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June 18, 2020

Honorable Chief Justice
and Associate Justices
Supreme Court of New Jersey
Hughes Justice Complex
P. O. Box 970
Trenton, New Jersey 08625

Re: State of New Jersey v. Rasheem W. McQueen and Myshira T. Allen-Brewer
Docket No. 084564

Honorable Justices:

With regard to the above-referenced matter, please accept this letter in lieu of a more formal brief on behalf of the State in opposition to defendant Allen-Brewer's cross-motion for leave to appeal. There are several reasons why defendant's cross-motion should be denied.

First, defendant argues this Court should grant leave to appeal because the Appellate Division "failed to recognize that the calls that it did not suppress are the fruit of the

poisonous tree of the calls it did suppress." (Dmb2).[1] Allen-Brewer makes this argument notwithstanding that neither she nor McQueen argued before the trial court that suppression of the police station call would require suppression of the subsequent jail calls under the "fruit of the poisonous tree" doctrine even if the jail calls were otherwise lawfully obtained.

Before the trial court, Allen-Brewer relied entirely on McQueen's legal argument in support of the motion to suppress evidence in which Allen-Brewer joined. (5T8-22 to 9-21). The brief on which Allen-Brewer relied in turn relied entirely on the trial court's reasoning in its suppression of the jail calls in State v. Jackson — the same reasoning this Court rejected in State v. Jackson, ___ N.J. ___ (2020). (Pa5-6). Specifically, counsel for McQueen argued before the trial court as follows: "The constitutional infirmity of the seizure is so obvious it barely warrants discussion. I will rely on the findings and citations in [the trial court's] thoughtful and cogent written

[1] References to the record are made as follows:
Pa = State's appendix to June 8, 2020 brief in support of motion for leave to appeal.
Dmb = Defendant Allen-Brewer's June 8, 2020 letter brief in opposition to the State's motion for leave to appeal and in support of defendant's cross-motion for leave to appeal.
1T = Transcript of grand jury proceeding, Oct. 30, 2018.
2T = Transcript of grand jury proceeding, Feb. 8, 2019.
3T = Transcript of motion to suppress, Feb. 25, 2019.
4T = Transcript of motion to suppress, Mar. 25, 2019.
5T = Transcript of motion to suppress, May 3, 2019.
6T = Transcript of motion, June 3, 2019.

opinion in State v. Mark Jackson, Indictment No. 18-04-0555 (Law Div. July 16, 2018)." (Pa5-6). Neither the brief nor the unpublished trial court decision on which defendants relied made any mention of the "fruit of the poisonous tree" doctrine. (Pa5-6; Pa26-93).

Had either defendant raised this issue before the trial court, the State could have responded and created a factual record to support arguments based on the independent source doctrine, the inevitable discovery doctrine, or the attenuation doctrine. By arguing before the trial court in a way that drew no distinction between the police station call and the jail calls and by failing to address the "fruit of the poisonous tree" doctrine, defendants "denied the State the opportunity to confront the claim head-on; . . . denied the trial court the opportunity to evaluate the claim in an informed and deliberate manner; and . . . denied any reviewing court the benefit of a robust record within which the claim could be considered." State v. Robinson, 200 N.J. 1, 21-22 (2009).

Defendants should not be permitted to bypass the trial court and have this issue considered for the first time by this Court on the basis of an incomplete factual record. See also State v. Galicia, 210 N.J. 364, 383 (2012) ("Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below."); State v. Witt, 223 N.J.

409, 418 (2015) ("We reject defendant's contention that the State must disprove issues not raised by the defense at a suppression hearing. . . . Parties must make known their positions at the suppression hearing so that the trial court can rule on the issues before it."). Cf. State v. Scott, 229 N.J. 469, 480 (2017) (considering argument for first time on appeal appropriate where "the record . . . is fully developed"). The trial court currently has jurisdiction over the present matter as a result of the Appellate Division's remand. If defendants intend to renew their challenge to the admissibility of the jail calls under an alternative "fruit of the poisonous tree" theory, they must do so before the trial court.

The State maintains that no "fruit of the poisonous tree" analysis is necessary because the recording and monitoring of the police station call was lawful, and for that reason this Court should grant the State's motion for leave to appeal and reverse the suppression of that call. If this Court agrees with the Appellate Division's dissenting judge that defendants had no reasonable expectation of privacy in the call, then no court will need to conduct a "fruit of the poisonous tree" analysis. However, if any court is to conduct this analysis in the first instance, it should not be this Court; it should be the trial court, especially given the incompleteness of the record with respect to the issue being raised.

Another reason why defendant should not be granted leave to appeal is that under Rule 3:5-7(d), she retains a right to appellate review of any decision denying her suppression motion, regardless of whether she pleads guilty or is found guilty at trial of any of the charged offenses. Furthermore, defendant may stand trial and be acquitted, in which case no appeal by defendant would be necessary. The State, by contrast, has no right to appeal from a suppression order after acquittal. See N.J. Const. art. I, ¶ 11 ("No person shall, after acquittal, be tried for the same offense."). From defendant's perspective, leave to appeal before this Court is not "necessary to prevent irreparable injury," R. 2:2-2(a), and therefore defendant's cross-motion for leave to appeal should be denied.

Finally, although defendant argues the Appellate Division and this Court erred by failing to conduct a consent analysis in State v. Jackson, 460 N.J. Super. 258 (App. Div. 2019), aff'd o.b., State v. Jackson, ___ N.J. ___ (2020), this argument lacks merit. As defendant acknowledges, the Appellate Division held and this Court affirmed in Jackson that the defendants had no reasonable expectation of privacy in recordings of phone calls they made while incarcerated. Id. at 265. (Dmb4). Thus, "the Prosecutor's Office was authorized to obtain the recordings without a search warrant, a communications data warrant, or a wiretap order." Ibid.

The Fourth Amendment of the federal constitution and Article I, Paragraph 7, of the New Jersey Constitution require police to obtain a warrant when police intrude into an area where a person has a reasonable expectation of privacy. See State v. Hinton, 216 N.J. 211, 236 (2013). Consent is a well-established exception to the warrant requirement, see, e.g., State v. Domicz, 188 N.J. 285, 305 (2006), but in Jackson, as here, because defendants had no reasonable expectation of privacy in the recorded jail calls, no warrant was required and thus no exception was required. There was no need for the Appellate Division or this Court to address an exception to the warrant requirement where no warrant was required.

In considering whether a person maintains a reasonable expectation of privacy in a given area at a given time, this Court considers the totality of the circumstances. See Hinton, 216 N.J. at 239-40. In Jackson, as here, it was undisputed that the defendants continued to use the correctional facility's phone system after being warned that their calls would be recorded. Jackson, 460 N.J. Super. 266, 277. That fact was one among several contributing to the totality of circumstances indicating that any expectation of privacy claimed by defendants was unreasonable and thus indicating no warrant was required. It was not a fact establishing defendant's consent to a search that otherwise would have required a warrant. Although the

defendants did give implied consent to the recording, monitoring, and divulgence of the calls, a consent analysis was unnecessary because the defendants had no reasonable expectation of privacy in the calls, and thus, for constitutional purposes, there was no search.

There is nothing incomplete or erroneous about the analysis underlying the Appellate Division's decision in Jackson, 460 N.J. Super. at 258, or about this Court's affirmance of that decision that would justify granting leave to appeal and revisiting in this case the same issue the Court addressed less than three months ago in Jackson, ___ N.J. at ___. Nor has defendant shown that granting leave to appeal with respect to the issue of the jail calls in this case is "necessary to prevent irreparable injury." R. 2:2-2(a). Defendant's cross-motion for leave to appeal therefore should be denied.

Respectfully submitted,

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