to a state-administered polygraph test. On May 25, 2001, the State informed the court that defendant would be submitting to a stipulated polygraph administered by the State's only available Spanish-speaking polygraph expert. The parties agreed that if defendant passed the polygraph as to the drug charges, the indictment as to those charges might be dismissed; and if the charges were not dismissed, the defense would be free to "use" the exonerating test results at trial.

Defendant submitted to the polygraph examination on June 6, 2001. The examination was conducted by Captain A.A. Bucarey. Defendant, his attorney, and the assistant prosecutor executed a written "Certificate of Understanding" that Captain Bucarey's expert opinion as to whether defendant was truthful would be admissible at trial regardless of the outcome. The agreement also provided that "the results of any polygraph examination other than the examination that is the subject matter of this agreement and stipulation are not admissible for any purpose[.]" Nothing in the agreement gave the State permission to interrogate or question defendant outside the context of the polygraph examination.

The assistant prosecutor and defense counsel then left the room. Captain Bucarey gave defendant a "polygraph permission form" and a "*Miranda* " form to review and sign. Defendant signed both forms. Captain Bucarey then tested defendant on whether he knew there was cocaine in his van on the date of his arrest. Defendant denied knowledge of the cocaine.

Captain Bucarey reviewed the test results and concluded that defendant was "attempting deception as to this issue," and advised defendant of the test results. Bucarey told defendant that he did not ordinarily reveal such results, but wanted to share them with defendant because they had "spent a period of time together" that afternoon. Captain Bucarey asked defendant if he wanted to provide "a reasonable explanation" for why he had lied. After a short time, defendant "began to cry" and gave Bucarey "a tape recorded statement."

Defendant moved to exclude admission of the polygraph results and his statement. After an *N.J.R.E.* 104 hearing, the trial judge found "a Sixth Amendment violation" because there was "no understanding between the State and defense, and the Defendant and the defense attorney, that they were submitting their client to a post-polygraph interview, and that's what took place." The judge, therefore, held that the results of the stipulated State polygraph were admissible, but that defendant's subsequent confession was not, because the State had violated defendant's right to counsel by interrogating him without the knowledge or presence of his attorney.

Defendant subsequently moved to exclude the results of the original polygraph examination performed by the Public Defender, and asserted that it was protected by attorney-client privilege. The judge denied the motion, reasoning that defendant waived the privilege by providing the polygraph results to the State "in an effort to assist [the] client" and have the charges against him dismissed. The court stated:

> ***9** I believe [defendant's original attorney] was acting in good faith on behalf of her client and believed in her client when he protested no knowledge about the cocaine, and believed that, in fact, the polygraph, the defense polygraph results verified what her client was telling her. And so she offered the information in an effort to assist her client. The attorney-client privilege applies to the confidential communications, as indicated in *State v[.] Schubert,* 235 *N.J.Super.* 212, at page 220, *certificat[ion] denied* 221 New Jersey 597.
>
> Privilege is limited to those communications with the client either expressly ma[de] confidential, or which he reasonably assumes under the circumstances will be understood by the attorney as so intended.
>
> When statements are made to an attorney or the attorney's agent by the client with the purpose of it being communicated to others, the privilege is not applicable. The privilege is not violated when Counsel provides law enforcement with information in an attempt to exonerate the client. So says *Schubert.*
>
> ....
>
> It's a situation where the client knew and understood that this information would be related to the State's attorney in an effort to exonerate him on the more serious charges, and that action was taken by the defense attorney to assist the client. As indicated in *Schubert,* statements or communications made by a client to his attorney or a representative of the attorney, namely the polygraphist, with the intent and purpose that it would be communicated to others [are] not privileged. Later in *Schubert,* against this backdrop, we're satisfied that the defense attorney had the implied authority to impart what they perceived to be only exculpatory information to the Prosecutor's investigator in an attempt to protect the interest of the client.
>
> We discern no ethical or legal violation in that respect. The defense, the Defendant's authorization to deal with the Prosecutor's office to effect a favorable conclusion of this investigation provided the attorney with a limited license to disclose exculpatory information in furtherance of that admission. The information so provided did not fa[ll] within the purview of protected confidential information.
>
> So, it appears under *Schubert,* that there was authorization by all the circumstances of the case for that communication being related over to the State in an effort to help the client. So, the application to preclude the use of polygraph examination information would be denied in this case.

Defendant now argues that "pursuant to *N.J.R.E.* 410, the trial court erred in allowing the State to impeach Mr. Munguia's credibility with statements made during efforts to reach a plea agreement." He specifically asserts that "[t]he Stipulation Agreement entered into by the State and defendant included a provision that neither party would be allowed to use the results of any other polygraph exam for any purpose," and that "[t]herefore, the admission of the defendant's prior inconsistent statements, made during the defense polygraph exam, were inadmissible." He adds "[e]ven if the State's stipulation and Certificate of Understanding had not included a provision precluding use of Mr. Munguia's responses to the defense polygraph for any reason, the same out of court statements should have been precluded pursuant to *N.J.R.E.* 410." In fact, the results of the defense polygraph were not admitted at trial, although the State attempted to impeach defendant's credibility by questioning him about untrue statements made to the investigator who administered the examination.

***10** *N.J.R.E.* 410 provides, in relevant part:

> Except as otherwise provided in this rule, *evidence of* a plea of guilty which was later withdrawn, of *any statement made in the course of that plea proceeding,* and of any statement made during plea negotiations when either no guilty plea resulted or a guilty plea was later withdrawn, *is not admissible in any civil or criminal proceeding against the person who made the plea or statement or who was the subject of the plea negotiations.*
>
> [*N.J.R.E.* 410 (emphasis added).]

The record presents no basis for asserting that the reason for disclosure of the defense polygraph was to secure a plea bargain or to obtain a negotiated disposition. Defendant's original attorney offered the results to the State because she thought they would exonerate her client, and defendant consented to releasing this information despite his knowledge of its falsity, in an attempt to seek a dismissal of the charges. As the trial judge noted when deciding the defendant's

challenge to the State polygraph and post-examination statement:

> It's obvious from listening to the testimony, that both defense attorney and the Defendant believed that he would pass the polygraph examination and, therefore, the State would dismiss the charges, understanding that he had passed the State's polygraph, and the defense would effectively be using the State's own witness against him at trial if that became necessary.
>
> So, it's quite apparent to me that both the Defendant and the defense attorney believe[d] that he would have passed the polygraph examination and it would be to their advantage to use the stipulated polygraph examination.

In any event, the present argument addressed to the defense polygraph was not raised in the trial court, is raised for the first time on appeal without any opportunity for comment by trial counsel or the trial judge, and does not constitute plain error because the admission of defendant's statements incident to the defense polygraph examination was not "clearly capable of producing an unjust result[.]" *R.* 2:10-2. Defendant testified at trial that he lied to Captain Bucarey during the stipulated State polygraph when he said he did not know the drugs were in his van. That defendant told these same lies during a defense polygraph could hardly have been harmful to the defense. Thus, the trial court's failure to exclude these statements constitutes harmless error if error at all.

IV.

As previously noted, the trial judge suppressed defendant's post-polygraph confession to Captain Bucarey because it was obtained in violation of his Sixth Amendment right to counsel, but denied defendant's motion to suppress the results of the stipulated polygraph test that preceded the confession. Defendant now contends that "the denial of the defendant's Sixth Amendment right to counsel was part of an intended course of conduct designed to obtain an illegal confession from the defendant," and that the stipulated "State polygraph is therefore evidence which is 'fruit from the poisonous tree' of police misconduct and should have been excluded from the trial." However, the confession was secured only after the results of the stipulated polygraph were obtained.

***11** Defendant initiated the State polygraph examination and entered into the stipulation knowingly and voluntarily. As the State points out, "[d]efendant cites to no case ... that holds that evidence lawfully obtained *before* an alleged police illegality is inadmissible fruit of the poisonous tree," and clearly the results of the stipulated polygraph exam were admissible. *State v. McDavitt*, 62 *N.J.* 36, 46 (1972).

V.

On count one, first degree possession with intent to distribute cocaine in a quantity of five ounces or more, defendant was sentenced to the then-presumptive term of fifteen years imprisonment with five years parole ineligibility. On count three, second degree possession of a firearm while possessing a controlled dangerous substance with the intent to distribute, defendant was sentenced to the then-presumptive term of seven years imprisonment with two years parole ineligibility, to be served consecutive to count one. On count five, fourth degree possession of a defaced firearm, defendant was sentenced to eighteen months imprisonment, to be served concurrent to count one. Hence, defendant's aggregate sentence was twenty-two years imprisonment with a seven year parole ineligibility period.

We find no basis for remanding or resentencing because one of the defendant's sentences, the shortest one made concurrent to the others, was above the presumptive term then in place. *See State v. King*, 372 *N.J.Super.* 227, 242-46 (App.Div.2004), *certif. denied*, 185 *N.J.* 266 (2005). *See also State v. Natale*, 184 *N.J.* 458 (2005); *State v. Roth*, 95 *N.J.* 334, 365-66 (1984). We add that the consecutive sentence was required by *N.J.S.A.* 2C:39-4.1(d). *See State v. Spivey*, 179 *N.J.* 229, 244 (2004). Accordingly, there is no basis for disturbing the sentence.

VI.

The judgment of conviction is in all respects affirmed.

**All Citations**

Not Reported in A.2d, 2006 WL 2069174

Footnotes

1 This recitation includes evidence from the motion to suppress and the trial. The critical facts necessary to evaluate the search are taken from the motion to suppress. Unfortunately, the parties do not isolate the testimony at the motion to suppress from the testimony presented at the trial.

2 Accordingly, we need not examine the alternative basis that the search was justified as incident to a lawful arrest. Defendant does not contend that the arrest was illegal and tainted the search on that basis.

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IN THE NEW JERSEY SUPREME COURT
No. 084493 (A-50-21)

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| **STATE OF NEW JERSEY,** *Plaintiff-Respondent,* | **CRIMINAL ACTION** |
| *v.* | **On Appeal from an Order of the Superior Court of New Jersey, Appellate Division** |
| **CORNELIUS C. COHEN,** *Defendant-Appellant.* | **Sat below: Hon. Ellen L. Koblitz, P.J.A.D. and Hon. Greta Gooden Brown, J.A.D.** |
| | **Notice of Motion for Leave to File a Brief and Participate in Oral Argument as Amicus Curiae** |

To:

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Raymond L. Hamlin
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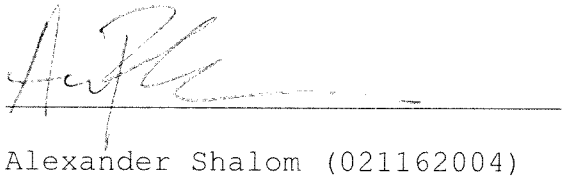
PLEASE TAKE NOTICE that the American Civil Liberties Union of New Jersey Foundation moves before this Court for leave to file the enclosed letter brief and appendix and participate in oral argument as *amicus curiae* in the above-captioned action currently pending before the Supreme Court of New Jersey. In support of this motion, proposed amicus relies upon the attached Certification of Alexander Shalom dated July 28, 2022.

Dated: July 28, 2022



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*Attorney for Proposed* Amicus Curiae

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| **CORNELIUS C. COHEN,** *Defendant-Appellant.* | |
| | **CERTIFICATION OF ALEXANDER SHALOM** |

I, Alexander Shalom, hereby certify the following:

1. I am an attorney admitted to practice law in the State of New Jersey and am employed as Senior Supervising Attorney and Director of Supreme Court Advocacy at the American Civil Liberties Union of New Jersey Foundation, the legal arm of the American Civil Liberties Union of New Jersey ("ACLU-NJ").

2. I make this certification in support of the motion of the ACLU-NJ for leave to file a brief and participate in oral argument in an *amicus curiae* capacity. I have personal knowledge of the facts set forth herein.

3. The ACLU-NJ is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 41,000 members and supporters in New Jersey.

The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of more than 1,750,000 members and supporters nationwide.

4. The ACLU-NJ has participated in a wide variety of cases, directly representing parties or in an *amicus curiae* capacity, involving search and seizure issues. *See, e.g., State v. Rosario*, 229 *N.J.* 263 (2017) (examining the distinction between a field inquiry and investigative detention); State *v. Feliciano*, 224 *N.J.* 351 (2016) (addressing roving wiretaps); *State v. Cushing*, 226 *N.J.* 187 (2016) (finding that an officer did not ask sufficient questions to establish apparent authority for the search of defendant's bedroom); *State v. Lunsford*, 226 *N.J.* 129 (2016) (requiring a court order for law enforcement to obtain telephone billing records); *State v. Bivins*, 226 *N.J.* 1 (2016) (holding that an "all persons present" warrant did not extend to the search of off-premises individuals); *State v. Verpent*, 221 *N.J.* 494 (2015) (rejecting per se exigency for suspected driving while drugged cases); *State v. Coles*, 218 *N.J.* 322 (2014) (holding that illegal detention vitiated consent); *State v. Earls*, 214 *N.J.* 564 (2013) (recognizing expectation of privacy in cell phone location information); *State v. Hinton*, 216 *N.J.* 211 (2013) (finding no constitutionally implicated search where eviction proceedings had advanced to lock-out stage); *State v. Harris*, 211 *N.J.* 566 (2012) (contesting scope of special needs search under PDVA); *State v.*

*Shannon*, 210 *N.J.* 225 (2012) (dismissing challenge to *Pena-Flores* rule for automobile searches).

5. I respectfully submit that the participation of the ACLU-NJ will assist the Court in the resolution of the significant issues of public importance implicated by this appeal. *R.* 1:13-9.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: July 28, 2022 Alexander Shalom (021162004)

IN THE NEW JERSEY SUPREME COURT
No. 084493 (A-50-21)

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| | **Sat below: Hon. Ellen L. Koblitz, P.J.A.D. and Hon. Greta Gooden Brown, J.A.D.** |
| **CORNELIUS C. COHEN,** *Defendant-Appellant.* | |
| | **CERTIFICATION OF SERVICE** |

I, Alicia Rogers, hereby certify the following:

1. I am a paralegal for the American Civil Liberties Union of New Jersey Foundation.

2. On August 1, 2022, I caused two copies of proposed *amicus curiae* the American Civil Liberties Union of New Jersey's Notice of Motion for Leave to File a Brief and Participate in Oral Argument as *Amicus Curiae;* Letter Brief of *Amicus Curiae;* and Certification of Alexander Shalom to be served via NJ Lawyers' Service on the following parties:

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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: August 1, 2022 Alicia Rogers