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Supreme Court of New Jersey

DOCKET NO. 087315

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Appellant,	:	On Leave to Appeal from Interlocutory Order of the Superior Court of New Jersey, Appellate Division.
v.	:	
KYLE A. SMART,	:	Sat Below: Hon. Carmen Messano, P.J.A.D. Hon. Allison E. Accurso, P.J.A.D.
Defendant-Respondent.	:	Hon. Lisa Rose, J.A.D.

BRIEF ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY AMICUS CURIAE

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PRELIMINARY STATEMENT

Under this Court's decision in Witt, the automobile exception to the warrant requirement authorizes a warrantless, on-site car search when two requirements are satisfied: (i) "the police have probable cause to believe that the vehicle contains contraband or evidence of an offense"; and (ii) "the circumstances giving rise to probable cause are unforeseeable and spontaneous." State v. Witt, 223 N.J. 409, 448 (2015). The first mirrors the automobile exception under federal law. But the second parts from federal law. This Court has made plain that this limited departure from the federal automobile exception is intended to serve a specific purpose: it "ensures that police officers who possess[] probable cause well in advance of an automobile search" obtain a warrant. Id. It is designed, in other words, to make clear that officers cannot "sit on probable cause and later conduct a warrantless search, for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant." Id.

In this case, however, the Appellate Division misapplied Witt. The panel acknowledged that "this is not a case where police 'sat' on probable cause and could have obtained a warrant before stopping the car." And it recognized that officers had reasonable suspicion to conduct a car stop, that probable cause arose during the stop at issue, and that officers conducted a

search promptly upon obtaining probable cause. Still, the panel held that the search here "fails under Witt" because the circumstances before probable cause suggested that probable cause did not develop in a "spontaneous and unforeseeable" way.

The Appellate Division's decision misdirects the inquiry under Witt away from its objective. Assessing the degree of unforeseeability presented by the circumstances that unfold before probable cause arises does not and cannot address the concern underlying New Jersey's limited departure from the federal automobile exception—that the police will unreasonably delay warrantless car searches after probable cause is established. And a long line of cases—from Witt to State v. Cooke and State v. Martin—confirms that warrantless car searches are permissible even when officers anticipated that their actions might contribute to probable cause.

Instead, the focus of Witt and New Jersey's automobile exception should be on what happens after probable cause is established: once an officer possesses probable cause, any warrantless car search must be reasonably prompt and of proper scope. Focusing on the officers' reasonable promptness in conducting a warrantless search after the circumstances establish probable cause will ensure that the automobile exception continues to address the harms this Court identified in Witt: unnecessarily protracted car stops on busy roads,

the needless and overly intrusive impounding of cars, and officers turning to consent searches to avoid the uncertainty of the automobile exception.

The words "unforeseeable and spontaneous" in Witt, by contrast, have unmoored the test from its purpose, made the test less administrable, and have caused confusion in the lower courts. In most cases, the circumstances that lead to probable cause are not entirely "unforeseeable." Indeed, because officers always know there is at least a chance that an automobile stop could lead to probable cause, there is virtually no automobile stop in which probable cause is "unforeseeable" at the time the officer effectuates the stop. So, the phrase "unforeseeable and spontaneous," when interpreted literally, creates difficult line-drawing problems for officers and courts, and has caused—and, if not clarified, will keep causing—disarray in the courts.

Thus, this Court should clarify that the test under Witt is not whether the circumstances before probable cause were "unforeseeable and spontaneous," but instead whether officers with probable cause to believe a car contained evidence conducted a reasonably prompt warrantless search of proper scope. Here, properly understood, Witt does not bar the warrantless search at issue because, once the K9 sniff provided the police with probable cause, the police promptly searched the car on the scene. This Court should therefore reverse the contrary holding of the Appellate Division.

QUESTION PRESENTED

In State v. Witt, 223 N.J. 409 (2015), this Court returned to the standard that governed the automobile exception in State v. Alston, 88 N.J. 211 (1981), which permits a warrantless car search if unforeseeable and spontaneous circumstances lead to probable cause. This standard ensures that police officers who possess probable cause well in advance of a car search seek a warrant. The police cannot, in other words, choose to "sit" on probable cause and later conduct a warrantless search, for then the car's inherent mobility would have no link with the officers not procuring a warrant.

In this case, the Appellate Division found (i) that the police had reasonable suspicion to stop the car defendant was riding in; (ii) that the circumstances may unforeseeably and spontaneously lead to probable cause after an investigatory stop even if the police expect to find contraband; and (iii) that the police did not "sit" on probable cause because probable cause arose only upon a positive K9 sniff during the stop. Still, the Appellate Division ruled that Witt did not permit the search. The question presented is:

Does the automobile exception permit the warrantless on-scene search of a car when a positive K9 sniff during the stop produces probable cause to believe the car contains drugs, and the search occurs reasonably soon after probable cause arises?

STATEMENT OF PROCEDURAL HISTORY AND FACTS

The Attorney General relies on the Statements of Procedural History and Facts in the State's brief in support of its motion for leave to appeal, adding only these comments. (Pb1 to 7).

On June 30, 2022, the Appellate Division ruled in a published opinion that the automobile exception to the warrant requirement did not permit police officers to conduct a warrantless car search in this case. State v. Smart, 473 N.J. Super. 87, 90-91 (App. Div. 2022) (citing State v. Witt, 223 N.J. 409, 450 (2015)); (Pa20).

The Appellate Division concluded that Witt's holding is "not limited to probable cause that arises at roadside based on a motor vehicle violation." Id. at 97-98; (Pa28 to 29). Rather, the circumstances may unforeseeably and spontaneously lead to probable cause "following an investigatory stop—even if police expect to find contraband in the vehicle." Ibid.; (Pa28 to 29). The Appellate Division also held that "reasonable articulable suspicion of criminal activity" arose before the police stopped the car defendant was riding in. Id. at 100; (Pa33). And the panel noted that because probable cause arose only after the K9 arrived and signaled that drugs were in the car, the police "could [not] have secured a warrant before stopping the car" and thus could not have "'sat' on probable cause." Id. at 97 (quoting Witt, 223 N.J. at 431-32); (Pa28 to 29).

Still, the panel held that the warrantless search at issue "fails under Witt" because "the use of the K-9 unit under the circumstances presented here did not result in the spontaneous and unforeseeable development of probable cause." Id. at 91 (quoting Witt, 223 N.J. at 450); (Pa20). The panel held, in other words, that the circumstances before probable cause materialized meant that the search was not "spontaneous and unforeseeable"—even though the panel recognized that the officers did not "sit" on probable cause and promptly conducted a search after obtaining probable cause.

On July 1, 2022, the State moved before the Appellate Division to stay the court's published opinion. (Pa35). On July 18, 2022, the panel denied the motion. (Pa35).

On September 13, 2022, this Court denied the State's motion for a stay, but granted the State's motion for leave to appeal and imposed an expedited, peremptory schedule requiring that any amicus briefs be filed by October 31, 2022. According to the New Jersey Supreme Court's website, this Court later filed an amended order requiring that any amicus briefs be filed by 4:30 p.m. on November 9, 2022.

LEGAL ARGUMENT

This Court should clarify the scope of the automobile exception under New Jersey law. As this Court has explained, New Jersey's automobile exception is meant to ensure that the police conduct a reasonably prompt on-scene warrantless car search after they determine that the circumstances have established probable cause for the search. See State v. Witt, 223 N.J. 409, 450 (2015) (citing State v. Alston, 88 N.J. 211, 233-34 (1981)). Thus, so long as the warrantless search occurs reasonably promptly after the officer obtains probable cause, Witt permits the search.

But the words "unforeseen and spontaneous" in the Witt test have caused confusion in the courts and have unmoored the test from the core purpose it is meant to serve. This Court should therefore make clear that the core inquiry under Witt is whether the police conducted a reasonably prompt search after determining that the circumstances established probable cause, and not whether the circumstances before probable cause were "unforeseeable and spontaneous." Here, because the panel misinterpreted Witt, it erroneously affirmed the trial judge's suppression order. This Court should thus reverse the holding of the Appellate Division.[1]

[1] Before probable cause to search the car arose, the police extended the investigatory stop as they waited for a K9 to arrive. See Smart, 473 N.J.

POINT I

UNDER THE AUTOMOBILE EXCEPTION, POLICE MAY CHOOSE TO CONDUCT A WARRANTLESS, ON-SITE CAR SEARCH ONLY IF THE SEARCH OCCURS REASONABLY SOON AFTER THE CIRCUMSTANCES ESTABLISH PROBABLE CAUSE FOR THE SEARCH.

A. New Jersey's limited departure from the federal automobile exception aims to prevent the police from deliberately "sitting" on probable cause and later conducting a warrantless car search.

This Court's precedents departing from the federal automobile exception make clear that the purpose of that departure was to prevent police, after they have obtained probable cause, from "sitting" on probable cause and later conducting a warrantless car search at a time and place of their choosing. Those cases therefore should be understood to permit a warrantless automobile search so long as the officer has probable cause for the search and the officer conducts the search reasonably promptly after obtaining probable cause.

1. Under federal law, the automobile exception permits warrantless searches of vehicles so long as officers have probable cause for the search.

Nearly a century ago, the United States Supreme Court construed the

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Super. at 97. Because the extension of the stop took place before probable cause arose, it has nothing to do with Witt, which addresses the circumstances in which warrantless automobile searches are permitted after probable cause arises. This brief thus does not address that part of the encounter.

Fourth Amendment to create the automobile exception to the warrant requirement. Carroll v. United States, 267 U.S. 132, 153 (1925). In the years that followed, the Court has continually refined it, eventually landing on a rule that has stood for decades and that "the overwhelming majority of states" has since adopted. See Maryland v. Dyson, 527 U.S. 465, 467 (1999) (per curiam); Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (per curiam); Witt, 223 N.J. at 425 n.2 (listing states).

The federal rule is straightforward: the Fourth Amendment authorizes the police to conduct a warrantless search of a car if it is "readily mobile" and they have "probable cause" to believe the car contains contraband or evidence of an offense. Labron, 518 U.S. at 940. In other words, probable cause alone satisfies the Fourth Amendment's automobile exception and there is no "separate exigency requirement." Dyson, 527 U.S. at 466.

The United States Supreme Court has identified three rationales for the automobile exception. First, cars are inherently mobile. Carroll, 267 U.S. at 153 (1925). Second, there is a lesser expectation of privacy in a car compared to a home. California v. Carney, 471 U.S. 386, 391-93 (1985). Third, and "most compelling," see Witt 223 N.J. at 424, a quick, on-site, probable-cause search of a car represents a lesser Fourth Amendment intrusion than impounding it and detaining its occupants while the police secure a warrant.

Chambers v. Maroney, 399 U.S. 42, 51-52 (1970); see also United States v. Ross, 456 U.S. 798, 831 (1982) (Marshall, J., dissenting) (finding "warrant requirement would not" significantly protect motorists' Fourth Amendment interests, as seizing car and detaining driver while securing search warrant may "be more intrusive than the actual search itself").

Critically, however, as the U.S. Supreme Court has held, federal law allows a warrantless vehicle search even if the search occurs well after probable cause arises. See, e.g., Labron, 518 U.S. at 940 (1996) (permitting officers with probable cause to believe cars contain contraband to search them without warrants even if searches occur well after probable cause arises). Indeed, as the body of doctrine on the federal rule has grown over time, the Fourth Amendment has been increasingly interpreted to authorize warrantless car searches that take place many hours—and sometimes days—after probable cause arises. Often, the searches have had little or no connection to the cars' inherent mobility, yet courts have still upheld them. See, e.g., United States v. Johns, 469 U.S. 478, 484 (1985) (allowing warrantless searches three days after police impounded truck and holding "[t]here is no requirement that the warrantless search be performed contemporaneously with its lawful seizure"); United States v. Ludwig, 10 F.3d 1523, 1528 (10th Cir. 1993) ("If police have probable cause to search a car, they need not get a search warrant even if they

have time and opportunity."); United States v. Gastiaburo, 16 F.3d 582, 586 (4th Cir. 1994) (upholding warrantless search of car 38 days after probable cause arose because "the police can search later whenever they could have searched earlier, had they so chosen" (citing California v. Acevedo, 500 U.S. 565, 570 (1991))); State v. Isleib, 356 S.E.2d 573, 576 (N.C. 1987) (finding federal law allowed warrantless car search 20 hours after probable cause arose because mere fact that police had "probable cause to secure the search warrant and adequate time to obtain one, but fail[ed] to do so," did not affect validity of search).

2. This Court parted from the federal standard for the automobile exception to ensure that officers do not sit on probable cause by unreasonably delaying a warrantless search after they obtain probable cause.

In its 1981 decision in Alston, this Court held that the automobile exception permits the warrantless search of a car when the police have "probable cause" to believe that the car contains contraband or evidence of an offense and "the circumstances giving rise to probable cause are unforeseeable and spontaneous." Witt, 223 N.J. at 447 (quoting Alston, 88 N.J. at 233). Alston thus provides "'a limited exigency to the warrant requirement.'" Id. at 431-32 (quoting Cooke, 163 N.J. at 673, and Alston, 88 N.J. at 233). At the time it decided Alston, this Court believed that it was not construing the

automobile exception differently from the federal interpretation under the Fourth Amendment[,]" and thus did not turn to Article I, Paragraph 7 of our State Constitution as a separate source of rights. Witt, 223 N.J. at 427.[2] It would only become clear years later that the federal rule has no exigency requirement beyond the mobility of the vehicle. See id. at 425 & n.1, 431-32.

In Witt, this Court reaffirmed the standard set forth in Alston, made clear that this standard was a departure from federal law, and clarified the analytical underpinnings of that standard. The Court reasoned that the Alston standard sought to "eliminate the concern expressed" in State v. Cooke, 163 N.J. 657 (2000): "the fear that 'a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe it contained drugs.'" See Witt, 223 N.J. at 448 (quoting Cooke, 163 N.J. at 667-68).[3] This limited departure is designed to "ensure[] that police officers who possessed probable cause well in advance of

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[2] That did not happen until 2000, when this Court, in Cooke, adopted a multifactor exigent-circumstances requirement that Witt would later overrule for being "unsound in principle and unworkable in practice." See Witt, 223 N.J. at 447 (citing Cooke, 163 N.J. at 670, and Pena-Flores, 198 N.J. at 28).

[3] It is now settled that even the federal automobile exception alone does not permit the warrantless search of a car parked in the curtilage of a defendant's home. See Collins v. Virginia, 138 S. Ct. 1663, 1668 (2018) (holding automobile exception does not permit police, uninvited and without a warrant, to enter a home's curtilage just to search vehicle parked there).

an automobile search sought a warrant." Witt, 223 N.J. at 431. It prevents officers from "sit[ting] on probable cause and later conduct[ing] a warrantless search, for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant." Id. at 432.

This Court reasoned that the federal automobile exception alone—which requires just probable cause to search—would not be adequate to address the fear discussed in Cooke. Allowing that fear to persist unabated would not accord with the enhanced protection that Article I, Paragraph 7 of the State Constitution provides. For under the federal test, the police may still "sit" on probable cause and later, long after any "'inherent exigency'" has dissipated, launch warrantless car searches and thus deliberately avoid the warrant requirement. See Witt, 223 N.J. at 431-32, 447-49 (quoting State v. Pena-Flores, 198 N.J. 6, 39 n.1 (2009) (Albin, J., dissenting)).

In contrast, our state automobile exception aims to keep officers from deliberately "sitting" on probable cause, and then, later, unreasonably launching warrantless searches, once any inherent exigency is gone. See Witt, 223 N.J. at 427-28, 447-48 (citing Alston, 88 N.J. at 233, and Chambers, 399 U.S. at 50-51). And if past cases did not adequately spell out how Alston's "unforeseeability and spontaneity" language was meant to accomplish that, Witt did. See id. at 447 (quoting Alston, 88 N.J. at 233). The "language in

Alston ensured that police officers who possessed probable cause well in advance of an automobile search sought a warrant." Id. at 431 (citing Alston, 88 N.J. at 233-34). As this Court explained, police officers cannot lawfully choose to "sit on probable cause and later conduct a warrantless search, for then the inherent mobility of the vehicle would have no connection" with the officers "not procuring a warrant." Id. at 431-32, 447.

Much of the language that this Court and legal scholars have traditionally used to describe the Witt standard makes sense given its purpose. See, e.g., Witt, 223 N.J. at 428 ("[W]e emphasized [in Alston] that 'when there is probable cause to conduct an immediate search at the scene of the stop, the police are not required to delay the search by seizing and impounding the vehicle pending review of that probable cause determination by a magistrate." (citing Alston, 88 N.J. at 234-35)); id. at 429 ("According to one commentator, [f]ollowing Alston, the state's automobile exception . . . appeared clear: provided that probable cause arose at the time of the seizure, the search of the automobile was warranted." (quoting Paul Stern, Revamping Search-and-Seizure Jurisprudence Along the Garden State Parkway, 41 Rutgers L.J. 657, 671 (2010))); Pena-Flores, 198 N.J. at 48 (Albin, J., dissenting) (finding "[p]olice officers who know in advance" of a warrantless search "that there is contraband in a car[,]" and thus have probable cause well before the search,

should seek judicial authorization before proceeding).

Thus, under the Witt standard, prosecutors—knowing that officers must perform warrantless car searches reasonably soon after the circumstances establish probable cause—could not defend their choice to wait to search a car for contraband when probable cause had arisen earlier and it was safe, practicable, and sensible to secure a warrant first. See Witt, 223 N.J. at 447-48 (citing Cooke, 163 N.J. at 667-68). Nor could defense attorneys argue that the automobile exception applies only when probable cause arises at roadside after a car stop for a motor-vehicle violation, a view that the Appellate Division properly rejected. Smart, 473 N.J. Super. at 97.

B. This Court should clarify that our State's limited departure from the federal automobile exception is meant to ensure only that officers conduct any on-site warrantless car search reasonably soon after obtaining probable cause.

This Court should clarify the "unforeseeable and spontaneous" inquiry under Witt so that it aligns with the purposes that prompted its adoption. As the panel's ruling demonstrates, there is a confusing disjunction between the wording of the "unforeseeable and spontaneous" inquiry, which requires courts to assess the circumstances that unfold before probable cause arises, and its purpose, which is to prevent warrantless unreasonable searches after probable cause arises. The Attorney General urges this Court to correct this logical disconnect. By explaining that officers cannot unreasonably wait to perform

warrantless on-site car searches after the totality of the circumstances establishes probable cause, this Court can provide needed clarity on the automobile exception. See Witt, 223 N.J. at 448 (noting "unforeseeable and spontaneous" requirement provides "reasonable accommodation of the competing interests between" residents' "right to be free from unreasonable searches and law enforcement's investigatory demands" (citing Alston, 88 N.J. at 233)).

1. The "unforeseeable and spontaneous" language unmoors the Witt test from the core purpose it is meant to serve. That language does not logically work to eliminate the concern that prompted this Court to restore the Alston standard: officers' deliberate choice to "sit" on probable cause and then later unreasonably search cars without warrants at a time and place of their choosing. See Witt, 223 N.J. at 431-32, 447-48. In other words, the requirement that the circumstances "unforeseeably and spontaneously" lead to probable cause misdirects the relevant inquiry. Assessing the circumstances that unfold before probable cause is obtained cannot logically preempt the fear that the police will choose to unreasonably delay warrantless car searches after they obtain probable cause, which is what drives our limited departure from the federal rule. See Witt, 223 N.J. at 431-32, 447-48.

The phrase "unforeseeable and spontaneous," after all, is at least in part

a misnomer. Not all circumstances that lead to probable cause are equally unforeseeable or spontaneous, and realistically, probable cause will arise in a way that is totally unanticipated in very few cases. The term, particularly when literally interpreted, therefore makes line-drawing too hard in "notoriously fact-sensitive" search-and-seizure cases, where probable cause often arises with differing degrees of unforeseeability. See State v. Boston, 469 N.J. Super. 223, 260 (App. Div. 2021).

It is thus unsurprising that the "unforeseeable and spontaneous" exception has created significant confusion in the courts. This case supplies a ready example of that confusion. The motion judge incorrectly suggested that Witt is "limited to probable cause that arises after a roadside stop based on a motor vehicle violation," and thus cannot support a warrantless, on-site vehicle search following an investigatory stop. See Smart, 473 N.J. Super. at 97-98. The panel disagreed with that understanding of Witt, recognizing correctly that a warrantless car search can still occur after an investigatory stop. But it then incorrectly held that when the circumstances arising before probable cause "did not result in the spontaneous and unforeseeable development of probable cause," the automobile exception does not authorize a warrantless search. Id. at 101. This Court's intervention is necessary to resolve the confusion created by the "unforeseeable and spontaneous" language in Witt.

That is not to say that Witt was decided on less-than-solid grounds. The pure exigency approach was indeed unworkable, and the purpose for Witt's divergence from Labron's allowance of off-site, delayed warrantless searches was and is valid and commendable. It is necessary, however, to clarify the Witt test to ensure that it aligns with Witt's doctrinal pulse: the delta between obtaining valid probable cause and acting on probable cause.

2. Refocusing the Witt test on what happens after probable cause—in other words, on whether an officer conducts a search reasonably soon after the officer obtains probable cause—would not change this Court's balancing of residents' "privacy and liberty interests and law enforcement's investigatory demands." See id. at 447. But it would go a long way toward resolving the confusion that has followed from Witt.

Reorienting the "unforeseeable and spontaneous" requirement to fit its objective would make the automobile exception more administrable, promoting uniformity of outcomes in similar situations and greater predictability. Doing so would also reduce the potential for unintended negative outcomes: drawn-out car stops on busy roads, the needless impounding of cars, and confusion among the police, who may look to different investigative methods when making split-second judgments amid legal uncertainty and chaos. See Witt, 223 N.J. at 442.

This Court's cases illustrate why this Court should clarify that our automobile exception turns not on whether the circumstances unforeseeably and spontaneously lead to probable cause, but on whether the officers search cars without warrants reasonably soon after the circumstances establish probable cause. These cases show that although the term "unforeseeable and spontaneous," as Witt uses it, seems to look to the circumstances that lead to probable cause, keeping that the focal point of the test will produce undesirable outcomes, including confusion about the degree of unforeseeability that suffices to meet the test, and will thus keep leading to differing results even in similar situations. Rather, the test's focal point should be the same as its purpose, and should ask whether officers chose to unreasonably "sit" on probable cause to intentionally avoid getting a warrant.

There are two categories of cases in which this Court has applied the unforeseeable and spontaneous test. First are cases in which, notwithstanding police officers' pre-search suspicions that cars contained evidence, this Court found that the test was met and held that the officers permissibly performed warrantless car searches when they did so reasonably soon after probable cause arose. And second are cases in which this Court found that the test was not met and held that the police impermissibly performed warrantless car searches when they did so too long after probable cause arose.

Cooke falls into the first category. There, a reliable confidential informant told the police that Cooke was selling drugs at a housing complex in a high drug-trafficking area and storing the drugs in a gray Ford Escort. Id. at 662. Two weeks later, an officer began surveilling the area and saw Cooke working on the Escort's radio speakers. Ibid. The officer then saw Cooke sell drugs twice, and saw him place the drugs in the Escort once. Ibid. Cooke and an accomplice drove off in another car, but officers on the perimeter team stopped them. Id. at 662-63. The officers arrested Cooke, took his keys to the Escort, and searched it on the scene, finding the drugs. Id. at 663.

Even though the officers knew for two weeks before probable cause arose that Cooke was reportedly selling drugs and storing them in the Escort, Witt later found that "a warrantless search would have been permissible under the Alston standard because the probable cause arose from unforeseeable and spontaneous circumstances." Witt, 223 N.J. at 433. And while the circumstances that led to probable cause were not all unanticipated, the facts fit the Witt test's goal, as the police did not purposely "sit" on probable cause. Rather, they promptly searched the Escort once they had probable cause.

Of course, had the officers not searched the Escort after getting Cooke's keys, but chose to leave it where it sat and came back to search it without a warrant days later, they would have unreasonably "sat" on probable cause,

rendering the search impermissible under Witt. See 223 N.J. at 431-34. Yet the circumstances that led to probable cause would be no different. Ibid. Cooke shows why the test's focus should be on whether the warrantless search occurred reasonably soon after probable cause arose.

Also falling within the first category is State v. Martin, 87 N.J. 561 (1981), decided the same day as Alston. In that case, at about 1:25 a.m., a store employee was getting into his car when a man exited a light-colored, wood-paneled station wagon and brandished a gun under a cloth. Id. at 564. Soon after the armed man and his accomplice forced their way into the store and stole $1,500 and other items, the robbery victims called the police. Ibid. When they arrived, the victims described the station wagon. Ibid. A victim also told the police that one man wore a white glove stained by blood or paint, which an officer found near the store's backdoor. Id. at 565.

Police in a neighboring town stopped a station wagon matching the description, checked the occupants' credentials, and though one man fled, allowed the car to go on its way. Id. at 564-65. The officers' supervisor, however, directed them to track the car down again, and 20 minutes later, they found the empty car in a parking lot a few blocks away from the spot where the car was stopped. Id. at 565. One officer looked through the car window and saw a can of paint, a paint-stained white glove, and paint-stained clothes.

Ibid. After two witnesses identified the car as the station wagon used in the robbery, the police had it towed to headquarters, where they searched it without a warrant and found evidence of the robbery. Ibid.

This Court upheld the warrantless search because "'the circumstances that furnished the officers with probable cause were unanticipated and developed spontaneously.'" See Witt, 223 N.J. at 428-49 (quoting Martin, 87 N.J. at 570, and citing Chambers, 399 U.S. at 50-51). Martin "differ[ed] significantly" from State v. Ercolano, 79 N.J. 25 (1979), when it was "readily practicable" for officers to obtain a warrant to search Ercolano's car because they had probable cause to search it long before his expected arrival at a "staked-out" apartment. Id. at 570 (quoting Ercolano, 79 N.J. at 46-47). Martin also held that when police have probable cause to believe a car contains contraband or evidence, "a warrantless search under the automobile exception is permissible, 'even if the vehicle is parked and unoccupied.'" Witt, 223 N.J. at 428-29 (quoting Martin, 87 N.J. at 567).

As in Cooke, the circumstances that led to probable cause in Martin were not totally unforeseeable and spontaneous. Minutes after stopping the station wagon, the police found it parked just blocks from the store. Through the window, they saw the other paint-stained glove the witness had described. And before towing the car, the police brought two witnesses to the scene, who

confirmed that the car was indeed the one that officers were looking for.

The words "unforeseeable and spontaneous," if taken literally, do not correctly describe all the circumstances that led to probable cause in Martin, though the Witt Court reaffirmed that the circumstances there unforeseeably and spontaneously established probable cause. Even still, though the officers searched the car at headquarters without a warrant, a practice that Witt now bars without a true exigency, this Court found that a warrantless search "would have been permissible at the scene." Id. at 569. And, at any rate, Witt makes plain that, had an on-the-spot warrantless search taken place well after probable cause arose, that search would not be permissible, no matter how unexpected it was that probable cause would arise.

In the second category are cases in which this Court said that the circumstances did not unforeseeably and spontaneously establish probable cause and in which the police unreasonably seized or searched cars without valid warrants well after probable cause arose. Witt pointed to Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality), as one such case. See Witt, 223 N.J. at 429-30; see also State v. Gonzales, 227 N.J. 77, 104-05 (2016). As Justice Albin in explained for a unanimous Court in Gonzales, the Coolidge "police had sufficient time—days—to secure a valid warrant" after probable cause arose. Gonzales, 227 N.J. at 104 (discussing why car seizure in

Coolidge would fail under Witt). In other words, the Coolidge officers unreasonably "sat" on probable cause before seizing the car.

In fact, Coolidge does not say quite how or when valid probable cause arose, so it is hard to say just how unforeseeable it was that probable cause would arise. See 403 U.S. at 445 to 527. But under the logic of Gonzales, the warrantless seizure of Coolidge's car would have been "permissible under our state-law jurisprudence" if, once the chain of events that led to probable cause was complete, the seizure occurred reasonably soon after. Id. at 104-05; but see Collins, 138 S. Ct. 1668 (deciding after Gonzales that federal automobile exception does not alone permit search of car parked in curtilage of home).

Ercolano also falls in the second category of cases. There, detectives had probable cause to believe that an apartment contained evidence of a gambling conspiracy, so they obtained a search warrant, which they planned to execute that evening while awaiting Ercolano's arrival in a Lincoln. 79 N.J. at 30-32, 46-47. Although the detectives had ample suspicion to believe the car contained evidence of the conspiracy when they obtained the warrant to search the apartment, they never sought a warrant to search the car. Id. at 31-32. Rather, they waited until the car arrived that evening, had it towed and impounded, and searched it at headquarters, finding betting slips. Ibid.

This Court declined to uphold the warrantless search under the

automobile exception, reasoning that if the police had probable cause to search the Lincoln, that probable cause arose well before the warrantless search, so the police could "easily" have obtained a warrant to search it. Id. at 46-49. And though Ercolano found that "'the circumstances' giving rise to probable cause to search this car were not unforeseeable," see id. at 47 (quoting Chambers, 399 U.S. at 50-51), this Court found the language below "fully consonant" with Chambers and other cases on the automobile exception:

> We hold that the government cannot rely upon an expected arrest to seize stolen goods, the presence of which it long had probable cause to know of, simply to avoid the inconvenience of obtaining a search warrant . . . If there was probable cause here there was no excuse for not obtaining a search warrant for the car either in advance or after defendant's arrest.
>
> [Id. at 47 (quoting Niro v. United States, 388 F.2d 535, 539-40 (1st Cir. 1968)) (emphasis added).]

The Ercolano Court did not explain precisely when or how probable cause to search the car arose. But it did not need to do so. That is because the police deliberately "sat" on probable cause after it materialized, rendering the later warrantless car search unreasonable.

Finally, Witt itself provided an example to demonstrate that "Alston's requirement of 'unforeseeability and spontaneity'" would place no "undue burden" on law enforcement, and would "eliminate" Cooke's concern about officers unfairly targeting for a warrantless search a car parked in the home

driveway of vacationing owners when the officers believed the car contained drugs. Witt, 223 N.J. at 447-48 (quoting Alston, 88 N.J. at 233, and Cooke, 163 N.J. at 667-68). As the Court explained, "if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so." Id. at 447-48.

This example illustrates the disjunction between what the unforeseeable and spontaneous test asks courts to assess and the problem it seeks to avert. The example says nothing about the circumstances that led the police to obtain probable cause to search the car, so no analysis of whether those circumstances unforeseeably and spontaneously led to probable cause is possible. But the example clarifies that after probable cause to search the car arose, when the car was not on the scene and was thus not readily searchable, it became reasonable to expect the officers to secure a warrant if it was practicable to do so.

These cases, and the example in Witt, show precisely why this Court should re-center the "unforeseeable and spontaneous" inquiry around whether the police act with reasonable promptness when performing warrantless on-site car searches once the circumstances establish probable cause. If the police in Cooke and Martin had searched the cars without warrants long after probable cause arose, the searches would have been impermissible under Witt, no matter how unforeseeable it was that the circumstances would lead to probable cause.

And had the police in Coolidge and Ercolano searched the cars without warrants promptly after probable cause arose, the searches would have been permissible under Witt, no matter if they anticipated that the circumstances would lead to probable cause.

It follows that it is not the unforeseeable and spontaneous nature of the circumstances that lead to probable cause that is the focal point of Witt. Rather, it is that once the circumstances known to the officer establish probable cause, her choice to act on it by searching the car without a warrant must be reasonably prompt. "It is the purpose of the rule, rather than the rule itself, to which we are ultimately bound." People v. Havelka, 384 N.E.2d 1269, 1272 (N.Y. 1978). And reorienting the automobile exception in this way would better serve the test's purpose while providing needed clarity. The result would be a more practicable standard that is less likely to result in unnecessarily protracted car stops, the intrusive impounding of cars, and officers turning to consent searches just to avoid uncertainty in the law.

One final note: our courts should not equate officers deliberately "sitting" on probable cause just to avoid getting a warrant with their reasonable choice to wait to act when the exigencies of the situation or the purpose of an investigation may not favor acting at the instant that probable cause arises. Indeed, "the police are not required to guess at their peril the

precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long." Hoffa v. United States, 385 U.S. 293, 310 (1966); compare State v. Josey, 290 N.J. Super. 17, 30 (App. Div. 1996) (disagreeing that police should have obtained warrant right after seeing sale of small bags of cocaine because, given officers' concerns that the small bags could be easily swallowed, they reasonably waited for sale of large bag), with Commonwealth v. Sergienko, 503 N.E.2d 1282, 1286 (Mass. 1987) (finding police unreasonably delayed warrantless seizure of marijuana from car for four-and-a-half hours after they had probable cause to believe drugs were inside because delay stemmed only from "police inaction").

It may not be reasonable for the police to arrest a suspect or search a car just after probable cause arises if doing so could jeopardize an informant's life or a sensitive surveillance location, cut short an important, wide-ranging investigation, or render a case unprovable in court. See Hoffa, 385 U.S. at 310 ("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."). And in those cases, if officers act reasonably, the automobile exception should permit the search.

POINT II

THE APPELLATE DIVISION'S DECISION MISAPPLIED WITT AND THE AUTOMOBILE EXCEPTION, AND SHOULD BE REVERSED.

Properly understood, this Court's decision in Witt and the automobile exception did not bar the warrantless search in this case. The Appellate Division's contrary decision should be reversed.

Like the police in Cooke and Martin, the police here had reasonable suspicion to associate the SUV that was stopped with a crime before probable cause arose, and called a K9 to "dispel," not just to confirm, their reasonable suspicion. See State v. Dickey, 152 N.J. 468, 477 (1998). Thus, as in Cooke and Martin, the circumstances that led to probable cause were not—in a literal sense—unforeseeable and spontaneous. And yet, as in those cases, the police here did not violate Witt because they did not, unlike the officers in Coolidge and Ercolano, intentionally "sit" on probable cause and later unreasonably search the SUV without a warrant, well after any inherent exigency had dissipated. Indeed, the panel itself correctly recognized as much: it held that because probable cause arose only after the K9 arrived, the police "could [not] have secured a warrant before stopping the car" and thus could not have "'sat' on probable cause." Smart, 473 N.J. Super. at 97 (quoting Witt, 223 N.J. at 431-32).

Practically speaking, what Witt called the automobile exception's "most compelling" rationale would no longer apply if the panel's view were to stand. See 223 N.J. at 424. The panel's approach would have forced the police to intrusively impound the vehicle as they applied for a warrant rather than promptly, and less intrusively, searching it on the spot. Thus, under the panel's approach, the woman who was later allowed to drive the same car away with her child—and who had nothing to do with the loaded gun and drugs found in her car—would have suffered the far more substantial intrusion of temporarily losing her car while the police secured a warrant. See Smart, 473 N.J. Super. at 93. Moreover, because the police would not yet have searched her car and found the evidence, they likely would have had to detain her until they executed that warrant and finished their investigation, further impairing not just her privacy interests, but her liberty interests. And had the later warrant-authorized search of the car turned up nothing, she would have suffered these intrusions unnecessarily, as the quick, on-the-spot search would have prompted the officers to release her and her car much sooner.

The bottom line: the panel's understanding of Witt unmoors the Witt test from the underlying purposes it serves. The "unforeseeable and spontaneous" inquiry was originally designed to ensure that officers do not sit on probable cause and later conduct a warrantless search when they could have obtained a

warrant. But the panel's focus on the events occurring before probable cause arose detaches the "unforeseeable and spontaneous" inquiry from that rationale. Here, because officers did not sit on probable cause and conducted a search reasonably promptly after obtaining probable cause, Witt does not prohibit the warrantless search. This Court should thus reverse the contrary findings of the Appellate Division.

CONCLUSION

For these reasons, this Court should clarify that the "unforeseeable and spontaneous" inquiry focuses on whether police officers act with reasonable promptness when performing warrantless car searches once the circumstances establish probable cause, hold that Witt did not prohibit the prompt warrantless search of the SUV once the circumstances established probable cause, and reverse the contrary holding of the Appellate Division.

Respectfully submitted,

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