

STATE OF NEW JERSEY,

Plaintiff/Appellant,

v.

KYLE A. SMART,

Defendant/Respondent.

SUPREME COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO.: A-2334-21

SUPREME COURT DOCKET NO.:
087315

Criminal Action

ON MOTION FOR LEAVE TO APPEAL
FROM A PUBLISHED OPINION OF THE
APPELLATE DIVISION AFFIRMING AN
INTERLOCUTORY ORDER OF THE
SUPERIOR COURT OF NEW JERSEY,
LAW DIVISION, OCEAN COUNTY.

Sat Below:

Hon. Carmen Messano, P.J.A.D.
Hon. Allison E. Accurso, J.A.D.
Hon. Lisa Rose, J.A.D.

DEFENDANT IS CONFINED

RESPONSE BRIEF ON BEHALF OF DEFENDANT-RESPONDENT,
KYLE A. SMART

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Dated: 8/1/2022

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Partial brief dated January 28, 2022. R1-4

¹ In accordance with R. 2:6-1(a)(2), the relevant portions of the brief below have been included in the appendix as it reflects specific facts presented to the court which are "germane to the appeal."

PROCEDURAL HISTORY²

On October 21, 2021, an Ocean County Grand Jury returned Indictment No. 21-10-1417 formally charging Defendant-Respondent, Kyle Smart, as follows: Count One, third degree Possession of CDS (FluoroFentanyl & Cocaine); Count Two, third degree Possession of CDS (Fentanyl); Count Three, Possession with Intent to Distribute CDS; Count Four, second degree Unlawful Possession of Firearm; Count Five, second degree Possession of Weapon for Unlawful Purpose; Count Six, second degree Possession of Firearm While Engaged in Certain Drug Activity; and Count Seven, Certain Person Not to Possess Firearm. (A1-5)

On December 14, 2021, Defendant filed a motion to suppress evidence seized without a search warrant. (A6-7)

On February 2, 2022, a non-testimonial motion hearing was held before the Honorable Rochelle Gizinski, J.S.C. (1T1-24)

On March 1, 2022, the Judge issued an oral decision on Defendant's motion. (2T3:1-22:19) That day the Court issued an Order granting Defendant's motion to suppress evidence (A8) and an Order granting a stay pending interlocutory review. (A9-10)

On March 22, 2022, the State moved for leave to appeal before the Appellate Division. The motion was granted.

On June 30, 2022, the Appellate Division issued a published

² 1T designates transcript of proceedings occurring on February 2, 2022. 2T designates transcript of proceedings dated March 1, 2022. "R" designates Respondent's appendix attached hereto.

decision affirming the motion judge's order suppressing evidence.

On July 1, 2022, the State filed a motion for stay of the Appellate Division's published opinion. The motion was denied on July 18, 2022.

On July 20, 2022, the State moved for leave to appeal the Appellate Division's published opinion before the Supreme Court.

STATEMENT OF FACTS³

On August 4, 2021, at approximately 2:00 p.m., Patrolman Louis Taranto of the Toms River Police Department Special Enforcement Team ("SET") was performing a narcotics related surveillance of the Harbor Front Condominium complex located in Toms River. This area was known by Detective Taranto to have frequent drug distribution activity. During the surveillance Detective Taranto observed an unoccupied white 2017 GMC Terrain, GA registration CQW7094 parked in the parking lot. The vehicle was observed to have tinted front windows and a white Carvana license plate. Detective Taranto had previously received information from confidential informant ("C.I.") 21-04 regarding a similar vehicle being used to distribute CDS in Toms River during the month of July 2021. According to the informant, the vehicle was used by a black male with facial tattoos, approximately 5'07" to 5'09" in height with long dreadlocks, who was identified as "Killer."

³ A copy of the published opinion appears at Appellant's appendix A18-34. The opinion will be cited to the pages of the slip opinion.

Database records from the Toms River Police Department found the C.I.'s physical description of the suspect matched Defendant, who was listed with prior felony and weapons convictions. Based on that information, the Detective believed that Defendant was the CDS distributor known as "Killer" who was distributing CDS in Toms River. (2T3:15-4:17) (R1-2)

Detective Taranto watched the unoccupied vehicle for 30 minutes. During the surveillance the detective observed a black female, later identified as Constance Comrie-Holloway, walk from the condos and enter the drivers seat of the GMC Terrain. A black male, identified as Defendant, was observed walking from the same area and entered the front passenger seat of the vehicle after placing a small child in the rear passenger side seat. Detective Taranto proceeded to follow the vehicle as it stopped at Boston Market on Route 37 in Toms River, and then traveled to PNC Bank located at 1329 Hooper Avenue, Toms River. It appeared to Detective Taranto that these locations were patronized for legitimate reasons. (2T4:18-5:3) (R2)

Other officers, presumably of the SET, continued to follow the vehicle as it traveled to 143 Shenandoah Boulevard in Toms River. Patrolwoman Sutter had previously received information from concerned citizen ("C.C.") 21-05 of possible narcotics related transactions occurring from the residence involving short term vehicle traffic. According to the concerned citizen

information, a white GMC Terrain with GA registration "COW7094" occupied by two black males had been previously observed entering and departing the residence for a brief time period. Patrolwoman Sutter also had information that multiple residents of 143 Shenandoah Boulevard were known drug users. (2T5:4-5:16) (R2-3)

After the GMC Terrain parked outside 143 Shenandoah Boulevard, Defendant was observed exiting the vehicle and walking through a fence to the backyard of the residence while the female driver remained inside. Defendant was out of the sight of officers for a brief period of time, then reemerged from the backyard and walked towards the vehicle with an unidentified white female who was already at the residence. Defendant was observed reentering the vehicle and left the area. Patrolwoman Sutter did not observe Defendant remove any objects from the vehicle or carry any object to the backyard, and she did not observe a hand-to-hand transaction between the female and Defendant. The Patrolwoman also did not observe any objects in the hands of either the Defendant or the white female when Defendant returned to the vehicle. (2T5:17-6:11) (R3)

Detective Taranto believed that Defendant and the female resident had engaged in a narcotics-related transaction based upon his training and experience, the totality of the circumstances, and the information provided by C.I. 21-04 and C.C. 21-05. Detective Taranto requested a marked patrol vehicle to stop the

GMC Terrain to investigate further. At 3:17 p.m., roughly an hour and 17 minutes after Detective Taranto identified the vehicle as one used to distribute drugs, Toms River Patrolman Fitzgerald used a marked patrol vehicle to conduct a motor vehicle stop of the GMC Terrain in the area of Hooper Avenue and Feathertree Drive. (2T6:9-6:18) (R3)

Once stopped, multiple uniformed and plains clothes officers approached the vehicle. Detective Taranto immediately asked Defendant to exit the vehicle, who was then patted down with negative findings. Defendant was advised of his Miranda rights, which he indicated he understood. Detective Taranto questioned Defendant about where he was coming from; Defendant replied that he just came from Shenandoah Boulevard to "see his people" and talk to someone. While Detective Taranto questioned Defendant, Detective Duncan Macrae asked Ms. Comrie-Holloway for her consent to allow officers to search the vehicle, which she denied. Following the denial of consent, officers requested a K-9 Unit to the scene to conduct an exterior sniff of the vehicle for drugs. Ms. Comie-Holloway was asked to exit the vehicle, and she removed her child from the backseat. At this point the vehicle was empty. (2T6:19-7:13) (R3-4)

At 3:40 p.m., approximately 23 minutes following the stop, Sheriff's Officer Vosseller arrived on scene with K-9 Duke to conduct an exterior sniff of the GMC Terrain. K-9 Duke made a

positive indication, and the officers proceeded to search the vehicle without first obtaining a search warrant. A small black Coach backpack located on the front passenger side floorboard was searched resulting in the seizure of an unloaded SCCY handgun magazine, a black digital scale, and a small cardboard box containing approximately 410 wax folds of suspect heroin. Police also searched the center console and located a black Taurus G2C .40 handgun containing ten rounds of ammunition with a round in the chamber. Additionally, \$1600 in cash was found in a purse located on the rear driver side seat. Defendant then told Detective Macrae that the vehicle's contents belonged to him. (2T7:14-8:18) (R4)

Defendant was placed under arrest, and both he and Ms. Comrie-Holloway were searched. Approximately \$431 in cash was found in Ms. Comrie-Holloway's bra area. Ms. Comrie-Holloway was not charged with a criminal or traffic-related offense and was released from the scene. Thereafter, she responded to police headquarters to provide a taped statement. During the statement she advised the heroin, digital scale and black backpack did not belong to her. She also stated that the handgun was registered to her, but she did not put it in the vehicle. (2T8:12-9:3) (R4)

LEGAL ARGUMENT

POINT I

THE INTERESTS OF JUSTICE DOES NOT REQUIRE THIS COURT TO GRANT LEAVE TO APPEAL BECAUSE THERE WAS NO ERROR IN SUPPRESSING THE EVIDENCE AND DENIAL OF LEAVE WILL NOT RESULT IN GRAVE DANGER OR INJUSTICE TO THE STATE.

Leave to file an interlocutory appeal of a trial court's order is permitted only "in the interest of justice." R. 2:2-4; Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008). The grant of interlocutory review is "highly discretionary" and "customarily exercised only sparingly." Vitanza v. James, 397 N.J. Super. 516, 517 (App. Div. 2008), citing State v. Reldan, 100 N.J. 187, 205 (1985). Leave to appeal is "extraordinary relief and granted only to consider a fundamental claim which could infect a trial and would otherwise be irremediable in the ordinary course." State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997). An interlocutory appeal is not appropriate to "correct minor injustices." Brundage, 195 N.J. at 599, citing Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div. 1956), *cert. denied*, 22 N.J. 574 (1956). "Rather, when leave is granted, it is because there is the possibility of 'some grave damage or injustice' resulting from the trial court's order." Brundage, 195 N.J. at 599, citing Romano, 41 N.J. Super. at 568.

Here, the State's leave to appeal should be denied because the courts below did not err in ordering suppression of the

evidence illegally seized from defendant's vehicle without a warrant, thus denial of leave will not pose grave damage or injustice to the State. The three judge Appellate Division panel correctly - and unanimously - determined that probable cause from the positive canine indication did not arise from "unforeseeable and spontaneous circumstances" as required under our State's automobile exception standard set forth in State v. Witt, 223 N.J. 409 (2015). Therefore, a search warrant was constitutionally required in this case.

The automobile exception as defined by Witt clearly did not apply based on the facts and circumstances of this case, where Defendant was under the surveillance of a specialized narcotics unit for approximately one hour and 17 minutes based on C.I. information that the GMC and Defendant had a history of drug distribution. The sole basis of the vehicle stop was to further investigate narcotics activity, following what the officers believed was defendant's involvement in a drug transaction at a residence with suspected narcotics history. Once stopped officers had Defendant exit the vehicle, patted him down, questioned him after reading Miranda warnings, and requested consent to search the vehicle. No contraband was observed in plain view, no admissions of wrongdoing were made, and consent to search was denied. Although officers had reasonable suspicion of illegal activity, there was no probable cause that the vehicle contained

drugs. Under these circumstances, a canine unit was then requested on scene to determine if drugs were in the vehicle while all the occupants remained outside. The canine unit arrived 23 minutes after the stop and gave a positive indication to the presence of narcotics resulting in probable cause. The Appellate Division correctly determined that “. . . those circumstances were not unforeseeable and spontaneous under Witt and, as such, the automobile exception to the warrant requirement did not apply to this warrantless search.” (slip op. at 3; see also 4-7)

Contrary to the State’s assertions, there are no errors to be corrected in this case because the rule of Witt was followed by the Appellate Division, thus ensuring the constitutional protection of our citizens from unlawful warrantless vehicle searches in similar circumstances. Indeed, the more onerous “unforeseeable and spontaneous” test departs from the federal standard for automobile searches because our “State Constitution provides greater protection against unreasonable searches and seizures than the Fourth Amendment.” Witt, 223 N.J. at 448, citing State v. Earls, 214 N.J. 564, 584 (2013).

Further, the Appellate Division’s proper application of the Witt standard does nothing to constrain law enforcement, nor does it threaten to modify or eliminate the automobile exception. In fact, the Witt Court has determined that the requirement of “unforeseeability and spontaneity” as set forth in State v. Alston,

88 N.J. 211 (1981), does not place an undue burden on law enforcement and comports with Art. I, Para 7 of the New Jersey Constitution. Witt, 223 N.J. at 447-448. Moreover, there are various investigative tools at officers' disposal during a roadside investigatory stop such as consent requests, plain view observations, questioning of occupants, dispatch warrant checks and so on. Where an investigatory stop involves a canine indication, officers still have the ability to secure a warrant and search a vehicle suspected of containing CDS and other illicit items. In so doing, police also prevent future legal challenges to these searches because a warrant was obtained as is constitutionally required.

Furthermore, the impoundment and removal of the vehicle from the roadside during the warrant application and search process increases the safety of officers and vehicle occupants. It is the officers' failure to impound the vehicle and apply for a warrant that unnecessarily prolongs the roadside encounter while the vehicle search is conducted.

For the foregoing reasons, leave for appeal is not necessary because the Appellate Division decision was not in error, and no grave damage or injustice is posed to the State.

POINT II

THE COURT DID NOT ERR WHEN IT SUPPRESSED THE EVIDENCE FOUND IN DEFENDANT'S CAR BECAUSE THE APPELLATE DIVISION CORRECTLY APPLIED WITT IN FINDING PROBABLE CAUSE FOR THE SEARCH DID NOT ARISE UNDER CIRCUMSTANCES THAT WERE UNFORSEEABLE AND SPONTANEOUS AS REQUIRED UNDER THE AUTOMOBILE EXCEPTION.

The State contends that the Appellate Division erred in affirming the suppression of evidence seized from Defendant's vehicle without a warrant. It is the State's position that the Appellate Division somehow "misread Witt" in finding that the probable cause arising from the canine indication did not arise spontaneously or unforeseeably. (Appellant's Brief at 11-13) The Appellate Division, however, was correct in finding that the automobile exception did not apply under the requirements of Witt, therefore the officers were required to obtain a warrant in order to search the defendant's vehicle.

Under the Fourth Amendment of the Federal Constitution and Article I, Paragraph 7 of our State Constitution, judicially authorized search warrants are strongly preferred before law enforcement officers conduct a search. State v. Johnson, 193 N.J. 528, 552 (2008). The automobile exception is a recognized exception to the warrant requirement. State v. Hill, 115 N.J. 169, 173 (1989).

Pursuant to Witt, "searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are

permissible.” Witt, 223 N.J. at 450. This 2015 decision set aside the exigent circumstances test for vehicle searches under State v. Cooke, 163 N.J. 657 (2000), and State v. Pena-Flores, 198 N.J. 6 (2009), and returned to the automobile search standard of Alston, supra, 88 N.J. 211 (1981). Witt, 223 N.J. at 450. In 1981 the Alston Court acknowledged that “the exigent circumstances that justify the invocation of the automobile exception are the unforeseeability and spontaneity of the circumstances giving rise to probable cause . . . and the inherent mobility of the automobile stopped on the highway.” Alston, 88 N.J. at 233; Witt, 223 N.J. at 431. Further, under Alston “the unanticipated circumstances that give rise to probable cause must occur quickly.” Id., citing Alston, 88 N.J. at 234.

Accordingly in New Jersey nonconsensual roadside vehicle searches may be conducted without a warrant if “(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.**” (emphasis added) State v. Rodriguez, 459 N.J. Super. 13, 15, 22 (2019), citing Witt, 223 N.J. at 447-448. Under New Jersey’s automobile exception, the unanticipated circumstances that give rise to probable cause must occur swiftly, and those officers who possessed probable cause in advance of an automobile search must still seek a warrant. Witt, 223 N.J. at 431-432. Otherwise, “the inherent mobility of the

vehicle would have no connection with a police officer not procuring a warrant." Id. at 432.

Further, the Witt Court has determined that Alston's requirement of "unforeseeability and spontaneity" does not place an undue burden on law enforcement and comports with Art. I, Para 7 of the New Jersey Constitution. Id. at 447-448. This more onerous test departs from the federal standard for automobile searches because our "State Constitution provides greater protection against unreasonable searches and seizures than the Fourth Amendment." Witt, 223 N.J. at 448, citing Earls, supra, 214 N.J. at 584. Furthermore, in reinstating Alston's two-factor automobile exception test, the Witt Court determined this standard "properly balances the individual's privacy and liberty interests and law enforcement's investigatory demands." Witt, 223 N.J. at 447.

Here, in rendering the Smart decision the Appellate Division applied the automobile exception standard set forth in Witt, and correctly found that probable cause from the canine alert did not arise from spontaneous and unforeseeable circumstances, thus resulting in an unlawful warrantless search of defendant's vehicle. The automobile exception as defined by Witt was stated by the Appellate Division:

Abandoning the "pure exigent-circumstances requirement" it had added to the constitutional standard to justify an

automobile search in State v. Cooke, 163 N.J. 657, 671 (2000), as reiterated in State v. Pena-Flores, 198 N.J. 6, 11 (2009), the Court in Witt declared the exigency requirement was "unsound in principle and unworkable in practice," 223 N.J. at 447. But the Court declined to adopt the less-stringent federal standard for warrantless searches of a vehicle, returning to the standard set forth in [State v. Alston, 88 N.J. 211 (1981)]. Ibid. (citing Alston, 88 N.J. at 233). Thus, the Witt Court announced: **"Going forward, searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible.** However, when vehicles are towed and impounded, absent some exigency, a warrant must be secured." Id. at 450; see also [State v. Rodriguez, 459 N.J. Super. 13, 23 (App. Div. 2019)] (footnote omitted) (stating Witt "afford[s] police officers at the scene the discretion to choose between searching the vehicle immediately **if they spontaneously have probable cause to do so**, or to have the vehicle removed and impounded and seek a search warrant later").
[slip op. at 9-11] (emphasis added)

Here, the Appellate Division applied Witt's automobile exception standard above to the specific facts of the Smart case, which involved an investigatory stop of the defendant. The Court noted that "reasonable and articulable suspicion of criminal activity arose prior to the stop," namely because "police suspected defendant of engaging in drug activity based on confidential sources and their observations during their continuous, same-day surveillance." The officers also had knowledge that "defendant had a criminal history, including drug arrests and convictions for weapons offenses." (slip op. at 16)

The officers' suspicions were not confirmed by their observations following this stop, so they "summoned the K-9 unit for the sole purpose of developing probable cause." (slip op. at 16-17) Probable cause did not arise until the canine arrived and alerted to the presence of narcotics. The Appellate Division concluded that ". . . **those circumstances were not unforeseeable and spontaneous under Witt** and, as such, the automobile exception to the warrant requirement did not apply to this warrantless search." (slip op. at 3) (emphasis added). Specifically, the Appellate Division correctly determined that:

. . . the use of the K-9 unit under the **circumstances presented here did not result in the spontaneous and unforeseeable development of probable cause; it was simply another step in the search for drugs that caused the stop in the first place.** Thus, when probable cause sufficient to support a search of the vehicle developed, police at that juncture were required to seek a warrant. We conclude that their failure to do so rendered the ensuing search fatally defective.
[slip op. at 17] (emphasis added)

The State further argues that the spontaneous and unforeseeable requirement under Witt was met here because the officers did not have probable cause "well in advance of the automobile search" and did not "sit on probable cause and later conduct a warrantless search." The State also contends that the unforeseeable and spontaneous requirement merely requires police to secure a warrant "when it is practicable to do so." (Appellant's

Brief at 14-16) The Witt Court applied the State's interpretation of the automobile exception in the hypothetical of "a car parked in the home driveway of vacationing owners," Witt 223 N.J. at 447-448, appearing to draw a distinction between on-scene searches generally and searches conducted after impoundment. However, Witt's specific holding is that "**searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances** are permissible. However, when vehicles are towed and impounded, absent some exigency, a warrant must be secured." (emphasis added) Id. at 450.

Notably, the Court in Witt "limit[ed] the automobile exception to on-scene warrantless searches." Witt, 223 N.J. at 449. Under Witt, New Jersey has "part[ed] with federal jurisprudence that allows a police officer to conduct a warrantless search at headquarters merely because he could have done so on the side of the road." Id. at 448. The "majority decision in Witt adds that "[w]hatever inherent exigency justifies a warrantless search at the scene under the automobile exception certainly cannot justify the failure to secure a warrant after towing and impounding the car at headquarters when it is practicable to do so.'" Rodriguez, 459 N.J. Super. at 24-25, citing Witt, 223 N.J. at 448-449.

Therefore, under the automobile exception established by Witt, police officers at the scene are afforded "the discretion to

choose between searching the vehicle immediately **if they spontaneously have probable cause to do so**, or to have the vehicle removed and impounded and seek a search warrant later." (emphasis added) Rodriguez, 459 N.J. Super. at 23. Under Witt, if **both factors** of the automobile exception are present and the officers decide to tow and impound the vehicle first, then "absent some exigency, a warrant must be secured," 223 N.J. at 450, because "warrantless searches should not be based on fake exigencies." Id. at 449. As the Appellate Division noted in Rodriguez:

Viewed 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. 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. Instead, the Court readopted a bright-line rule, **one that is predicated on the requirements of spontaneity and probable cause**. That is the test we are obligated to apply today. [Rodriguez, 459 N.J. Super. at 24] (emphasis added)

Here, the Appellate Division applied Witt's specific holding to the facts and circumstances in Smart, and correctly determined that the State's interpretation of the automobile exception standard did not excuse the officers from seeking a warrant for the roadside stop:

On appeal, the State primarily contends police did not 'possess[] probable cause well in

advance of [the] automobile search,' and thus law enforcement did 'not sit on probable cause,' in a manner proscribed in Witt. See id. at 431-32. The State therefore maintains the warrantless search and seizure here passed constitutional muster.

Although we agree police could not have secured a warrant before the car was stopped and, in that sense, did not "sit" on probable cause, **we disagree with the State's contention that probable cause under these circumstances was unforeseeable and spontaneous within the meaning of Witt.** Notwithstanding the officers' reasonable suspicion that defendant was engaged in illegal activity involving drugs, leading to this investigatory stop, probable cause did not arise until the canine alerted for the presence of narcotics. **We therefore conclude those circumstances were not unforeseeable and spontaneous under Witt and, as such, the automobile exception to the warrant requirement did not apply to this warrantless search.**

[Slip op. at 2-3] (emphasis added)

The Appellate Division also appropriately distinguished the circumstances in the Smart case from this Court's post-Witt decisions involving officers' use of canines during traffic stops. In State v. Dunbar, 229 N.J. 521 (2017), this Court upheld the seizure of defendant where the officer did not conduct a canine sniff in a manner that prolonged the traffic stop beyond the time required to complete the stop's mission, such as issuing a ticket, checking for valid driving credentials and so on. In State v. Nelson, 237 N.J. 540 (2019), the traffic stop was upheld because police had developed reasonable suspicion during the stop to justify a delay for a canine sniff.

However, in Smart the Appellate Division found that “reasonable articulable suspicion of criminal activity arose prior to the stop” and, “[u]nlike the circumstances in Nelson, . . . the officers’ suspicions were not confirmed by their observations after the stop was conducted.” (slip op. at 16) The officers’ “mission of the stop - an investigation into illegal drug activity - remained ongoing until the K-9 unit arrived” thus justifying the prolonged stop. (slip op. at 16) However, the Court was

. . . not convinced the canine’s alert for the presence of narcotics - which gave rise to probable cause in this case - falls within the ambit of circumstances the Witt Court contemplated as “unforeseeable and spontaneous” under the automobile exception. When the officers’ sensory perceptions failed to confirm their suspicions of drug activity following the stop of the GMC, police summoned the K-9 for the sole purpose of developing probable cause. **That investigative tool, although validly employed under Dunbar and Nelson, nonetheless fails under Witt, because the use of the K-9 under the circumstances presented here did not result in the spontaneous and unforeseeable development of probable cause; it was simply another step in the search for drugs that caused the stop in the first place.** Thus, when probable cause sufficient to support a search of the vehicle developed, police at that juncture were required to seek a warrant. We conclude their failure to do so rendered the ensuing search fatally defective.

[slip op. at 17] (emphasis added)

Finally, requiring police to obtain a warrant based on canine alerts that do not arise under spontaneous and unforeseeable circumstances will not expose police and citizens to lengthy

roadside encounters as the State suggests. To the contrary, it is the officers' failure to impound the vehicle and obtain a warrant under those circumstances that unnecessarily prolongs the roadside encounter while the unlawful search is conducted on the roadside. Further, the impoundment and removal of vehicles from the roadside during the warrant application and search process increases the safety of officers and vehicle occupants while also ensuring the constitutional rights of our citizens.

Based on the foregoing, the Appellate Division panel's decision that the automobile exception did not apply under Witt was not in error, and the State's motion for leave to appeal should be denied.

CONCLUSION

Based on the foregoing arguments, Defendant respectfully requests that this Court deny the State's motion for leave to appeal.

Respectfully submitted

/s Clifford P. Yannone

Clifford P. Yannone
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Dated: August 1, 2022

APPENDIX

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January 28, 2022

Via E-Courts Submission

Honorable Rochelle Gizinski, J.S.C.
Ocean County Superior Court
120 Hooper Avenue, Courtroom #11
Toms River, N.J. 08753

**Re: State of N.J. v. Kyle Smart
Ind. No. 21-10-1417**

Dear Judge Gizinski:

Please accept this letter memorandum in lieu of a more formal brief in response to the State's opposition to Defendant Kyle Smart's Motion to Suppress Evidence Seized Without a Search Warrant. In addition to the brief, the Defense will rely upon oral arguments, which is presently scheduled before Your Honor on February 2, 2022.

COUNTER STATEMENT OF FACTS

On August 4, 2021, at approximately 2:00 p.m., members of the Toms River Police Department Special Enforcement Team were performing a narcotics related surveillance of the Harbor Front Condominium complex located in Toms River. This area was known to have frequent drug distribution activity. During the surveillance officers observed an unoccupied white 2017 GMC Terrain, GA registration CQW7094 parked in the parking lot. The vehicle was observed to have tinted front windows and a white Carvana license plate. According to the police report, officers had previously received information from a confidential informant regarding a

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similar vehicle being used to distribute CDS in Toms River during the month of July 2021. According to the informant, the vehicle was used by a black male with facial tattoos, approximately 5'07" to 5'09" in height with long dreadlocks, who was identified as "Killer." Database records from the Toms River Police Department found this information was a match to Kyle Smart, who was listed with prior felony and weapons convictions. Based on that information, the surveilling officers believed that Mr. Smart was the CDS distributor known as "Killer" who was distributing CDS in Toms River.

During the surveillance detail officers observed a black female, later identified as Constance Comrie-Holloway, walk from the condos and enter the drivers seat of the GMC Terrain. A black male, identified as Kyle Smart, was observed walking from the same area and entered the front passenger seat of the vehicle after placing a small child in the rear passenger side seat. Officers proceeded to follow the GMC Terrain around Toms River. The vehicle stopped at Boston Market on Route 37 in Toms River, and then traveled to PNC Bank located at 1329 Hooper Avenue, Toms River. It appeared to the officers that these locations were patronized for legitimate reasons.

Officers continued to follow the vehicle as it traveled to 143 Shenandoah Boulevard in Toms River. Officers had previously received information from another confidential informant of possible narcotics related transactions occurring from the residence involving short term vehicle traffic. According to the C.I. information, a white GMC Terrain with GA registration "COW7094" occupied by two black males had been previously observed, entering, and departing the residence for a brief time period. Officers also had information that multiple residents of 143 Shenandoah

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Boulevard were known drug users.

After the GMC parked outside of 143 Shenandoah Boulevard, Mr. Smart was observed exiting the vehicle and walking through a fence to the backyard of the residence while the female driver remained inside. Mr. Smart was out of the sight of officers for a brief period of time, then Mr. Smart reemerged from the backyard and walked towards the GMC with an unidentified white female who was already at the residence. Mr. Smart was observed reentering the vehicle and left the area. The surveilling officers did not observe any objects in the hands of either Mr. Smart or the white female, nor were any furtive movements noted.

According to the police report, based on the officers' training and experience, the totality of the circumstances and confidential information, officers claimed to believe that Mr. Smart was involved in a CDS related transaction. The officers decided to stop the vehicle by a marked patrol vehicle to investigate further. The GMC Terrain was subsequently stopped by a marked vehicle in the area of Hooper Avenue and Feathertree Drive. Once stopped, multiple uniformed and plain clothes officers approached the vehicle. Officers did not note any nervous or furtive movements when they approached the occupants. Detective Taranto immediately asked Mr. Smart to exit the vehicle, who was then patted down with negative findings. Mr. Smart was advised of his Miranda rights, which he indicated he understood. Detective Louis Taranto questioned Mr. Smart about where he was coming from; Mr. Smart replied that he just came from Shenandoah Boulevard to see his people and talk to someone. While Detective Taranto questioned Mr. Smart, Detective D. Macrae asked Ms. Comrie-Holloway for her consent to allow officers to search the vehicle, which she denied. Following the denial of consent, officers requested a K-9 Unit to the scene to conduct

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an exterior sniff of the vehicle for CDS. Ms. Comie-Holloway was then asked to exit the vehicle, and she removed her child from the backseat.

Approximately twenty-three minutes following the stop, Sheriff's Officer Vosseller arrived on scene with K-9 Duke to conduct an exterior sniff of the GMC Terrain. K-9 Duke made a positive indication, and the officers proceeded to search the vehicle without first obtaining a search warrant. A small black Coach backpack located on the front passenger side floorboard was searched resulting in the seizure of an unloaded SCCY handgun magazine, a black digital scale, and a small cardboard box containing approximately 410 wax folds of suspect heroin. Police also search the center console and located a black Taurus G2C .40 handgun containing ten rounds of ammunition with a round in the chamber. Additionally, \$1600 in cash was found in a purse located on the rear driver side seat.

Mr. Smart was placed under arrest, and both he and Ms. Comrie-Holloway were searched. Approximately \$431 in cash was found in Ms. Comrie-Holloway's bra area. Ms. Comrie-Holloway was not charged with a criminal or traffic-related offense and was released from the scene. Thereafter, she responded to police headquarters to provide a taped statement. During the statement she advised the heroin, digital scale and black backpack did not belong to her. She also stated that the handgun was registered to her, but she did not put it in the vehicle.

STATEMENT OF PROCEDURAL HISTORY

On August 4, 2021, Mr. Smart was arrested and charged with Toms River Complaint No. W-2021-000982-1507 with firearms, CDS Possession, and CDS Distribution offenses, and was lodged in the Ocean County Jail.

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