

STATE OF NEW JERSEY,  
  
Plaintiff/Appellant,  
  
v.  
  
KYLE A. SMART,  
  
Defendant/Respondent.

**SUPREME COURT OF NEW JERSEY**

SUPREME COURT DOCKET NO.:  
087315 (A-6-22)

Criminal Action

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

---

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

---

CLIFFORD P. YANNONE, ESQUIRE  
Attorney ID No. 011872010  
Starkey, Kelly, Kenneally, Cunningham &  
Turnbach  
Two Hooper Avenue  
Toms River, New Jersey 08753  
P: (732)701-3500  
Email: [cyannone@starkeykelly.com](mailto:cyannone@starkeykelly.com)  
Attorneys for Defendant-Respondent,  
Kyle Smart

Dated: 11/4/2022



POINT II . . . . .23

DEPARTURE FROM THE "UNFORSEEABILITY AND SPONTANEITY" REQUIREMENT FOR INVESTIGATORY STOPS WOULD DIMINISH INDIVIDUALS' ENHANCED STATE CONSTITUTIONAL PROTECTIONS AND ALTER THE BALANCE BETWEEN INDIVIDUAL RIGHTS AND LAW ENFORCEMENT INVESTIGATORY DEMANDS.

CONCLUSION. . . . .28

**TABLE OF APPENDIX<sup>1</sup>**

Respondent's Partial brief dated January 28, 2022 . . .R1-4

---

<sup>1</sup> 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."

TABLE OF AUTHORITIES

CASES CITED:

Carroll v. United States, 267 U.S. 132 (1925) . . . . . 10

Chambers v. Maroney, 399 U.S. 42 (1970) . . . . . 10

Colorado v. Bannister, 449 U.S. 1 (1980) . . . . . 15

Maryland v. Dyson, 527 U.S. 465 (1999) . . . . . 24

Pennsylvania v. Labron, 518 U.S. 938 (1996) . . . . . 24

State v. Alston, 88 N.J. 211 (1981) . . . . . Passim

State v. Bruzzese, 94 N.J. 210 (1984) . . . . . 27

State v. Cooke, 163 N.J. 657 (2000) . . . . . 8, 10, 11, 24, 25

State v. Dunbar, 229 N.J. 521 (2017) . . . . . 17, 19

State v. Earls, 214 N.J. 564 (2013) . . . . . 26

State v. Johnson, 193 N.J. 528 (2008) . . . . . 27

State v. Nelson, 237 N.J. 540 (2019) . . . . . 17, 18, 19

State v. Pena-Flores, 198 N.J. 6 (2009) . . . . . 8, 10, 11, 24, 25

State v. Martin, 87 N.J. 561 (1981) . . . . . 21, 22

State v. Rodriguez, 459 N.J. Super. 13 (App. Div. 2019) . . . . . 12

State v. Smart, 473 N.J. Super. 87 (App. Div. 2022) . . . . . Passim

State v. Witt, 223 N.J. 409 (2015) . . . . . Passim

Rodriguez v. United States, 575 U.S. 348 (2015) . . . . . 17

PROCEDURAL HISTORY<sup>2</sup>

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.

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 (A6) and an Order granting a stay pending interlocutory review.

On March 22, 2022, the State moved for leave to appeal before the Appellate Division. The motion was granted on April 5, 2022.

---

<sup>2</sup> 1T designates transcript of proceedings occurring on February 2, 2022. 2T designates transcript of proceedings dated March 1, 2022. "A" designates Appellant's appendix. "R" designates Respondent's appendix attached hereto.

(A7)

On June 30, 2022, the Appellate Division issued a published decision affirming the motion judge's order suppressing evidence.

On July 1, 2022, the State filed a motion to stay the Appellate Division's decision. The motion was denied on July 18, 2022. (A8)

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 this Court. On September 7, 2022, this Court granted the State's motion for leave to appeal (A16-17), and denied the State's motion for stay of the Appellate Division's published opinion. (A18)

#### **STATEMENT OF FACTS**

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." 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

In the present matter, the courts below did not err in finding that the warrantless search of defendant's vehicle was unconstitutional and in violation of our State's automobile exception standard. In 2015, this Court declined to adopt the less-stringent federal standard for warrantless vehicle searches and returned to the standard set forth in State v. Alston, 88 N.J. 211 (1981), announcing that: "[g]oing forward, searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible." State v. Witt, 223 N.J. 409, 450 (2015). The Appellate Division in Smart applied the automobile standard of Witt and correctly concluded that probable cause from the canine alert during the investigatory stop for drugs did not arise under unforeseeable and spontaneous circumstances.

In this case Defendant was targeted during police surveillance and followed around the Toms River area by narcotics officers for an hour-and-seventeen minutes to investigate drug activity. The eventual stop of Defendant was based solely on officers' reasonable suspicion of drug activity. Once stopped, those suspicions were not immediately confirmed and consent to search the GMC was denied, causing officers to request a drug

sniffing canine on scene and alert on the vehicle. This was not a situation where a vehicle was stopped for unrelated traffic offenses that subsequently led to the unforeseeable and spontaneous development of probable cause. Nor did the probable cause develop swiftly; the canine alert occurred approximately an hour-and-forty-minutes into the officers' investigation of Defendant. There was nothing spontaneous or sudden about the surveillance, investigatory stop, and canine request, and the officers anticipated the use of the canine and alert for drugs under these circumstances. Moreover, the vehicle and its occupants had been secured and defendant had not posed a threat to the officers, therefore obtaining a search warrant was not impracticable.

A reversal of Smart would expand the automobile exception and effectively eliminate the unforeseeability and spontaneity requirement for all motor vehicle stops that based on reasonable suspicion of criminal conduct. Consequently, police would be permitted to circumvent the search warrant requirement every time a canine alerts at an investigatory stop for suspected drug activity. Such an outcome would revert New Jersey back to the federal standard for vehicle searches and diminish the enhanced protections afforded under the State Constitution that were recognized by this Court in Witt, Pena-Flores, and Cooke. Also, the balance this Court sought between individual privacy interests

and law enforcement investigatory demands would be permanently altered in favor of the latter.

Moreover, an immediate search by consent was denied in this case, signaling defendant's desire to avail himself of his constitutional privacy rights and wait for a neutral magistrate's ruling on a search warrant application the vehicle.

**POINT I**

**PURSUANT TO THE AUTOMOBILE EXCEPTION STANDARD SET FORTH IN WITT, OFFICERS' WARRANTLESS ROADSIDE SEARCH OF DEFENDANT'S VEHICLE DURING THE INVESTIGATORY STOP WAS UNLAWFUL BECAUSE PROBABLE CAUSE FROM THE CANINE ALERT DID NOT ARISE FROM UNFORSEEABLE AND SPONTANEOUS CIRCUMSTANCES.**

The Smart case involved an hour-and-seventeen-minute surveillance of a suspect with a known drug history and was stopped by narcotics officers based solely on reasonable suspicion of suspected drug activity. The courts below applied the automobile exception as defined in Witt, and correctly found that the positive canine alert that occurred twenty-three minutes after the stop did not arise from unforeseeable and spontaneous circumstances. Unlike in Alston or the post-Witt canine cases of Dunbar and Nelson, the Smart case did not involve a stop for traffic offenses that subsequently led to the unforeseeable and spontaneous development of probable cause of criminal conduct. Further, the foreseeability and spontaneity requirement declared in Witt applies to all roadside stops, and is not limited to situations

where police possess probable cause well in advance of a stop. Also, the vehicle and occupants were secured and defendant did not pose a danger to the officers, therefore obtaining a warrant was not impracticable.

**A. THE COURTS BELOW CORRECTLY APPLIED THE AUTOMOBILE EXCEPTION OF WITT AND ALSTON IN FINDING PROBABLE CAUSE DID NOT ARISE FROM UNFORSEEABLE AND SPONTANEOUS CIRCUMSTANCES.**

Pursuant to this Court's decision in Witt, warrantless "searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible." Witt, supra, 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 447.

In 1981, the Alston Court had acknowledged that "[t]he primary rationale for the automobile exception lies in the exigent circumstances created by the inherent mobility of vehicles that often makes it impracticable to obtain a warrant." Alston, 88 N.J. at 230-231; Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42, 51 (1970). However, in Alston this Court declared for the first time 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 (citations omitted). Thirty-four years later, the Witt Court reinstated that standard, holding that in New Jersey "the automobile exception authorize[s] the warrantless search of an automobile only 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.

Here, in rendering the decision in State v. Smart, 473 N.J. Super. 87 (2022), the Appellate Division applied the automobile exception standard set forth in Alston and reinstated in Witt. The Court 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”).  
[Smart, 473 N.J. Super. at 95-96 (emphasis added)]

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.” Id. at 100. 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.” Id. at 101. 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.” Id. at 91 (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.  
[Id. at 101 (emphasis added)]

Clearly, the plain meaning of the automobile exception as stated by Witt and Alston did not apply to the roadside investigative stop in Smart. Additionally, the trial court had analyzed the definitions of “unforeseeable” and “spontaneous” and their application to the investigation, stop and search in this case:

The common definition of unforeseeable is “not able to be reasonably anticipated or expected.” These officers anticipated and expected to find CDS in the vehicle. Had they not, they likely would not have engaged in over and [sic] hour of surveillance during which defendant committed no crime.

The common definition of spontaneous is “done or said in a natural and often sudden way, and without a lot of thought or planning.” The surveillance officers engaged in here, the stop, and the interrogation were not sudden, nor did they occur without thought or planning. Officers spent over an hour

following defendant with CDS activity in mind, specifically linked to Kyle Smart. This encounter is unlike one in which an officer stopped a vehicle for a motor vehicle violation and only coincidentally discovered evidence leading to probable cause after that stop.

[2T21:8-21:25]

The Courts below applied the automobile exception standard as written by this Court, and the suppression order that resulted from the officers' unlawful warrantless search should be affirmed.

**B. THE AUTOMOBILE EXCEPTION DID NOT APPLY IN SMART BECAUSE THE REASON FOR THE STOP WAS CONNECTED TO THE SUBSEQUENT SEIZURE OF DRUGS, AND THE PROBABLE CAUSE TO SEARCH DEFENDANT'S VEHICLE DID NOT DEVELOP SWIFTLY.**

The automobile exception was also inapplicable under the circumstances in Smart because the probable cause arising from the canine alert was related, or connected to, the reason officers stopped the vehicle to begin with. This was not a case where police stopped the vehicle for traffic offenses which then led to the development of probable cause based on unforeseeable and spontaneous circumstances.

In the Alston case, this Court highlighted the connection between the reason for the stop (speeding violation) and the items ultimately seized (firearms) in determining that probable cause arose from unforeseeable and spontaneous circumstances. In Alston, detectives conducted a traffic stop of defendants' vehicle for speeding. 88 N.J. at 232. The vehicle occupants were observed

making unusual and furtive movements in the backseat prior to the stop. Id. During the stop officers observed shotgun shells in the glove compartment and discovered a sawed-off shotgun in a plastic bag protruding from the front passenger seat. Id. Under these circumstances, the Court found the detectives had probable cause that other weapons were secreted in the vehicle, and a road-side search revealing two handguns was upheld under the automobile exception. Id. The Court also rejected the defense argument that securing a warrant was not impracticable because the occupants were removed and the vehicle was not readily movable. Id. at 232-233. As noted above, the Alston Court ruled that the exigent circumstances under the automobile exception are the unforeseeability and spontaneity of the circumstances giving rise to probable case, and the inherent mobility of the automobile stopped on the highway. Alston, 88 N.J. at 233. Applying this standard, the Alston Court upheld the warrantless search under the automobile exception, finding that:

In the instant case, the defendants' **speeding vehicle was stopped on the highway for reasons wholly unconnected with the reason for the subsequent seizure.** See Colorado v. Bannister, 449 U.S. 1, 3 n.2, 101 S.Ct. 42, 43 n.2, 66 L.Ed.2d 1, 4 n.2 (1980). **The unanticipated circumstances that gave rise to probable cause to search for concealed weapons developed swiftly.** Given that the detectives had probable cause to believe that dangerous weapons were concealed in the passenger compartment of the vehicle, the vehicle's inherent mobility and the potential danger

posed by the presence of weapons were sufficient exigent circumstances to justify a warrantless search.

[Alston, 88 N.J. at 234 (emphasis added)]

According to Alston, the basis for the stop and swiftness of the development of probable cause are factors to be considered in the unforeseeable and spontaneous circumstances analysis. In the Smart case, the sole reason for the stop of defendant's vehicle was for officers to further investigate and locate drugs. The officers' drug investigation involved a lengthy surveillance of defendant as he traveled to Boston Market, PNC Bank, and then a residence with a known history of suspected drug activity. The subsequent stop was based on reasonable suspicion of a suspected drug transaction, and Defendant was Mirandized and questioned about his stop at the residence. Officers immediately requested a drug sniffing canine on scene when consent to search was denied. Clearly, the request for the canine and positive alert were anticipated by the officers prior to the investigatory stop for drugs. Also, there is nothing in the record to indicate the officers feared for their safety or expected to find weapons (more on this below). Unlike the circumstances in Alston, the development of probable cause for the search of drugs in Smart was certainly not swift, and the seizure of the drugs in defendant's vehicle was connected to the reason for this investigatory stop.

**C. THE APPELLATE DIVISION DID NOT ERR IN APPLYING  
THE POST-WITT CANINE CASES TO THE  
CIRCUMSTANCES IN SMART.**

In rendering the Smart decision, the Appellate Division sought guidance from this Court's post-Witt decisions involving officers' use of drug sniffing canines during traffic stops in State v. Dunbar, 229 N.J. 521 (2017), and State v. Nelson, 237 N.J. 540 (2019). Smart, 473 N.J. Super. at 98-101. In Dunbar, this Court adopted the federal standard set forth in Rodriguez v. United States, 575 U.S. 348, 355 (2015), that the unreasonable extension of a traffic stop to conduct a canine sniff constitutes an unreasonable seizure absent reasonable and articulable suspicion. See Dunbar, 229 N.J. at 539. In reaching this decision, the Supreme Court observed that a dog sniff "is a measure aimed at 'detecting evidence of criminal wrongdoing'," therefore "is not fairly characterized as part of the officer's traffic mission." Rodriguez, 575 U.S. at 355-356.

Under Dunbar, "an officer does not need reasonable suspicion independent from the justification for a traffic stop in order to conduct a canine sniff," but the sniff cannot be conducted "in a manner that prolongs a traffic stop beyond the time required to complete the stop's mission." 229 N.J. at 540. However, "if an officer has articulable reasonable suspicion independent from the reason for the traffic stop that a suspect possesses narcotics, the officer may continue a detention to administer a canine

sniff." Id.

In Nelson, defendant was stopped for failing to maintain lane and tailgating on the Turnpike, although police had just received a tip from the Bureau of Alcohol, Tobacco and Firearms that the same vehicle would be travelling on that highway with a large quantity of marijuana. 237 N.J. at 546-547. A canine sniff was conducted on the vehicle 37 minutes into the stop resulting in a positive indication on the vehicle. Id. at 547. Officers then impounded the vehicle and obtained a search warrant. Id. at 547-548. A search was conducted once the warrant was secured, resulting in the seizure of eighty pounds of marijuana. Id. at 548. The Court in Nelson concluded that the wait for the canine exceeded the time needed to accomplish the task tied to the traffic infraction. Id. at 554. However, the Court found reasonable suspicion had developed during the stop to justify the wait based on the "totality of the circumstances," including: the initial tip from ATF; the moving violations observed; defendant's nervous behavior and conflicting trip itinerary; the lack of any personal belongings in the vehicle; large bags observed in the cargo hold; defendant's admissions of prior narcotics arrests; and the overwhelming smell of air freshener. Id. at 554-555.

With these post-Witt canine cases in mind, the Appellate Division in Smart 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." Smart, 473 N.J. Super. at 100. 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. Id. However, the Court in Smart 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.

[Smart, 473 N.J. Super. at 101 (emphasis added)]

Unlike the post-Witt canine cases, reasonable suspicion in Smart arose prior to the stop, not during the stop. When those suspicions were not confirmed, officers resorted to the canine which eventually led to the positive alert. Accordingly, the

development of probable cause was not unforeseeable and spontaneous, and there was no error in the findings of the Appellate Division.

**D. THE UNFORSEEABILITY AND SPONTANEITY REQUIREMENT UNDER WITT APPLIES TO ALL ROADSIDE STOPS.**

The State argues that the unforeseeable and spontaneous requirement under Witt was met in Smart because officers did not possess probable cause "well in advance of the automobile search" and did "not sit on probable cause and later conduct a warrantless search." SBr at 14-15<sup>3</sup> The Witt court had 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. However, the Appellate Division correctly determined that "prohibiting police from obtaining probable cause 'well in advance' of a warrantless search is not the sole command of Witt. Probable cause pursuant to the post-Witt automobile exception must 'aris[e] from unforeseeable and spontaneous circumstances.'" Smart, 473 N.J. Super. at 97 (quoting Witt, 223 N.J. at 450). Witt expressly stated that this requirement extends to "searches on the roadway," Id., thus its application is not limited to situations involving empty parked cars or where officers possess probable cause well in advance of

---

<sup>3</sup> SBr refers to the State's supplemental brief dated October 11, 2022.



a stop. Accordingly, the Appellate Division appropriately rejected the State's narrow interpretation of applicability of the unforeseeable and spontaneous requirement:

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.**

[Smart, 473 N.J. Super. at 90-91 (emphasis added)]

**E. DEFENDANT'S VEHICLE WAS SECURED AND AN "INDEPENDENT EXIGENCY" DID NOT EXIST, THEREFORE OFFICERS WERE STILL REQUIRED TO OBTAIN A SEARCH WARRANT.**

Although the Court in Witt dispensed with the separate exigent circumstances requirement of the automobile exception, the State presents a post hoc argument that an "independent exigency" existed to justify the warrantless search of Defendant's vehicle. SBr at 18-19. Relying on State v. Martin, 87 N.J. 561 (1981), the State argues defendant had a heightened motivation to remove evidence once stopped and questioned by police and presented a possibility of violence. Notably, Martin involved the warrantless search of an unoccupied vehicle involved in a recent armed robbery, and the

"independent exigency" was that the suspects were still at large and could return to remove the vehicle or its contents. 87 N.J. at 569.

There is no basis for this "independent exigency" theory under on the facts and circumstances in Smart. The officers' investigatory stop was based on suspected drug activity, not for weapons or crimes of violence. Defendant complied with officers and exited the vehicle, no weapons were found on his person, and there is no indication in the record that the officers felt threatened by defendant. Further, unlike in Martin, the lone target of the officers' investigation was secured.

Moreover, any concern regarding the inherent mobility of the vehicle or practicality of obtaining a warrant at the scene was rendered moot, particularly "when prior to the sniff officers removed all three occupants from the car" (2T19:13-19:18), "the vehicle was no longer inherently mobile, and any search conducted would no longer be considered prompt per Witt." (2T18:16-18:19) As observed by the trial court:

After Ms. Comrie-Holloway denied consent to search the vehicle everyone waited 25 minutes for the trained K-9 whose hit indicated drugs were in the car therefore establishing probable cause. At this point, with everyone out of the vehicle, the vehicle was no longer inherently mobile, and any search conducted would no longer be considered prompt per Witt. Even the circumstances giving rise to probable cause to search defendant's car were not unforeseeable as [sic] spontaneous as required

by Witt to validate a warrantless search.

. . .  
There was nothing spontaneous about the decision to search defendant's car. And despite the State's assertion that the inherent mobility of the vehicle rendered it impractical to obtain a search warrant, that consideration was rendered moot when prior to the sniff officers removed all three occupants from the car.

Additionally, there were several officers on the scene that would permit some to remain while the vehicle was impounded and the search warrant was obtained. The impound lot was nearby and the search warrant was likely to be granted.

[2T18:13-18:22; 2T19:12-19:23]

Here, the officers were clearly intent on searching Defendant's vehicle for drugs, and they chose when and where to conduct the stop and orchestrate that search. Further, there were no circumstances that would have prevented the officers from obtaining a warrant prior to the anticipated search.

#### POINT II

**DEPARTURE FROM THE "UNFORSEEABILITY AND SPONTANEITY" REQUIREMENT FOR INVESTIGATORY STOPS WOULD DIMINISH INDIVIDUALS' ENHANCED STATE CONSTITUTIONAL PROTECTIONS AND ALTER THE BALANCE BETWEEN INDIVIDUAL RIGHTS AND LAW ENFORCEMENT INVESTIGATORY DEMANDS.**

Although the Smart court properly applied the automobile exception mandates in Witt and Alston, the State nevertheless seeks a reversal of this decision and a departure from binding precedent. The reversal of Smart would cause the elimination of this Court's unforeseeable and spontaneous circumstances requirement pertaining

to roadside motor vehicle stops based on reasonable suspicion of criminal activity. Consequently, police would be permitted to circumvent the search warrant requirement for every investigative stop involving drug sniffing canines. Such an outcome would revert New Jersey back to the federal standard for vehicle searches, a standard our state has moved away from since Alston was decided. Also at jeopardy are the enhanced protections afforded under the State Constitution that were expressly recognized by this Court in Witt, Pena-Flores, and Cooke, all of which construed the automobile exception through Article I, Paragraph 7 of our Constitution.

In 2015, the Witt Court determined that New Jersey's automobile search standard under Alston ". . . is more in line with the jurisprudence of most other jurisdictions, yet still protective of the right of citizens to be free from unreasonable searches." Witt, 223 N.J. at 415. Although Witt set aside the independent exigent-circumstances standard for automobile searches under Cooke and Pena-Flores, the Court also pronounced that ". . . we do not adopt the federal standard for automobile searches because that standard is not fully consonant with the interests embodied in Article I, Paragraph 7 of our State Constitution." Witt, 223 N.J. at 447. Indeed, fifteen years earlier, the Cooke Court rejected the less-stringent federal standard established in Pennsylvania v. Labron, 518 U.S. 938 (1996) and Maryland v. Dyson, 527 U.S. 465 (1999), which merely required probable cause to

conduct a warrantless vehicle search under the Fourth Amendment. Cooke, 163 N.J. at 661, 665, 671. In Cooke, this Court "decline[d] to reach a similar conclusion under the New Jersey Constitution. Instead, [the Court] concluded[d] that the automobile exception under New Jersey law requires both probable cause and a finding of exigent circumstances to sustain a warrantless search of a vehicle." Id. at 661. In so doing, the automobile exception was finally construed by this Court under Article I, Paragraph 7 of our State Constitution. Id. at 661, 671.

The enhanced protections of the automobile exception under our State Constitution through the exigent circumstances requirement was reaffirmed by this Court a few years later in Pena-Flores. 198 N.J. at 25-26, 28. The Pena-Flores Court acknowledged that "[w]e have never subscribed fully to the federal version of the automobile exception and the relationship of our jurisprudence to federal jurisprudence is an uneasy one." Id. at 20-21. This Court noted that the decisions in ". . . Alston and Martin rejected the federal standard by declaring (1) that the stop had to be unforeseen and spontaneous and (2) that exigency must be assessed based on the particular facts and circumstances of the case, and does not automatically flow from the mobility of the vehicle." Pena-Flores, 198 N.J. at 22.

Although Witt subsequently declared the exigent circumstances requirement "unsound in principle and unworkable in practice," 223

N.J. at 447, this Court also found that Alston's requirement of "unforeseeability and spontaneity" does not place an undue burden on law enforcement and comports with Article I, Paragraph 7 of the New Jersey Constitution. Id. at 448. In the Court's view, this more onerous test departs from the less-stringent 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 (quoting State v. Earls, 214 N.J. 564, 584 (2013)). 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.

Pursuant to Witt and the preceding decisions, the additional unforeseeable and spontaneous circumstances requirement under the New Jersey automobile exception is grounded in the enhanced protections provided in our State Constitution. Those protections extend to all individuals, including those who are the target in an investigative stop for suspected drug activity. The Appellate Division in Smart correctly determined that those same enhanced protections applied to Defendant as well and were violated when officers searched his vehicle without a warrant. A reversal of Smart, and the resultant elimination of the unforeseeable and spontaneous requirement of Witt and Alston for investigative

stops, would permanently alter the proper balance between individual rights and police investigative needs this Court had sought. A reversal of Smart would permit officers to completely circumvent the warrant requirement during every investigative stop for suspected criminal activity. Surely, this is not the outcome this Court had envisioned in rendering the Witt decision.

Finally, it is notable that officers' request for consent to search the vehicle was denied in this case. The denial of consent signaled defendant's desire to avail himself to his constitutional rights to privacy and await a neutral magistrate's ruling on a search warrant application for his car. It is well established under the federal and State constitutions that judicially authorized search warrants are strongly preferred before law enforcement officers conduct a search. State v. Johnson, 193 N.J. 528, 552 (2008). "The cautionary procedure of procuring a warrant ensures that there is a reasonable basis for the search and that the police intrusion will be reasonably confined in scope." Cooke, 163 N.J. 670-671 (quoting State v. Bruzzese, 94 N.J. 210, 218 (1983), cert. denied, 465 U.S. 1030 (1984)). Here, Defendant had a constitutionally protected privacy interest that was intruded when the officers conducted the warrantless search of his vehicle in violation of the Witt automobile exception standard. Therefore, the suppression of evidence based on the unreasonable search was not in error.

CONCLUSION

The Smart decision applied the automobile exception standard set forth in Witt, and correctly found that probable cause from the canine alert did not arise under unforeseeable and spontaneous circumstances. The reversal of Smart will result in the elimination of the foreseeability and spontaneity requirement in all investigative stop cases involving the use of drug sniffing canines. Consequently, the enhanced protections afforded under the State Constitution will be diminished, and the balance between individual privacy and liberty interests and law enforcement's investigatory demands will be permanently altered. Accordingly, this Court should affirm the Appellate Division decision in this case.

Respectfully submitted

/s Clifford P. Yannone

Clifford P. Yannone  
Attorney for Defendant-  
Respondent

Dated: November 4, 2022



# APPENDIX

CHARLES E. STARKEY  
SCOTT W. KENNEALLY  
KEVIN N. STARKEY ◊  
WILLIAM P. CUNNINGHAM ◊  
TERRANCE L. TURNBACH

-----  
CLIFFORD P. YANNONE  
MICHEL A. PAULHUS ◊

◊ Certified by the Supreme Court of New Jersey  
As a Civil Trial Attorney  
◊ Certified by the Supreme Court of New Jersey  
As a Criminal Trial Attorney

**CUNNINGHAM & TURNBACH**  
COUNSELLORS AT LAW

TWO HOOPER AVENUE  
TOMS RIVER, NEW JERSEY 08753

732-701-3500 / 732-240-3777 FAX  
REAL ESTATE FAX: 732-876-0388

EMAIL: TOMSRIVER@STARKEYKELLY.COM  
WWW.STARKEYKELLY.COM

WILLIAM V. KELLY (1945-2018)  
HAROLD CORLEY WHITE (1934-1993)  
ROBERT H. DOHERTY, JR. (1922-1993)

-----  
DIRECT DIAL: 732-701-3508  
EMAIL: [cyannone@starkeykelly.com](mailto:cyannone@starkeykelly.com)

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

RI

**STARKEY, KELLY, KENNEALLY, CUNNINGHAM & TURNBACH**  
Counsellors at Law

January 28, 2022

Page 2

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

R2

**STARKEY, KELLY, KENNEALLY, CUNNINGHAM & TURNBACH**

Counsellors at Law

January 28, 2022

Page 3

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

R3

**STARKEY, KELLY, KENNEALLY, CUNNINGHAM & TURNBACH**  
Counsellors at Law

January 28, 2022

Page 4

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.

R4