STATE OF NEW JERSEY

Respondent/Plaintiff,

Vs.

SUPREME COURT OF
NEW JERSEY

DOCKET NO.: ___

CRIMINAL ACTION

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-2354-18T2

Sat Below:

CORNELIUS C. COHEN

Appellant/Defendant.

Hon. Ellen Koblitz, J.A.D.
Hon. Hon. Greta Gooden-Brown, J.A.D.

APPELLANT/DEFENDANT'S BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION

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QUESTIONS PRESENTED

1. Whether the court engaged in the proper analysis under *State v Witt* to determine if the exigency requirements under the automobile exception were met by "unforeseen and spontaneous circumstances" or were the product of preplanned or fake exigencies?

2. Whether the trial court's interpretation of the holding in *State v Kahlon* supports the search of the entire vehicle upon the smell of marijuana?

ERRORS COMPLAINED OF

1 The Appellate Division was in error in affirming the finding of exigent circumstances under *State v Witt*.

2. The Appellate Division erred by failing to reverse the trial courts suppression ruling pursuant to *State v Kahlon* as *Kahlon* does not support a search of the entire automobile based on the inability to pinpoint the source of the smell of marijuana and the record only supports that a reasonable search was limited to the interior of the automobile.

SHORT STATEMENT OF THE MATTER[1]

Appellant-Defendant Cornelius Cohen respectfully petitions this Court to review the final judgment of the Appellate Division affirming the trial court's denial of his motion to suppress evidence.

The Appellate Division below held that in assessing whether exigent circumstances exists under the automobile exception, or if preplanned or fake exigencies, a court is only to view the conduct of the New Jersey State Police under an objectively reasonable standard without regard to their motives or intent.

Defendant contends that this ruling is in conflict with this Court's decision in *State v Witt* which reverted to the exigency standard espoused in *State v Alston. Alston* requires a court to assess whether probable cause existed prior to subsequent events that are alleged to be preplanned or "fake exigencies. That is, whether it was objectively reasonable for the State Police to have obtained a warrant when facts demonstrate that a warrant could have secured and instead "sat on probable cause" to later conduct a warrantless search of an

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[1] "1T" refers to the transcript for the hearing on December 20, 2017.
"2T" refers to the transcript for the hearing of April 19, 2018
"3T" refers to the transcript for the Oral Argument of June 15, 2018.
Db refers to Defendant's Appellate Division brief.
Da refers to Defendant's Appellate Division brief appendix.
DPA refers to Defendant's Petition for Certification appendix.

automobile. Defendant contends that this is the correct inquiry in determining whether the exigency requirements of unforeseeable and spontaneous circumstances are met under the automobile exception to the warrant requirement.

In addition, the Appellate Division affirmed the trial court's application of *State v. Kahlon* finding that the inability of a state trooper to ascertain where the smell of raw marijuana was emanating from permitted the trooper to search the entire vehicle which Defendant believes is not supported by the holding in *Kahlon*.

Defendant respectfully contends that this case presents the precise circumstance under which certification can be granted including that the Appellate Division's decision presents a question of general public importance which have not but should be settled by this Court and is in conflict with any other decision of the same or a higher court as to the limited exigency standard of *Witt* and the permissible scope of the search of an automobile pursuant to *Kahlon*.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

Defendant contends that this petition for certification should be granted as his case presents a question of general public importance which has not been but should be settled by the Supreme Court, conflicts with conflict with precedent and in the interest of justice. R. 2:12-4. "Typically, a case for certification encompasses several of the relevant factors controlling the exercise of the Court's discretionary appellate jurisdiction." *Mahony v. Danis*, 95 N.J. 50, 51 (1983).

EXIGENT CIRCUMSTANCES

It is the Defendant's belief that under the circumstances of his case, the trial court failed to establish whether there was probable cause arising out of the State Police's investigation of the Defendant prior to determining if a subsequent warrantless search and seizure under the automobile exception arose out of unforeseen and spontaneous events or from preplanned or fake exigencies.*Da51-52.*

In *State v. Witt*, 223 N.J.409 (2015), overturning its decision in *State v. Pena-Flores*, 198 N.J. 6 (2009), this Court returned to the automobile exception standard previously set forth in *State v. Alston*, 88 *N.J.* 211, 233 (1981). Under *Alston*, "a warrantless search of an automobile was constitutionally permissible, provided that the police had probable cause to search the vehicle and that the police action was prompted by the 'unforeseeability and spontaneity of the circumstances giving rise to probable cause.'" *Id.* at 233

In writing for the Court, Justice Albin cautioned that under the standard espoused in *Alston*, "[w]arrantless searches should not be based on fake exigencies." *Id.* at 449; See, *Pena-Flores*, supra, 198 N.J. at 11 ("the stop and search of the vehicle cannot be pre-planned -it must be unforeseen and spontaneous"). Justice Albin explained that the unforeseeable and spontaneous requirements espoused in *Alston* demands that police who have probable cause should obtain a warrant otherwise a subsequent warrantless search may be unreasonable and thus unlawful.

> The exigency requirement in *Alston*, as the *Cooke* Court noted, was the "'unforeseeability and spontaneity of the circumstances giving rise to probable cause, and the inherent mobility of the automobile,' "*id.* at 672, 751 A.2d 92 (quoting

> *Alston, supra,* 88 *N.J.* at 233, 440 *A.*2d 1311), and "the unanticipated circumstances that give rise to probable cause occur swiftly," *ibid.* (citing *Alston, supra,* 88 *N.J.* at 234, 440 *A.*2d 1311). *The language in Alston ensured that police officers who possessed probable cause well in advance of an automobile search sought a warrant. Police officers could not 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. The Alston standard provided a limited exigency to the warrant requirement.*
>
> *Witt*, supra, 223 N.J. at 432-33.

In the Defendant's case, in reviewing whether the acts of the State Police were preplanned or fake exigencies, the trial court did not assess whether probable cause existed prior to the encounter with the Defendant to determine whether the police were "[sitting] on probable cause" and thereafter conducted a warrantless search of an automobile. Such an analysis is at the heart of a determination of whether conduct preplanned or a fake exigency. *Id.*; Da51-52.

There has been conflict as to this cautionary language as a recent Appellate Division decision interpreted "fake exigencies" to be applicable only to cases involving towing and impoundment of vehicles. *State v Rodriquez*, ___ N.J.Super ___ (2019) (slip

op. at 15)[2]. In *Rodriquez*, police officers conducted a motor vehicle stop as a result of observing a malfunctioning headlight. Officers noticed the odor of raw marijuana coming from the vehicle and observed several small pieces of marijuana on the front passenger seat.[3] A search of the vehicle found $10,000 in cash and a large box of marijuana. The trial court granted defendant's suppression motion finding that as it was clear that the vehicle was going to be towed and impounded, and the defendant was already in the back of the police cruiser under arrest, a warrant was required to search the automobile. *Id.* at 3-7.

In reversing the trial court's order, the Appellate Division held that *Witt* permitted the search of the automobile as a result of the smell of marijuana. *Id.* at 13-14. In finding that the alleged lack of exigency as a result of the vehicle being impounded did not require a warrant for the search, the court noted that,

> "[v]iewed in its proper context, the Court's reference in Witt to "fake exigencies" signifies that the police cannot rely upon a contrived justification to search an impounded vehicle without a warrant merely because the vehicle could have been searched earlier at the roadside.

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[2] *State v. Rodriquez*, Dkt No. A-0180-18TA (App.Div. May 3, 2019)

[3] Upon further inquiry, the police determine that defendant's drivers license had been suspended.

> The whole tenor of the Witt opinion is to eliminate the need for police to establish "exigencies" at the roadside to proceed with a warrantless search."
>
> *Id.* at 15.

Defendant respectfully contends that certification in this case is necessary as Justice Albin's opinion in *Witt* clearly speaks to exigency outside of the context of towing and impoundment and does not support this narrow interpretation, particularly as it pertains to the failure to reasonably secure a warrant prior to a warrantless search of an automobile. *Witt*, supra, 223 N.J. at 432-33.

It is the requirement of a neutral and detached magistrate that provides meaning to the "limited" exigency requirement under our constitution, ensuring that the circumstances are in fact unforeseeable and spontaneous and not preplanned or fake exigencies which may occur when law enforcement personnel are the sole arbiters of constitutional protections.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.
>
> *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

Reasonableness is at the crux of our search and seizure law. *State v. Bruzzese*, 94 N.J. 210, 217-218 (1983), *cert. denied*, 465 U.S. 1030 (1984). If preplanned or "fake exigencies" are at odds with the exigency standard in *Witt*, then one must assess the alleged violation from the time when it was practicable for a police officer to have obtained a warrant, to determine whether the circumstances pertaining to a subsequent warrantless search or seizure were preplanned or fake exigencies, or in fact, unforeseeable and spontaneous.

Lastly, in the interest of justice, the record supports that an objectively reasonable time was available to State Police to obtain a warrant and the subsequent events leading up to the warrantless search were pre-planned or fake exigencies and require this Courts intervention.

The facts of Defendant's case illuminate this issue. After receiving information from a confidential informant (CI), Detective Joseph Czech stared his investigation of the Defendant as early as December 15, 2015 when he ran the plates the Defendants' automobile. *1T30:7*. On January 8, 2016 a Real Time Tracking report was requested for tracking of the Defendant and Nazsa Baker's automobiles. On January 14 2016, Detective Czech's supervisor sent a request for assistance (be on the look out "BOLO") on January 14, 2016 noting that the Defendant was to return to New Jersey on or about January 17, 2016. Czech also

testified that the BOLO was used as a "tool" in his ongoing investigation and he was aware that it was a possibility the automobile driven by the Defendant would be stopped as a result of the BOLO. *1T 59:9-60:6; 61:4-16.* Notwithstanding the tracking of the accused over a roughly 30 day period, Detective Czech did not request a warrant during that time. *1T62:7-63:8.*

A focus on the warrant requirement (probable cause) when there is a subsequent warrantless search serves to reinforce the limited exigency required in *Witt* when a court is assessing whether a subsequent warrantless search or seizure is unreasonable as in most cases, a police officer upon encountering a driver on a roadway will not have any prior knowledge of the driver, occupants, or the vehicle or would be aware of an ongoing investigation. As such, preplanned or fake exigencies are unlikely dangers to citizens in such scenarios.

In contrast, in situations where probable cause exists and a warrant reasonably obtained, police should not be able to pursue a subsequent warrantless search or seizure under the automobile exception by substituting investigatory tools for a neutral and detached magistrate "simply to avoid the inconvenience of obtaining a search warrant". *State v. Ercolano* 79 N.J. 25, 47 (1979).

POINT 2

THE COURTS' APPLICATION OF STATE V. KAHLON

The trial court and Appellate Division's interpretations of the holding in *State v. Kahlon*, 172 N.J. Super. 331 (App. Div.1980), and cases citing this decision, are in conflict with a decision of this Court and other Appellate Division decisions. Here, the trial court misapplied *Kahlon* in support of the reasonableness of Trooper Travis' extension of the scope of his interior search of the vehicle to the trunk and hood of the automobile finding that the smell of marijuana gavee the trooper the ability to search the entire vehile.*Da52*

Our 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.'" *State v. Walker*, 213 N.J. 281, 290 (2013) (quoting *State v. Nishina*, *supra*, 175 N.J. 503, 515-16(2003)). Search and seizure cases however, limit the breath of the search based on the officer's observations. Although a search may be

initially valid, may become unreasonable because of its intolerable intensity and scope. *Terry v. Ohio*, 392 U.S. 1, 19 (1968); *State v. Astalos*, 160 N.J. Super. 407, 413 (App. Div. 1978).

In *Kahlon*, a police officer upon conducting a motor vehicle stop detected the odor of "burning marijuana" when the "defendant opened his window to provide the officer with his [driving] credentials [,]". Upon searching the interior of the vehicle, the officer found "a half-burned marijuana cigarette [,]" "a clear plastic bag filled with . . . approximately [one-half] ounce of marijuana and a package of cigarette wrapping papers." *Kahlon*, supra, 172 N.J. Super. at 336-37. The Appellate Court held that the officer's "inability to pinpoint the source" of the odor emanating "from the rear of the [defendant's] vehicle, together with the marijuana already found in the car," established probable cause to extend the search to the trunk of the car. *Id.* at 338.

In further support of its opinion in the Defendant's case, the Appellate Panel *cited* *State v. Guerra*, 93 N.J. 146, 150 (1983) where this Court, citing *Kahlon* with approval, upheld a search where an officer smelled unburnt marijuana and observed that the car was "hanging low in the trunk" thus supporting the scope of the search extending to the trunk of the automobile. *Id.* at 149-51; DPA22.

Missing from the Appellate Panel's application of *Kahlon* to the Defendant case is that the initial smell of unburnt marijuana by a police officer, as "an odor of unburned marijuana creates an inference that marijuana is physically present in the vehicle", *combined* with the discovery of evidence supporting the existence of marijuana during the search of the interior of the automobile supported probable cause to expand the scope of the search to the trunk or hood of a vehicle. See, *State v Judge,* 275 N.J. Super. 194, 205-06 (App. Div 1994) (upholding the search of a vehicle when an officer, after smelling burnt marijuana, found marijuana on the defendant and in a gym bag in the back seat prior to searching the trunk with the accused's consent).

In the Defendant's case, unlike *Kahlon*, the record is devoid of any evidence of marijuana discovered during the interior search of the automobile or the existence of any any facts supporting the suspicion of a drug cache in the trunk or the hood of the automobile. In *Kahlon* and the cases interpreting it, when a police officer was unable to pinpoint the smell of marijuana, there was also a discovery of marijuana (or some other CDS) to allow the scope of the search to expand beyond the interior of the automobile.

Consequently, even if one were to consider the "shake" and the air fresheners as facts supporting probable cause to search

the interior of the automobile, such facts only support a finding of personal use of marijuana which, without more, would not support the expansion of the scope of the search to the trunk or hood of the automobile. *State v Patino*, 83 N.J. 1,12. (1980)("[T]he bare circumstance of a small amount of marijuana does not constitute a self-evident proposition that more marijuana or other contraband might be elsewhere in the automobile.").

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION'S OPINION

As to Witt's caution regarding fake exigencies, the Appellate Division attempted to address the issue as one of intent noting that "[a]ccording to Defendant, "the facts of this case" "highlight[] that the true intent of the troopers was to search the entire automobile for . . . weapons" as a result of the CI's tip. However, the existence of a parallel investigation into defendant's suspected firearms trafficking is irrelevant." DPA22-23.

Respectfully, here is where the Appellate Division's decision misses the mark as to the exigency requirement for our automobile exception. *Alston* would require an analysis as to whether a warrant could have reasonably been obtained prior to the State Troopers following the Defendant as a result of the

BOLO. If it is determined that there was probable cause and the police did not seek a warrant, instead "sitting on probable cause, then there is no longer the necessary exigency "for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant." *Witt*, supra, 223 N.J. at 432.

As such, since the trooper was following the Defendant as a result of the BOLO, the subsequent events are not a "parallel investigation" but may be shown to be a continuation of one investigation that went afoul of the protections under our constitution thus resulting in the preplanned or fake exigencies cautioned by this Court in *Witt*.

CONCLUSION

For all of the above stated reasons, Defendant respectfully requests that this Court grant his Petition for Certification and reverse the Appellate Division's decision.

Respectfully Submitted,

/s/ Raymond L. Hamlin
Raymond L. Hamlin, Esq.

Dated: May 20, 2020

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STATE OF NEW JERSEY Plaintiff-Respondent, v. CORNELIUS C. COHEN Defendant-Appellant.	SUPREME COURT OF NEW JERSEY Docket No.: App. Div. Docket No.: A-2354-18T2 NOTICE OF PETITION FOR CERTIFICATION Criminal Action: Sat below Hon. Ellen Koblitz, J.A.D. Hon. Greta Gooden Brown, J.A.D.

TO: Clerk of the Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street: PO Box 970
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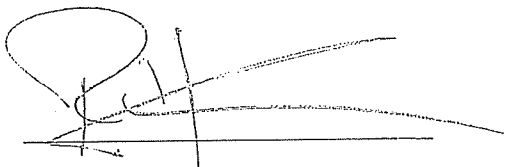
PLEASE TAKE NOTICE that the undersigned attorney for Defendant/Appellant shall petition the New Jersey Supreme Court pursuant to R.2:12-3(a) for Certification to appeal and review the decision and final judgment of the Superior Court, Appellate Division as set forth in that Court's decision dated April 20, 2020. The filing fee is enclosed herewith.

Cornelius Cohen was indicted on October 17, 2016, Indictment Number 16-10-0012-S, for Second Degree Unlawful Possession of a Weapon in violation of N.J.S.A. 2C:39-5(b) (Count One); Third Degree Unlawful Possession of a Weapon in violation of N.J.S.A. 2C:39-5(c)(1)(Count Two) and; Fourth Degree Possession of a Prohibited Device in violation of N.J.S.A. 2C:39-3(f)(Count Three). On December 21, 2018, the Appellant was sentenced subject to a plea agreement, reserving his right to challenge the order denying his suppression motion, to five years imprisonment serving a minimum of forty-two months before being eligible for parole. Mr. Cohen's sentence was stayed pending appeal.

Respectfully submitted,



Raymond L. Hamlin, Esq.

Date: May 8, 2020

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2354-18T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CORNELIUS C. COHEN,

Defendant-Appellant.

Submitted February 5, 2020 – Decided April 20, 2020

Before Judges Koblitz and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 16-10-0162.

Hunt Hamlin & Ridley, attorneys for appellant (Raymond Louis Hamlin, of counsel and on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Sarah C. Hunt, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

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STATE OF NEW JERSEY **Respondent-Plaintiff,** **v.** **CORNELIUS C. COHEN** **Appellant-Defendant.**	**SUPREME COURT OF NEW JERSEY** **Docket No.:** **App. Div. Docket No.: A-2354-18T2** **CERTIFICATION OF COUNSEL** **Criminal Action:** **Sat below** **Hon. Ellen Koblitz, J.A.D.** **Hon. Greta Gooden Brown, J.A.D.**

I hereby certify that the petition for certification in this matter presents a substantial question and is filed in good faith and not for purposes of delay. I 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.

-s- *Raymond L. Hamlin*
Raymond L. Hamlin

Date: May 20, 2020

Following the denial of his motion to suppress evidence seized from his vehicle without a warrant after a motor vehicle stop, defendant entered a conditional negotiated guilty plea, R. 3:9-3(f), to second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b). He was sentenced in accordance with the plea agreement to five years' imprisonment, with the mandatory three-and-one-half-years of parole ineligibility. See N.J.S.A. 2C:43-6(c).

Defendant now appeals from the December 24, 2018 judgment of conviction, raising the following points for our consideration:

> POINT ONE:
>
> THE MOTION COURT'S RULING FINDING THAT [STATE V. KAHLON[1]] PERMIT[]S THE SEARCH OF THE ENTIRE AUTOMOBILE UPON THE SMELL OF MARIJUANA WAS IN ERROR.
>
> POINT TWO:
>
> THE STATE FAILED TO ESTABLISH THAT THERE WERE EXIGENT CIRCUMSTANCES THAT WOULD SUPPORT THE WARR[A]NTLESS SEARCH OF DEFENDANT'S AUTOMOBILE.
>
> > A. IN ASSESSING WHETHER THE STOP AND SEARCH WAS PREPLANNED, THE MOTION COURT ERR[]ED IN FINDING THAT THE VERIFICATION OF THE CONFIDENTIAL INFORMANT'S

[1] 172 N.J. Super. 331 (App. Div. 1980).

INFORMATION PERMITTED THE STATE TROOPERS TO SEARCH THE AUTOMOBILE.

B. THE MOTION COURT'S FINDING THAT TWO STATE TROOPERS INDEPEND[E]NTLY SMELLED RAW MARIJUANA IS NOT DETERMINATIVE AS TO WHETHER THE STOP AND SEARCH OF THE AUTOMOBILE WAS PREPLANNED.

We affirm.

At the hearing on the suppression motion, State Police Detective Joseph Czech and Trooper Charles Travis IV testified for the State. Trooper Caitlin Brennan and Najah[2] Baker testified for the defense. Czech, an eleven-year veteran assigned to the State Police Trafficking Unit, testified that in January of 2016, a confidential informant (CI) who had provided reliable information to other detectives in the past notified him that defendant was trafficking weapons between the Carolinas and New Jersey. The CI stated defendant used two different vehicles to transport the weapons "to the Essex . . . as well as Middlesex County area[s]," and provided a description of the vehicles, including the license plate numbers. Czech's investigation revealed that the vehicles, a gray Infiniti G35 and a black Honda Civic, were registered to defendant and Baker,

[2] Alternate spellings of Najah appear in the record.

respectively. The investigation also confirmed that the Honda Civic had traveled through the southern states in November 2015.

On January 15, 2016, the CI notified Czech that defendant was "en route to one of the Carolinas" and "would be returning" to New Jersey on Sunday, "January 17th." As a result, Czech entered "[t]he license plates of both vehicles" into "various [law enforcement] databases" so that he would be notified by "[t]he Regional Operations Intelligence Center [ROIC]" if either license plate "was r[u]n by another officer or . . . picked up by an automated reader." In addition, Czech's supervisor "sent out an e-mail to State Police stations" to "be on the lookout [BOLO] for the[] vehicles" being operated by defendant or Baker. However, the e-mail only directed recipients to "notify [Czech] or other unit members if they . . . came across the vehicle[s]." Subsequently, Czech was notified by the ROIC and Travis that the Honda Civic was located and responded to the location.

Travis, a nine-year veteran trooper, testified that he was aware of the BOLO from the e-mail being "forwarded to . . . [his] work e-mail" and "disseminated at rol[l] call." According to Travis, during his shift on January 17, he observed the Honda Civic identified in the BOLO "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. In addition, "[a]s the vehicle was going through the toll plaza" for "the Woodbridge area, . . . the E-ZPass reader indicated unpaid tolls." Travis continued to "follow[] the vehicle" onto "parkway north" and, based on the violations, conducted a motor vehicle stop "around [milepost] 137." Brennan assisted with the stop as "a back-up trooper."

Defendant was identified as the driver of the vehicle, and Baker was identified as the front seat passenger. Upon approaching the vehicle, Travis detected "[a] strong odor of raw marijuana" emanating from the vehicle and observed "multiple air fresheners hanging from the rearview mirror," indicating an attempt "to mask the [marijuana] odor." Additionally, while requesting defendant's driving credentials, Travis "observed greenish-brown vegetation on [defendant's] beard and . . . shirt," believed to be marijuana residue. After defendant and Baker confirmed that neither was a medical marijuana user, Travis ordered them out of the vehicle, placed them under arrest, and conducted a search of the vehicle to ascertain the source of the marijuana odor while other officers responded to the scene, one of whom also detected the odor of marijuana emanating from the vehicle.

During the search, Travis found a spent 9mm shell casing in a shot glass inside the glove compartment of the vehicle's interior. After completing the search of the passenger compartment with negative results for marijuana, Travis proceeded to search "the engine compartment" because "[m]arijuana can fit in the engine compartment" and "will get sucked into the air . . . vents." There, Travis found "[a] black canvas bag" containing a "shotgun" along "the firewall of the engine . . . where it meets the partition for the passenger compartment." Inside "a smaller bag" on "the driver's side in the same location up against . . . the firewall," he found "a revolver." Proceeding to the trunk, Travis found a "duffle bag" inside the trunk containing "various calibers of ammunition," including hollow point bullets.

The entire encounter was recorded on the dash-cam video recording in Travis's patrol car, which "start[ed] recording" once Travis activated his overhead emergency lights to conduct the stop. The dash-cam video was played during the hearing and viewed by the judge. After the search, Travis transported defendant back to the State Police barracks and issued him "[m]otor vehicle violation[] summonses" for "failure to pay tolls" and "failure to maintain . . . lane of travel." Based on the seizure of the two firearms and the hollow point bullets, defendant was subsequently indicted for two counts of second-degree

unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) and N.J.S.A. 2C:39-5(c)(1); and fourth-degree possession of a prohibited device, N.J.S.A. 2C:39-3(f).

For the defense, Trooper Brennan testified at the hearing that she "had been speaking with Travis" on the Turnpike during her shift on January 17, when "he abruptly took off." She followed him and served as a back-up during the motor vehicle stop, but did not know the reason for the stop and had no recollection of receiving the BOLO. In turn, Baker testified that when they were stopped on January 17, neither she nor defendant had consumed marijuana or had marijuana in their possession. She also provided her E-ZPass records for the period in question, which were moved into evidence.

Following the hearing, the judge denied defendant's motion. In a written decision, the judge credited Travis's testimony, which was corroborated by the dash-cam video, applied the governing principles, and concluded that the search was legally justified. First, citing State v. Smith, 306 N.J. Super. 370, 380 (App. Div. 1997), the judge determined that "based on his training and experience," Travis's observation of defendant's "failure to maintain his lane of traffic" "indicated possible intoxication" and "provided him with an 'articulable and

reasonable suspicion that the driver committed a motor vehicle offense.'" The judge added

> Travis also testified he observed . . . [d]efendant drive through the EZ Pass lane without paying the toll. Specifically, when . . . [d]efendant drove through the EZ Pass lane, the toll sign indicated "No Toll Paid." To contradict this observation, . . . [d]efendant provided the [c]ourt with . . . Baker's EZ Pass records and argued the toll was paid. Based on the [c]ourt's review and interpretation of the records, it appears . . . Baker's EZ Pass account had a negative balance on January 17, 2016. The records also indicate the toll charged on January 17, 2016 was not actually recorded as paid until January 21, 2016, two days after a prepaid payment of $50.00 posted to the account. . . .
>
> Thus . . . [d]efendant's efforts to impeach the credibility of Trooper Travis with the EZ-Pass records is misplaced . . . .

The judge also dismissed defendant's attempt to discredit Travis's testimony with Brennan's. In that regard, the judge found

> Brennan's testimony ancillary to the core issues of this case. According to . . . Brennan, she and . . . Travis were parked next to each other on the Turnpike when . . . Travis quickly drove off. At this time, . . . Brennan was unaware as to why . . . Travis unexpectedly drove off. . . . Brennan decided to follow . . . Travis as back up. However, . . . Brennan had no reason to focus her attention on the vehicle pursued by . . . Travis because she was unaware of who . . . Travis was pursuing, or why. In addition to . . . Brennan's lack of knowledge, she was physically unable to observe . . . [d]efendant's vehicle as she traveled behind . . . Travis. As a result,

> . . . Brennan was unable to provide testimony regarding the validity of the motor vehicle stop.

The judge posited that "the core issue of th[e] motion [was] whether the smell of raw marijuana was actually detected." Despite the fact that "no marijuana was found in the vehicle," the judge found "Travis's testimony that he smelled raw marijuana" credible, explaining

> After removing . . . [d]efendant and . . . Baker from the vehicle, . . . Travis begins the search of the vehicle. At this time, an unidentified detective walks up to . . . Travis. . . . Travis introduces himself and explains to the detective he is searching the vehicle after detecting raw marijuana. At 22:18 of the [dash-cam video], the unidentified detective confirms the smell of raw marijuana by saying, "yeah, you can really smell it." Then, at 22:36 of the [dash-cam video], . . . Travis is unsuccessful in his search for marijuana and states quietly he doesn't know why there isn't marijuana, and maybe . . . [d]efendant had the marijuana in the car earlier. . . .
>
> Although no marijuana was subsequently found in the vehicle . . . , this [c]ourt finds Trooper Travis'[s] credibility coupled with the corroboration of the unidentified detective enough to support probable cause of the search by a preponderance of the evidence. First, as evidenced by the [dash-cam video], . . . Travis and the unidentified detective were meeting for the first time before conducting the search. The unidentified detective's corroboration of the raw marijuana smell was unsolicited by . . . Travis, and there is no evidence to suggest the two preplanned the conversation to support the search as a result of the notice.

In specifically addressing the impact of the notification contained in the BOLO, the judge reasoned

> Although . . . Travis was made aware of . . . [d]efendant and alleged weapon trafficking prior to making the motor vehicle stop, this [c]ourt finds the stop and subsequent warrantless search were independent of the notification. . . . Travis'[s] motive for following . . . [d]efendant is inconsequential as the analysis of the stop is based solely on the objective facts involving the motor vehicle violations observed. Here, . . . Travis observed . . . [d]efendant committing motor vehicle violations. When the smell of raw marijuana was detected, a warrantless search became permissible to locate the marijuana. [Kahlon, 172 N.J. Super. at 338].

The judge concluded

> Travis had an articulable and reasonable suspicion [that] . . . [d]efendant committed motor vehicle violations. Once . . . [d]efendant's vehicle was lawfully stopped, . . . Travis's detection of the odor of raw marijuana emanating from the vehicle was unforeseeable and spontaneous, permitting a warrantless search of the entire vehicle.

Our review of the trial court's decision on a motion to suppress is limited. State v. Robinson, 200 N.J. 1, 15 (2009). "An appellate court reviewing a motion to suppress evidence in a criminal case must uphold the factual findings underlying the trial court's decision, provided that those findings are 'supported by sufficient credible evidence in the record.'" State v. Boone, 232 N.J. 417, 425-26 (2017) (quoting State v. Scriven, 226 N.J. 20, 40 (2016)). We do so

"because those findings 'are substantially influenced by [an] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Gamble, 218 N.J. 412, 424-25 (2014) (alteration in original) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). This deferential standard of review applies even if the trial court's factual findings are "based on both a video recording and eyewitness testimony." State v. S.S., 229 N.J. 360, 374 (2017) (citing State v. Elders, 192 N.J. 224, 248 (2007)).

"The governing principle, then, is that '[a] trial court's findings should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction.'" Robinson, 200 N.J. at 15 (alteration in original) (quoting Elders, 192 N.J. at 244). "[A] trial court's factual findings should not be overturned merely because an appellate court disagrees with the inferences drawn and the evidence accepted by the trial court or because it would have reached a different conclusion." S.S., 229 N.J. at 374. "We owe no deference, however, to conclusions of law made by trial courts in deciding suppression motions, which we instead review de novo." State v. Brown, 456 N.J. Super. 352, 358-59 (App. Div. 2018) (citing State v. Watts, 223 N.J. 503, 516 (2015)).

Applying that de novo standard of review to the trial court's legal conclusions, "[w]e review this appeal in accordance with familiar principles of

constitutional law." State v. Robinson, 228 N.J. 529, 543 (2017). "Both the United States Constitution and the New Jersey Constitution guarantee an individual's right to be secure against unreasonable searches or seizures." State v. Minitee, 210 N.J. 307, 318 (2012) (citing U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7). Thus, searches and seizures conducted without a warrant "are presumptively invalid as contrary to the United States and the New Jersey Constitutions." State v. Pineiro, 181 N.J. 13, 19 (2004) (citing State v. Patino, 83 N.J. 1, 7 (1980)). As such, "the State must demonstrate by a preponderance of the evidence," id. at 20 (quoting State v. Wilson, 178 N.J. 7, 13 (2003)), that "[the search] falls within one of the few well-delineated exceptions to the warrant requirement." Id. at 19-20 (quoting State v. Maryland, 167 N.J. 471, 482 (2001) (alteration in original)). "Thus, we evaluate the evidence presented at the suppression hearing in light of the trial court's findings of fact to determine whether the State met its burden." Id. at 20.

The exception invoked in this case to justify the warrantless search is the automobile exception to the warrant requirement. Pursuant to State v. Witt, 223 N.J. 409 (2015), officers may conduct a warrantless, nonconsensual search during a lawful roadside stop "in situations where: (1) the police have probable cause to believe the vehicle contains evidence of a criminal offense; and (2) the

circumstances giving rise to probable cause are unforeseeable and spontaneous." State v. Rodriguez, 459 N.J. Super. 13, 22 (App. Div. 2019) (citing Witt, 223 N.J. at 447-48). See also State v. Alston, 88 N.J. 211, 230-31 (1981).

"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." State v. Walker, 213 N.J. 281, 290 (2013) (quoting State v. Nishina, 175 N.J. 502, 515-16 (2003)) (internal quotation marks omitted); accord, e.g., State v. Pena-Flores, 198 N.J. 6, 30 (2009); State v. Birkenmeier, 185 N.J. 552, 563 (2006); State v. Guerra, 93 N.J. 146, 150-51 (1983); State v. Legette, 441 N.J. Super. 1, 15 (App. Div. 2015); State v. Myers, 442 N.J. Super. 287, 295-96 (App. Div. 2015);[3] State v. Chapman, 332 N.J. Super. 452, 471 (App. Div. 2000); State v. Vanderveer, 285 N.J. Super. 475, 479 (App. Div. 1995); State v. Judge, 275 N.J. Super. 194, 201 (App. Div. 1994); State v. Sarto, 195 N.J. Super. 565, 574 (App. Div. 1984); Kahlon, 172 N.J. Super. at 338.

[3] "[A]bsent evidence the person suspected of possessing or using marijuana has a [medical use marijuana] registry identification card, detection of marijuana by the sense of smell, or by the other senses, provides probable cause to believe that the crime of unlawful possession of marijuana has been committed." Myers, 442 N.J. Super. at 303.

These and other decisions have "'repeatedly recognized that' . . . the detection of that smell satisfies the probable-cause requirement." Walker, 213 N.J. at 287-88 & n.1. Thus, in the context of a warrantless automobile search, the "smell of marijuana emanating from the automobile [gives] the officer probable cause to believe that it contain[s] contraband." Pena-Flores, 198 N.J. at 30 (citation omitted). However, "[a] police officer must not only have probable cause to believe that the vehicle is carrying contraband but the search must be reasonable in scope." Patino, 83 N.J. at 10. In that regard, "[i]t is widely recognized that a search, although validly initiated, may become unreasonable because of its intolerable intensity and scope." Id. at 10-11 (citing Terry v. Ohio, 392 U.S. 1, 19 (1968)). Thus, "the scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry, 392 U.S. at 19 (quoting Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

Applying those principles here, we conclude that the judge's factual findings are amply supported by the record and his legal conclusions are sound. As "a trained and experienced State Trooper," Travis's detection of the odor of raw marijuana "emanating from the passenger compartment of a legally stopped motor vehicle, created probable cause to believe that a violation of law had been

or was being committed" and justified the ensuing search. Myers, 442 N.J. Super. at 297. Indeed, the detection of the odor of raw marijuana after stopping the vehicle, in conjunction with Travis's observation of marijuana residue on defendant's beard and shirt, as well as several air fresheners hanging from the rearview mirror, were objectively unforeseeable and unanticipated circumstances that gave rise to probable cause to justify a warrantless search.

Defendant argues that the judge's ruling that the "[t]roopers' search of the entire automobile based on the smell of raw marijuana" was justified did "not comport with the holding in Kahlon or our case law concerning automobile searches and the smell of marijuana." Accordingly, defendant "contends that the search of the trunk and hood was unreasonable and all evidence obtained from said search should be suppressed." We disagree.

In Kahlon, after conducting a motor vehicle stop and detecting the odor of "burning marijuana" when the "defendant opened his window to exhibit his [driving] credentials," the defendant ultimately admitted to the officer he had been "smoking marijuana." 172 N.J. Super. at 336. A subsequent search of the interior of the vehicle uncovered "a half-burned marijuana cigarette," "a clear plastic bag filled with . . . approximately [one-half] ounce of marijuana and a package of cigarette wrapping papers." Ibid. When the officer continued to

search the back seat where a passenger had been seated, "he noticed the very heavy odor of unburned marijuana," but found "no potential marijuana containers." Id. at 337. We held that the officer's "inability to pinpoint the source" of the odor emanating "from the rear of the [defendant's] vehicle, together with the marijuana already found in the car," established probable cause to extend the search to the trunk of the car, where he discovered approximately thirty pounds of marijuana in a torn plastic bag located inside a partially opened cardboard box. Id. at 338.

Likewise, in Guerra, after pulling a car over on the Turnpike for an inoperable taillight, a trooper "detected a strong odor of raw unburned marijuana emanating from the interior of the car." 93 N.J. at 149. Upon concluding that a small overnight suitcase in the car's interior "could not have been the source of the odor," a subsequent search of the trunk uncovered plastic bags containing marijuana. Id. at 149-50. Citing Kahlon with approval, our Supreme Court upheld the trial court's denial of the defendant's suppression motion, holding that under the automobile exception to the warrant requirement, the trooper "had probable cause to search the trunk for evidence of contraband" once he determined that "the small suitcase in the car's interior" could not have been the source of the "strong odor of marijuana." Id. at 150.

Here, we are satisfied that Travis's detection of a strong odor of raw marijuana in the car's interior and inability to locate the source after searching the interior justified extending the search to the trunk and the engine compartment where, as Travis explained, the odor of marijuana could travel through the air vents into the vehicle's interior. "The 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." State v. Esteves, 93 N.J. 498, 508 (1983) (citing Guerra, 93 N.J. at 151). The fact that the search uncovered firearms and ammunition, instead of marijuana, does not invalidate the search. See Vanderveer, 285 N.J. Super. at 479 ("The fact that cocaine turned up instead of marijuana does not invalidate the [warrantless] search.").

Defendant also argues that "the fact that two State Troopers independently smelled raw marijuana is of no significance in refuting . . . [d]efendant['s] contention that [the] stop and search of the automobile was preplanned" and "thus unreasonable." According to defendant, "the facts of this case" "highlight[] that the true intent of the troopers was to search the entire automobile for . . . weapons" as a result of the CI's tip. However, the existence of a parallel investigation into defendant's suspected firearms trafficking is irrelevant. "[T]he proper inquiry for determining the constitutionality of a

search and seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent." State v. Kennedy, 247 N.J. Super. 21, 27 (App. Div. 1991). "The fact that the officer does not have the state of mind hypothesized by the reasons which provide the legal justification for the search and seizure does not invalidate the action taken, so long as the circumstances, viewed objectively, support the police conduct." Id. at 28 (citing State v. Bruzzese, 94 N.J. 210, 220 (1984)). Accord State v. Bacome, 228 N.J. 94, 103 (2017).

Affirmed.

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STATE OF NEW JERSEY **Respondent-Plaintiff,** **v.** **CORNELIUS C. COHEN** **Appellant-Defendant.**	**SUPREME COURT OF NEW JERSEY** **Docket No.:** **App. Div. Docket No.: A-2354-18T2** **CERTIFICATION OF COUNSEL** **Criminal Action:** **Sat below** **Hon. Ellen Koblitz, J.A.D.** **Hon. Greta Gooden Brown, J.A.D.**

I hereby certify that the petition for certification in this matter presents a substantial question and is filed in good faith and not for purposes of delay. I 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.

-s- Raymond L. Hamlin
Raymond L. Hamlin

Date: May 20, 2020