COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY

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Honorable Chief Justice and Associate Justices
New Jersey Supreme Court
Richard J. Hughes Justice Complex
Post Office Box 970
Trenton, New Jersey 08625

Re: State of New Jersey v. Kyle A. Smart
Supreme Court Docket No. 087315
Appellate Div. Docket No. A-2334-21; Indictment No. 21-10-1417

Criminal Action: On Leave to Appeal an Interlocutory Order Entered in the Superior Court of New Jersey, Law Division (Criminal), Ocean County

Sat Below: Honorable Carmen Messano, P.J.A.D; Honorable Allison E. Accurso, J.A.D.; Honorable Lisa Rose, J.A.D.

Honorable Judges:

Please accept this letter memorandum submitted on behalf of amicus curiae the County Prosecutors Association of New Jersey.

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STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

Recognizing that the "material facts" pertinent to the matter before this Court are "essentially uncontroverted," were "not contested in the trial court," and were "not disputed on appeal," the County Prosecutor's Association of New Jersey ("CPANJ") is satisfied to rely upon the facts and procedural history contained in the Superior Court, Appellate Division's published decision in this matter, see State v. Smart, 473 N.J. Super. 87, 91-94 (App. Div. 2022). These undisputed facts present an under-two-hour investigation and warrantless search that any member of the 21 county prosecutor's offices represented by the CPANJ would confidently defend.

While conducting surveillance in "a high crime area" known for "frequent drug activity," Officer Louis Taranto of the Toms River Police Department's Special Enforcement Team observed a vehicle with tinted front windows and out-of-state plates. Id. at 91. Officer Taranto recognized the vehicle as matching a confidential information ("CI") tip he had received a month prior connecting this vehicle to "'a black male with facial tattoos,' between five-feet-seven and five-feet-nine inches, 'with long dreadlocks,' known as 'Killer'" who "distributed drugs 'in the Toms River area.'" Id. at 92.

[1] Consistent with its limited role as amicus curiae and the interlocutory nature of the matter before the Court, to avoid unnecessary repetition the CPANJ has combined its statements of procedural history and facts.

A database search provided Officer Taranto with "defendant's name, height, and moniker," as well as a photograph matching the CI's description of the defendant and a criminal record containing drug arrests and drug- and weapons-related convictions. Ibid.

When a man matching the defendant's description and a woman entered the vehicle 30 minutes later, Officer Taranto followed the vehicle while the two first patronized "legitimate" businesses in Toms River. Ibid. After following the vehicle onto Shenandoah Boulevard, what Officer Taranto observed appeared less legitimate. While the officer "did not observe a hand-to-hand transaction," he nonetheless saw that which his training and experience gave him reason to suspect was a "drug deal:" "Defendant exited the car, walked to the backyard of the building, and returned shortly thereafter with an unidentified woman. The woman entered the residence; defendant re-entered the [vehicle]." Ibid. That Officer Taranto knew of a concerned citizen report from a month prior that reported "suspected narcotics-related transactions between multiple residents of the building and the occupants of several cars that stopped there," one of which matched the defendant's vehicle, only further served to support his suspicions. Id. at 92-93.

Armed with this wealth of reasonable and articulable suspicion, after "one hour and seventeen minutes" of surveillance Officer Taranto stopped

defendant's vehicle. Id. at 93. After the steps taken during the first 23 minutes of the stop to confirm or dispel these suspicions – patting down defendant, speaking with defendant, seeking consent to search the vehicle – all failed to do either, Officer Taranto called for a trained police K-9, who arrived on scene and conducted an exterior sniff of the vehicle. Ibid. "Immediately following the canine's positive detection, police searched the vehicle," locating inside of it heroin, a loaded handgun, and $1,600. Ibid. "Defendant was arrested; the driver and her child were permitted to leave the scene in the [vehicle]." Ibid.

The CPANJ accepts much of the Appellate Division's review of this chain of events and that court's disagreement with the analysis that led the trial court to order suppression. The CPANJ agrees with the Appellate Division's "undisputed" conclusion that Officer Taranto "lacked probable cause to search the [vehicle] prior to encountering defendant" and did not develop probable cause "during the one-hour-and-seventeen-minute surveillance," and, therefore, "a warrant would not have issued at any point" before or "during the surveillance." Id. at 96-97. Thus, the CPANJ agrees with the Appellate Division's conclusion that "this is not a case" that this Court warned against in State v. Witt, 223 N.J. 409, 431-32 (2015), where "police officers … possessed probable cause well in advance of an automobile search," but did not seek a search warrant. Smart, 473 N.J. Super. at 97; see also State v. Gonzalez, 227

N.J. 77, 104-05 (2016). As the Appellate Division correctly found, Officer Taranto did not "sit on probable cause." Smart, 473 N.J. Super. at 97; Witt, 223 N.J. at 431-32.

Likewise, the CPANJ agrees with the Appellate Division's rejection of the trial court's conclusion "that law enforcement's suspicions of drug activity before the stop made the automobile exception unavailing." Smart, 473 N.J. Super. at 98. The appellate court was correct in not being "convinced" that this Court's holding in Witt "is limited to probable cause that arises after a roadside stop based on a motor vehicle violation, as the motion judge seemingly suggested here." Id. at 94, 97. Even if Officer Taranto's "goal was clear" and directed at "uncover[ing] drugs," as the trial court found, such a goal would be irrelevant not only to a Witt analysis, but to any Fourth Amendment analysis: "Under the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution, 'the 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.'" State v. Watts, 223 N.J. 503, 514 (2015)(quoting State v. Bruzzese, 94 N.J. 210, 288 (1983)).

The CPANJ also agrees with the Appellate Division's approval of the officer's use of the canine during the stop, see State v. Dunbar, 229 N.J. 521,

537-540 (2017); State v. Nelson, 237 N.J. 540, 552-55 (2019). As the Appellate Division rightly noted, "reasonable articulable suspicion of criminal activity arose prior to the stop," making "the mission of the stop" "an investigation into illegal drug activity." Smart, 473 N.J. Super. at 100. This suspicion was not dispelled by "observations" made "after the stop" and, therefore, the suspicion "did not cease after police conducted 'ordinary inquiries incident to'" the stop, but "remained ongoing until the K-9 unit arrived." Ibid. (quoting Rodriguez v. United States, 575 U.S. 348, 355 (2015)). "[T]he totality of the factors that gave rise to reasonable articulable suspicion of drug activity to stop the car, justified prolonging the stop until the K-9 unit arrived because the dog sniff for suspected narcotics was 'reasonably related in scope' to the basis for the stop." Ibid. (quoting Terry v. Ohio, 392 U.S. 1, 19-20 (1968)).

Where the CPANJ parts company with the Appellate Division, where it submits the appellate court erred and what it respectfully requests this Court act to correct, is in finding "the canine's alert to the presence of narcotics … changed the equation" for application of the automobile exception as defined by Witt. Id. at 98. The appellate court refused to be "convinced" that "the canine's alert for the presence of narcotics" – an "investigative tool" "validly employed" and which unquestionably "gave rise to the probable cause" – "falls

within the ambit of circumstances the Witt Court contemplated as 'unforeseeable and spontaneous' under the automobile exception." Id. at 100. For the Appellate Division, "the use of the K-9 unit" to establish probable cause … did not result in the spontaneous and unforeseeable development of probable cause" because "it was … another step in the search for drugs that caused the stop in the first place." Ibid. Thus, the appellate court concluded that "at that juncture" Officer Taranto was "required to seek a warrant," and that the "failure to do so rendered the ensuing search fatally defective." Ibid.

Contrary to the last paragraph of Smart, Witt's formulation of the spontaneity and unforseeability requirement of the automobile exception is clear and does not support Smart's conclusion that the only mechanism available for lawful automobile searches following a canine sniff is obtaining a search warrant. The CPANJ joins with the State in asking this Court to reverse Smart because Smart is incorrectly decided and if allowed to stand would invite back into automobile searches the very evils this Court sought to eliminate with Witt: "The current approach to roadside searches premised on probable cause – 'get a warrant' – places significant burdens on law enforcement. On the other side of the ledger, we do not perceive any real benefit to our citizenry by the warrant requirement in such case – no

discernable advancement of their liberty or privacy interests." Witt, 223 N.J. at 446-47.

LEGAL ARGUMENT

POINT I

THE CPANJ JOINS AS AMICUS CURIAE TO URGE REVERSAL OF SMART'S INCORRECT INTERPRETATION OF WITT AND PREVENT THE INJECTION BACK INTO THE AUTOMOBILE EXCEPTION THE NEGATIVE CONSEQUENCES WITT SOUGHT TO PREVENT

In Witt this Court jettisoned the "exigent-circumstances standard" of the automobile exception announced in State v. Cooke, 163 N.J. 657 (2000) and reaffirmed by State v. Pena-Flores, 198 N.J. 6 (2009), replacing that "unsound in principle and unworkable in practice" standard with that which had come before Cooke – the rule of State v. Alston, 88 N.J. 211, 233-35 (1981):

> the automobile exception authorize[s] the warrantless search of an automobile … when the police have probable cause to believe that the vehicle 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.

The newly resurrected spontaneity and unforseeability requirement was defined by this Court as focused on the timing of the development of probable cause and connected to the ability or inability of law enforcement to obtain a search warrant in advance of encountering the vehicle:

> For example, 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. In this way, we eliminate the concern expressed in Cooke, supra – 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 the vehicle contained drugs." … In the case of the parked car, if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies.

Ibid. (quoting Cooke, 163 N.J. at 667-68). This Court reaffirmed the temporality of the spontaneous and unforeseeable[2] requirement one year after publication of Witt in Gonzalez, 227 N.J. at 104-05, stating,

> In Witt, supra, we specifically noted that, in the case of a car suspected of containing drugs parked in a driveway, "if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies." … In short, when police have sufficient time to secure a warrant, they must do so.

(quoting Witt, 223 N.J. at 448) (emphasis added).

That which this Court stated in 2015 in Witt and 2016 in Gonzalez mirrors that which it stated in Alston, and its companion case State v. Martin, 87 N.J. 561, 563 (1981), in 1981. Adopting the spontaneity and unforeseeability requirement of Chambers v. Maroney, 399 U.S. 42, 50-51

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[2] The plain meaning of the words spontaneous and unforeseeable, as defined by Merriam-Webster's Dictionary (2022), also supports a temporal understanding of this requirement. Spontaneous means, "developing or occurring without apparent external influence, force, cause, or treatment," and "not apparently contrived or manipulated;" unforeseeable means, "not able to be reasonably anticipated or expected: not foreseeable."

(1970), the Alston Court found the facts before it met this requirement; the reason for the motor vehicle stop – speeding – was "wholly unconnected with the reason for the subsequent seizure" – the "unanticipated" plain view observation of shotgun shells in the vehicle. Alston, 88 N.J. at 216-17, 233-35.

Tellingly and significantly, the Alston Court distinguished the sufficient facts before it from the facts it had found insufficient to satisfy this standard in State v. Ercolano, 79 N.J. 25 (1979). Id. at 234. In Ercolano, 79 N.J. at 30-32, police were conducting a wiretap-aided investigation into illegal gambling associated with a specific apartment in Elizabeth. Police overheard two conversations between an unidentified speaker and their target setting up meetings and money exchanges. Id. at 30-31. Following one of these calls, police observed a vehicle arrive at the apartment driven by the target's brother the defendant. Id. at 31. Police obtained a warrant for the apartment only, but executed that warrant when the defendant was next scheduled to be at the apartment. Ibid. Officers were directed to arrest the defendant during warrant execution. Ibid. According to plan, defendant was arrested for conspiracy and his vehicle was searched. Ibid.

In finding these facts insufficient to justify an automobile exception search, the Ercolano Court found,

> If … there was probable cause to search the vehicle upon defendant's arrival at the apartment, that same probable cause

> made it readily feasible for the police to have applied for a search warrant for the vehicle at the same time as the search warrant for the apartment. Indeed, the police knew for more than a week that defendant had been visiting [their target] using the same automobile, and they certainly had probable cause to believe that he was implicated in the conspiracy. Thus, if there was also probable cause to believe that objects connected with the conspiracy were contained in that car, the police had that information all during the same extended period. Paraphrasing Chambers, supra, "the circumstances" giving rise to probable cause to search this car were not unforeseeable.

Id. at 47 (emphasis in original); see also Alston, 88 N.J. at 234; Martin, 87 N.J. at 563, 570-71 (noting that unlike Ercolano, the facts before it – police were searching for and found a vehicle involved "in a freshly-committed robbery" – established that "the circumstances that furnished the officers with probable cause were unanticipated and developed spontaneously").

The "clear" rule of Alston and Witt thus has long been recognized to be that "provided that probable cause arose at the time of the seizure, the search of the automobile was warranted." Witt, 223 N.J. at 429 (citing Paul Stern, Revamping Search-and-Seizure Jurisprudence Along the Garden State Parkway, 41 Rutgers L.J. 657, 671 (2010)) (emphasis added). Application of this clear, unambiguous rule of law to the uncontroverted facts before it legally permitted the Appellate Division here to reach only one conclusion – that the automobile search conducted on defendant's vehicle was lawful. As the Appellate Division itself found, probable cause to search the defendant's

vehicle did not exist before the stop took place and, therefore, a search warrant could "not have issued at any point" before or "during" Officer Taranto's "surveillance" of defendant. Smart, 473 N.J. Super. at 96-97.

Rather than find as a matter of law that which the facts demanded, the Appellate Division injected uncertainty into Witt by finding the method used by police to obtain probable cause relevant to the calculation of spontaneity and unforeseeability. Id. at 101. For the Appellate Division, the development of probable cause here could not be spontaneous or unforeseeable, even though it indisputably arose only at the time of the stop, because the court perceived as significant the use of a police canine, which had to be relied upon when "the officers' sensory perceptions failed to confirm their suspicions of drug activity following the stop." Ibid. The use of the police canine was for the appellate court "simply another step in the search for drugs that caused the stop in the first place," a fact it found to be not only dispositive, but also mandated obtaining a search warrant in order for a lawful search to be conducted. Ibid.

In so finding, the Appellate Division here drew a distinction between the facts before it and those in State v. Rodriguez, 459 N.J. Super. 13, 25 (App. Div. 2019), a case the court cited to with approval in which a pre-marijuana-legalization roadside automobile search was upheld "where police smelled marijuana emanating from the defendant's vehicle after stopping a car for a

traffic violation." Smart, 473 N.J. Super. at 97, 101. The appellate court correctly did not find the fact that the stop in Rodriguez was precipitated by a traffic violation and not reasonable suspicion of criminal activity like here significant to the Witt calculation: "We are not convinced Witt's holding is limited to probable cause that arises after a roadside stop based on a motor vehicle violation … The circumstances giving rise to probable cause may be unforeseeable and spontaneous following an investigatory stop – even if police expect to find contraband in the vehicle." Id. at 97-98.

Thus, the only difference between Rodriguez and the case at bar is which law enforcement nose detected the drugs in the defendant's vehicle – a trained police officer or a trained police canine. This is a distinction without meaningful difference. As this Court adopted from a "federal determination" and has consistently recognized, "a canine sniff is sui generis and does not transform an otherwise lawful seizure into a search that triggers constitutional protections." Dunbar, 229 N.J. at 538; Nelson, 237 N.J. at 553. In finding that use of a drug-detecting canine here "changed" the spontaneous and unforeseeable "equation," the Appellate Division did just that; it transformed what was plainly a lawful detention and deployment of a police canine into an unlawful police search.

In doing so, the Appellate Division mandated that in future cases in which the "sensory perceptions" of a police canine, and not a human police officer, are used to develop reasonable suspicion of drug activity into probable cause to search, police must "seek a warrant." Smart, 473 N.J. Super. at 101. In a post-marijuana-legalization world – one in which the facts of Rodriguez, 459 N.J. Super. at 16-18 will not be replicated, but the facts of the case at bar will – the practical effect of the appellate court's rule of law would quite obviously result in the increase in applications for vehicle search warrants and the concomitant increase in vehicle impoundments while warrants are obtained. See Witt, 223 N.J. at 441-42 ("the use of telephonic search warrants has not resolved the difficult problems arising from roadside searches … The hope that technology would reduce the perils of roadside stops has not been realized. Prolonged encounters – even within the range of 30 to 45 minutes – may pose an unacceptable risk of serious bodily injury and death. News reports reveal the carnage caused by cars and truck crashing into police officers and motorists positioned on the shoulders of our highways").

Such a result is very much a result the Witt Court sought to prevent by returning to the Alston automobile exception. Witt, 223 N.J. at 433-449.

> The current approach to roadside searches premised on probable cause – 'get a warrant' – places significant burdens on law enforcement. On the other side of the ledger, we do not perceive any real benefit to our citizenry by the warrant requirement in such

> cases – no discernible advancement of their liberty or privacy interests. When a police officer has probable cause to search a car, is a motorist better off being detained on the side of the road for an hour (with all the accompanying dangers) or having his car towed and impounded at headquarters while the police secure a warrant? Is not the seizure of the car and the motorist's detention "more intrusive than the actual search itself"? … At the very least, which is the greater or lesser instruction is debatable, as Justice White observed in Chambers, supra, 399 U.S. at 51-55[.]

Id. at 446-47 (quoting United States v. Ross, 456 U.S. 798, 831 (1982)(Marshall, J., dissenting)); see also Rodriguez, 459 N.J. Super. at 24 ("An inflexible rule of mandatory impoundment could impose greater inconvenience upon motorists, particularly if the vehicle's owner, a relative, or a friend of the motorist is nearby and able to come and remove the vehicle from the scene").

Had Officer Taranto done as the Appellate Division "required" and sought a warrant, the very burdens Rodriguez, Witt, Alston, Ross, and Chambers warned against would have been realized here. Rather than allowing the vehicle's driver and her child to leave the scene of the stop with the vehicle after its search and the defendant's arrest as happened here, see Smart, 473 N.J. Super. at 93, both would have been detained while the vehicle was impounded and arrangements for their transportation made. The driver would have been deprived of the vehicle – "a necessity for a large segment of the population" – for the hours to days needed to obtain the warrant the appellate

court deemed a necessary prerequisite for a lawful search. Streeter v. Brogan, 113 N.J. Super. 486, 488 (Ch. Div. 1971); cf. State Hamm, 121 N.J. 109, 124 (1990); State v. Moran, 202 N.J. 311, 325-26 (2010). This alternate version of events would unquestionably have been "more intrusive than the actual search" that was conducted by Officer Taranto. Witt, 223 N.J. 446 (quoting Ross, 456 U.S. at 831).

CONCLUSION

Because neither policy, nor decades of clear court precedent support the adoption of the rule of law advanced by the Appellate Division and the real-life consequences of that rule on law enforcement and New Jersey citizenry, amicus curiae the County Prosecutors Association of New Jersey respectfully requests this Court reverse the decision of the Appellate Division and find the search conducted here to be a lawful automobile exception search.

Respectfully submitted,

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