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July 21, 2022

Re: State of New Jersey (Plaintiff-Appellant) v.
Kyle A. Smart (Defendant-Respondent)
Appellate Division Docket No. A-002334-21
Supreme Court Docket No. -

Criminal Action:
On Motion for a Stay of the Published Opinion
Of the Superior Court of New Jersey, Appellate
Division.

Sat Below: Hon. Carmen Messano, PJ.A.D.,
Hon. Allison E. Accurso, J-A.D.,
Hon. Lisa Rose, J.A.D.

Hon. Rochelle Gizinski, J.S.C.

Defendant is confined.

Honorable Judges:

Pursuant to R. 2:6-2(b) and R. 2:6-4(a), this letter in lieu of a formal brief is submitted on behalf of the State of New Jersey.

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TABLE OF APPENDIX

STATEMENT OF PROCEDURAL HISTORY AND FACTS[1] [2]

We rely on our procedural history and statement of facts in our July 20, 2022 brief in support of our motion for leave to appeal to this Court contained in the appendix herein at SA5-11.

LEGAL ARGUMENT

POINT I
THE STATE'S MOTION FOR A STAY OF THE PUBLISHED OPINION IN STATE V. SMART SHOULD BE GRANTED IN THE INTERESTS OF JUSTICE.

This Court should grant a stay of the Appellate Division's published opinion in State v. Kyle Smart __N.J.Super __ (App. Div. 2022) (Docket No. A-2334-21, decided June 30, 2022), in order to preserve the status quo while the State seeks review of the decision from this Court. Our motion for leave to appeal to this Court was filed on July 20, 2022. That motion and its appendix appears in this brief at SA1-59.

A stay of the opinion pending disposition of the State's motion for leave to appeal is warranted under the standard set forth in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), and Garden State Equality v. Dow, 216 N.J. 314 (2013).

A party seeking a stay must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of

[1] The facts and procedural history are combined to avoid repetition.
[2] The appendix to this brief is designated "SA" in order to avoid confusion with the appendix in our brief in support of our motion for leave to appeal to this Court, which brief appears in our appendix to this brief.

succeeding on the merits; and (3) balancing the "relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were." Garden State Equality, 216 N.J. at 320 (quoting McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting). The moving party has the burden to prove each of the Crowe factors by clear-and-convincing evidence. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012) (citation omitted). When a case presents an issue of "significant public importance," a court must consider the public interest in addition to the traditional Crowe factors. McNeil, 176 N.J. at 484.

Here, the State has satisfied all three of the Crowe factors as well as the fact that the issue is of great public importance - indeed this is a constitutional issue affecting a large number of cases in this State.

There is a reasonable likelihood of success on the merits and the State's claim rests on settled law. We rely on our brief in support of our motion for leave to appeal to this Court dated July 21, 2022, and filed with this Court on that day. It appears at SA1-59.

Briefly however, the Smart decision changes current law and practice under this Court's pronouncements in State v. Witt 223 N.J. 409 (2015). Until the Smart decision was published, police could search a car they had stopped based on probable cause and

provided the circumstances giving rise to probable cause arose "spontaneously" or "unforeseeably." Under Witt, the rules of spontaneity and unforeseeability were easily understood; if the **"circumstances"** giving rise to probable cause were not known to police beforehand, then the *legal conclusion* of probable cause arose in a spontaneous or unforeseeable way. Witt at 447. The Appellate Division in Smart found all police action in this roadside encounter to be proper and constitutional, up to the time the canine positively alerted for drugs in Defendant's car. The *dog's positive alert* indicating probable cause was the *sole reason and sole constitutional infirmity* the spontaneous or unforeseeable test of Witt could not be met, and therefore police needed to apply for a warrant. The Court erroneously understood that the *probable cause itself* had to be unforeseen and spontaneous - not the circumstances giving rise to probable cause. The Smart rule, requiring a warrant in these circumstances, promotes form over substance and stands against the policy of Witt to constrain dangerous roadside encounters for little benefit to the citizenry. The Court in effect has eliminated the automobile exception to the warrant requirement in these types of cases.

The Witt decision sets forth the proper understanding of the spontaneous and unforeseen requirement since the evil to be avoided is clearly set forth in that decision - that is, police

may "not sit on probable cause and later conduct a warrantless search, for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant." Witt at 432. Hence, if police had probable cause prior to encountering a defendant, the roadside seizure would not be considered spontaneous and unforeseen. The Appellate Division here found police did not sit on probable cause or have probable cause prior to encountering Defendant. (slip op. at 3 and 11)

In all drug cases, where a car is stopped in a deemed constitutional investigative detention, and where a canine is called to the scene, and that is deemed constitutional, police are now prohibited from a warrantless roadside probable cause search permitted by Witt because of the *per se* rule created by the Court - that when a routine investigative tool is employed by law enforcement such as here by calling a dog to the scene, police need to seek a warrant if the result is positive for drugs.

A stay would be the most appropriate mechanism to preserve the status quo. Indeed, the new rule will affect not only cases going forward, but potentially those cases that have already been decided. Therefore, the State submits that a stay should be granted while this Court considers its motion for leave to appeal in order to prevent irreparable harm to the State in this case and the perhaps hundreds similar cases throughout the

State, in order to avoid a great hardship, and because the issue is one of great public importance.

CONCLUSION

For the aforementioned reasons, the State's motion for a stay of the Smart decision should be granted so that this Court may have the opportunity to consider this matter.

Respectfully submitted,

s/ Samuel Marzarella
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Dated: July 21, 2022

SUPREME COURT OF NEW JERSEY

APPELLATE DIVISION
DOCKET NO. A-2334-21

SUPREME DOCKET NO.

CRIMINAL *ACTION*

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

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS CONFINED

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TABLE OF APPENDIX[1]

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

[1] In accordance with R. 2:6-1(a)(2) the relevant portions of the briefs 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

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SAH

PROCEDURAL HISTORY[2]

On October 21, 2021 an Ocean County Grand Jury charged Kyle Smart with possession of a CDS, compound containing, FluoroFentanyl, and Cocaine, contrary to the provisions of N.J.S.A 2C: 35-10a(1) (Count One - Third degree); possession of a CDS, Fentanyl, contrary to the provisions of N.J.S.A. 2C: 35-10a(1) (Count Two - Third degree); possession with intent to distribute a CDS, Fentanyl, contrary to the provisions of N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(5) (Count Three - Third degree); unlawful possession of a firearm, a black Taurus G2C .40 handgun, without obtaining a permit to carry the same as provided in N.J.S.A. 2C: 58-4, contrary to the provisions of N.J.S.A. 2C:39-5b(1) (Count Four- Second degree); possession of a weapon for an unlawful purpose, a black Taurus G2C .40 handgun, contrary to the provisions of N.J.S.A. 2C: 39-4a(1) (Count Five - Second degree); possession of a firearm while engaged in certain drug activity, attempting or conspiring to commit a violation of N.J.S.A. 2C: 35-5, knowingly possess a black Taurus G2C .40 handgun, contrary to the provisions of N.J.S.A. 2C: 39-4.1a (Count Six - Second degree); certain person not to possess firearm, previously convicted of a crime pursuant to the

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[2] 1T designates transcript of proceedings occurring on February 2, 2022 (wrongly dated March 2 by the reporter - see 1T10-24 for verification of the correct date).
2T designates transcript of proceedings dated March 1, 2022.
"A" designates appendix attached hereto.

SAS

provisions of N.J.S.A. 2C: 15:1 and N.J.S.A. 2c: 39-5b; on Essex County Indictment 08-01-00257-I, did purchase, own, possess or control a firearm, a black Taurus G2C .40 handgun, contrary to the provisions of N.J.S.A. 2C: 39-7b(1) (Count Seven - Second degree). (A1-5)

On December 14, 2021, Defendant filed a motion to suppress evidence seized from his car. (A6-7)

On February 2, 2022 a non-testimonial hearing was held before the Hon. Rochelle Gizinski, J.S.C. (1T10-24)

On March 1, 2022 the Judge issued an order suppressing the evidence, (A8), and granted a stay pending interlocutory review also on March 1, 2022. (A9-10) The Judge's oral decision appears at 2T3-1 to 22-19.

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

On March 31, 2022, the Appellate Division issued a published decision affirming the motion judge's order suppressing the evidence in this case.

On July 1, 2022 the State filed a motion for a stay of the published decision. The motion was denied on July 18, 2022.

This motion for leave to appeal follows.

SALe

STATEMENT OF FACTS[3] [4]

On August 4, 2021 at approximately 2:00p.m., Patrolman Louis Taranto of the Toms River Police Department Special Enforcement Team was conducting narcotics surveillance in the area of the Harbor Front Condominium Complex located at 215 Washington Street, Toms River, New Jersey. The area was known to Taranto to be a high crime area - one of frequent narcotics transactions and other criminal activity.

During the course of the surveillance Patrolman Taranto observed an unoccupied white 2017 GMC Terrain bearing Georgia registration CQW7094 parked within the condominium parking lot area. The vehicle has tinted front windows and a white Carvana license plate attached on the front end. Taranto recalled receiving information during the month of July 2021 from C.I. 21-04 about a suspected narcotics dealer - the C.I. described him as a black male with facial tattoos, approximately 5'07"-5'09" in height with long dreadlocks, identified by the street name "Killer" that was operating a similar vehicle and distributing Controlled Dangerous Substances (CDS) in the Toms River area. (1T3-15 to 4-11)

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[3] It should be noted at the outset that the parties agreed on the facts of this case, and the Judge acknowledged that agreement. (see, 1T57-18; see also, 1T62-13 and 1T52-4 to 52-8), although the State was prepared to hear from 3 witnesses. (A16-17).

[4] A copy of the published opinion in this case appears at A18-34. When citing to the opinion we will cite to the pages of the slip opinion.

C.I. 21-04 described the vehicle and had provided Taranto with a photograph of it. Taranto recalled seeing the photograph of the vehicle and concluded the one he saw was the same vehicle in the photograph as well as the one the C.I. described. With the assistance of that photograph, Taranto was able to positively identify the vehicle in the parking lot as the same one reported by the C.I. Additionally, Taranto, using the C.I. information, conducted a database search and found Kyle A. Smart listed as 5'07" with a moniker of "Killer." (hereafter, "Defendant") Defendant's mugshot also depicted him with long dreadlocks and facial tattoos. He was also noted to have several CDS related arrests and multiple felony convictions, including weapons offenses. Based upon this information, Taranto believed Defendant to be the suspect described by C.I. 21-04 who was distributing CDS in the Toms River area. (1T4-12 to 4-17) (A11-12)

After approximately thirty minutes, Taranto observed a black female, later identified as Constance P. Comrie-Holloway approach and enter the driver's side door of the GMC Terrain. At this time, Taranato also observed a male, later identified as Defendant Kyle Smart, enter the front passenger side of the vehicle after placing a small child in the rear passenger compartment. The vehicle proceeded to depart the parking lot and travelled to the Boston Market located at 141 Route 37 East. The vehicle then proceeded to the PNC Bank located at 1329 Hooper Avenue, Toms River, New

Jersey. Taranto observed these stops to be consistent with legitimate patronage. (1T4-18 to 5-3)

Thereafter, the vehicle travelled to 143 Shenandoah Boulevard, where it parked outside the residence. At this time, Taranto was made aware from Patrolman Sutter that she had been contacted by a concerned citizen, C.C. 21-05, during the month of June 2021 that he/she believed there to be narcotics related transactions occurring from this residence. According to C.C. 21-05 he/she had observed several cars arrive at 143 Shenandoah Boulevard and briefly enter the residence before departing, which he/she believed to be indicative of narcotics related activity. On one occasion, C.C. 21-05 observed two black males arrive, enter and depart the residence after being inside the residence for a brief period of time. In this instance, C.C. 21-05 reported that the black males were operating a white GMC Terrain bearing a Georgia registration. (1T5-4 to 5-16) Taranto also documented that Patrolman Sutter was aware of multiple residents of 143 Shenandoah Boulevard being known CDS users. (A13)

Taranto observed Defendant exit the vehicle and walk through a fence to the backyard of the residence while the female driver remained in the vehicle. After a brief period of time, Defendant was then seen reemerging from the backyard with a white female. Defendant proceeded to re-enter the GMC Terrain while the white female proceeded to the residence. Taranto believed Defendant and

the female resident had engaged in a narcotics related transaction. (1T5-18 to 6-11) His conclusion was based upon his training and experience, the totality of the circumstances and the C.I. and C.C. information. (A13)

At 3:17 p.m., an hour and 17 minutes after Taranto first identified the vehicle as one used to distribute CDS, Patrolman Fitzgerald, operating a marked Toms River Police Department patrol vehicle executed a motor vehicle stop of the white GMC Terrain in the area of Hooper Avenue and Feathertree Drive. Taranto asked Defendant to exit the vehicle, at which time Defendant was patted down and advised of his Miranda rights, which he indicated he understood. Taranto spoke to defendant about his actions leading up to the motor vehicle stop. However, Defendant only indicated that he had come from Shenandoah Boulevard where he had stopped to "see his people." Defendant did not provide any details as to who he had met with or why he was at that location. (1T6-12 to 7-4)

At 3:40 p.m., approximately 23 minutes after the automobile was stopped, and following a refusal to consent to a search of the vehicle, a K-9 responded on scene to conduct an exterior sniff of the vehicle. The K-9 sniff was positive. A subsequent search of the interior compartment of the vehicle yielded a small black Coach backpack that was situated on the front passenger side floorboard. Located within the backpack was an unloaded SCCY handgun magazine, a black digital scale, and a small cardboard

box containing approximately 400 wax folds stamped with an indistinguishable green circular logo, and approximately 10 wax folds stamped "Bentley" in blue ink containing a white powdery substance, suspected heroin. Additionally, located within the vehicle's center console was a black Taurus G2C .40 handgun (Serial# ACC643641) that was loaded with 10 rounds of .40 Speer ammunition with a round actively chambered. Finally, within the vehicle, $1600 in assorted US paper currency was located within a purse on the rear driver side seat. Subsequently, Defendant was placed under arrest. At that time, he indicated to Detective Duncan MaCrae that everything found in the vehicle belonged to him. (1T7-14 to 8-15)

Comrie-Holloway provided a formal statement later at police headquarters, wherein she advised that the heroin, digital scale, and black backpack (where those items were found) did not belong to her. She also stated that while the handgun was registered to her, she did not put it in the vehicle. (1T8-16 to 9-3)

LEGAL ARGUMENT

POINT I

THE INTERESTS OF JUSTICE REQUIRE THIS COURT TO GRANT LEAVE TO APPEAL BECAUSE THE ERROR IN SUPPRESSING THE EVIDENCE WILL RESULT IN GRAVE DAMAGE OR INJUSTICE WHICH IS IRREMEDIABLE IN THE ORDINARY COURSE

This is a published case. State v. Kyle A. Smart, __ N.J. Super __ (App. Div. 2022) (Docket no. A-2334-21, decided June 30, 2022)

The State seeks leave to appeal from the interlocutory order of the Appellate Division affirming the motion judge's decision granting Defendant's motion to suppress evidence seized from Defendant's car.

Leave to appeal is "highly discretionary" 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)(citing State v. Reldan, 100 N.J. 187, 205 (1985) Among other reasons, an interlocutory appeal should be granted "because there is the possibility of 'some grave damage or injustice' resulting from the trial court's order. Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008) Moreover, "[i]n a criminal case leave to appeal is ordinarily granted to the State when the trial judge suppresses evidence because of the jeopardy consequences which flow from an acquittal at the trial which follows the suppression. *See Reldan, supra; R.* 2:2-4; *R.* 2:5-6." Alfano, supra.

Leave to appeal should be granted to preserve the State's case and to address the important interests the rule in this published case affects.

In the present matter, the courts below erred in finding that the evidence seized from the car should be suppressed. They found the entirety of police actions in the case to be reasonable and proper including the investigative detention of Defendant and his car as well as the calling out of a canine for a sniff for drug activity. Indeed, the canine sniff was deemed to be completely proper as within the scope of a sound constitutional investigative detention. But the Appellate Division concluded that once the canine positively alerted, the police were then required to obtain a warrant because that alert "changed the equation" in this case and therefore the circumstances of the case were no longer "spontaneous and unforeseeable" under State v. Witt, 223 N.J. 409 (2015) Hence the Appellate Division concluded the warrantless seizure of evidence as a result of the dog sniff was improper and affirmed the suppression order.

The State's motion for leave to appeal should be granted so that the errors made in this case may be corrected and so that the rule created in this case, the constraints placed upon law enforcement because of it, the reintroduction of lengthy roadside encounters, as well as the severe modification or elimination of the automobile exception in these cases may be corrected.

It was error for the court to conclude - while all other police actions were reasonable - that only the canine sniff outside Defendant's car was the cause of a constitutional violation here

as not being spontaneous and unforseeable especially since these sniffs are not considered searches. The rule in Smart faults the police for failure to have a warrant in hand at the time they unforeseeably and spontaneously came upon defendant's vehicle, and obligates them to delay the roadside search until a warrant is first obtained - contrary to the automobile exception to the warrant requirement, and contrary to Witt.

Undercutting Witt and its automobile exception will have a devastating impact across the State, exposing police and citizenry to lengthy roadside encounters for little or no benefit to be obtained.

POINT II

THE COURT ERRED WHEN IT SUPPRESSED THE EVIDENCE FOUND IN DEFENDANT'S CAR RESULTING FROM A SEARCH BASED ON PROBABLE CAUSE BECAUSE THE APPELLATE DIVISION MISREAD WITT

On appeal concerning motions to suppress evidence, factual findings are upheld when supported by sufficient credible evidence in the record, but legal conclusions are owed no special deference. State v. Gamble, 218 N.J. 412, 424-425 (2014)

The Appellate Division found in this case that the police "could not have secured a warrant before the car was stopped" (slip op. at 3 and 11), that a warrant would not have issued at any point during the surveillance of Defendant's car, that the police did not "sit on probable cause" *such that they could have obtained a*

warrant before encountering Defendant's car, (Slip op. at 3 and 11) and that probable cause only arose during the investigative detention at the time the canine positively alerted on Defendant's car. Ibid. Nevertheless, the Appellate Division - when pressed to apply the decision of this Court in Witt, held "the validity of the warrantless roadside search of the GMC does not end with the Court's holding in Witt." (Slip op. at 13) The Appellate Division significantly held that the use of the canine was proper and that it was "reasonably related in scope" to the basis for the stop. (slip op. at 16-17) However, that Court ruled that the use of the canine "changed the equation" in this case, (slip op. at 13), such that the dog's positive alert was not a "spontaneous and unforeseen development of probable cause; it was simply another step in the search for drugs that caused the stop in the first place." (slip op. at 17) Hence the Court concluded that when the canine alerted, police were then required to seek a warrant. (Ibid)

Significantly, the Appellate Division, seems to have misread Witt. First, that Court believed that the *legal conclusion* that probable cause existed had to arise immediately via police sensory perceptions. (see, e.g. slip op. at 13 and 16) Yet, Witt makes clear that the "circumstances" that give rise to the legal conclusion of probable cause had to have arisen spontaneously and unforeseeably - that is police could not have foreseen or predicted the circumstances as they

developed throughout the encounter. See Witt at 447-448 and throughout. As Witt observes,

> *Alston* properly balances the individual's privacy and liberty interests and law enforcement's investigatory demands. *Alston*'s requirement of "unforeseeability and spontaneity," *id.* at 233, 440 *A.*2d 1311, does not place an undue burden on law enforcement. For example, if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so. In this way, we eliminate the concern expressed in *Cooke, supra*—the fear that "a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs." 163 *N.J.* at 667-68, 751 *A.*2d 92. In the case of the parked car, if the **circumstances giving rise** to probable cause were **foreseeable and not spontaneous**, the warrant requirement applies.

[Witt, at 447-48,](emphasis added)

This error - that *probable cause* had to arise spontaneously and unforeseeably instead of the *circumstances* underlying that legal conclusion - caused the Court to write, "[w]e discern no constitutionally significant distinction between law enforcement's observations of criminal activity after a car is stopped for a motor vehicle violation and the same observations following an investigatory stop." (slip op. at 12-13) The Court continued, "[f]or example, had police observed drugs in plain view upon effecting the investigatory stop in this case, the automobile exception readopted by the Court in Witt likely would have been satisfied." (Slip op. at 13) Because it believed the legal conclusion of probable cause had to arise spontaneously,

apparently via plain view or by other police senses, the Court ruled that, "the officers' suspicions were not confirmed by their observations after the stop was conducted." (slip op. at 16 -17) Of course, additional investigatory steps during an investigative detention are always permitted and will be upheld provided they are reasonable in order for the police to dispel or confirm their reasonable suspiciona. More about this will be said below.

Second, the misreading of Witt is also why the Court relied upon those cases in which a motor vehicle violation provided the only basis for the stop of the car since, as quoted above, it discerned no difference between the traffic stop cases and the investigatory detention cases. Yet, in our view, the heightened level of suspicion allowing for an "investigative detention" is clearly distinguishable from traffic stops where there is no suspicion of any crime whatsoever. Nevertheless, even in the traffic stop cases police are allowed to use a canine provided the stop is related in scope and duration to the officers' mission - and if the canine positively alerts - under this decision, are police required to seek a warrant? The officers' mission here was to confirm or dispel their suspicions that a crime was occurring - and the Appellate Division even acknowledged that the stop was proper and the canine sniff was proper as reasonably related in scope to the purpose of the stop. That the Court tied its reasoning in this case to the traffic stop cases in which use of a drug

sniffing dog has absolutely nothing to do with the traffic infraction which served as the sole justification for the stop in the first place is reason enough for review.

Third, the essence of Witt is whether the circumstances of the encounter developed in an unforeseeable and spontaneous way. Witt explicitly guides us in the determination of unforeseeability and spontaneity as standing against the evil of "sitting" on probable cause or having probable cause in advance of encountering a defendant and then conducting a warrantless search later. The Appellate Division, burdened by its error that probable cause had to arise spontaneously and unforeseeably and not the *circumstances* leading to that conclusion wrote,

> 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 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 13)

Hence, police did not have probable cause "well in advance of an automobile search" and they did not "sit on probable cause

and later conduct a warrantless search." Witt at 431-432. This is in essence the spontaneity and unforeseeability requirement of Witt and the Appellate Division's finding that police did not sit on probable cause should have gone far to disposing of the case.

This idea permeates Witt and comes from the automobile exception to the warrant requirement of the famous case Carrol v. United States, 267 U.S. 132 (1925), wherein the Court asserted that in "cases where the securing of a warrant is reasonably practicable, it must be used." However, the Carrol Court foreshadowed the Witt spontaneity and unforeseeablity requirement when it upheld the warrantless probable cause search in that case while recognizing the reason why officers did not seek a warrant beforehand.

> Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. **As soon as they did appear, the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants.**
>
> Carroll v. United States, 267 U.S. 132, 160-61, 45 S. Ct. 280, 288, 69 L. Ed. 543 (1925) (emphasis added)

Similar to Carroll, Witt observed that its unforeseeable and spontaneous requirement merely requires police secure a

warrant to search a car "when it is practicable to do so." 223 N.J. at 449. As explained in Witt, the inherent mobility of the vehicle is one of the rationales for the automobile exception, recognizing that it may not be practicable to secure a warrant given that the vehicle can be quickly moved out of the locality or jurisdiction. Id. at 422 (citing Caroll 267 U.S. 132, at 153). However, when the probable cause over the vehicle is not connected to or threatened by the vehicle's inherent mobility, police must secure a warrant to find and search the car. In other words, **police may "not sit on probable cause and later conduct a warrantless search**, for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant." Witt, at 432. (emphasis added) Thus, the unforeseeable and spontaneous requirement "ensure[s] that police officers **who possess[ ] probable cause well in advance of an automobile search** [seek] a warrant." Id. at 431. (emphasis added)

No one could seriously question that every circumstance of the police encounter with Defendant that day was unforeseeable – and both Courts below did not question this important point. Indeed, here the motion judge acknowledged that officers did not have probable cause in advance of encountering Defendant, that instead they were conducting general narcotics surveillance in an area known for narcotics activity. (1T3-15 to 3-23). The

Judge stated the police "did not set out that day with a specific suspect in mind. . . ." The Appellate Division agreed. "In the present matter it is undisputed that police lacked probable cause to search the GMC prior to encountering defendant at the condominium complex." (slip op. at 11).
Hence, the motion judge found there to be no probable cause to believe criminal activity was afoot during the entire time of the surveillance, and the Appellate Division agreed. (slip op. at 11).

Yet, the published decision held - in a conclusory manner - merely that probable cause did not arise spontaneously or unforeseeable, and this was because, although the canine was properly called to the scene during a constitutional investigatory detention, its alert was the only factor that made probable cause not spontaneous and unforeseeable. The Court wrote,

> However, we are 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 unit 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 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 their failure to do so rendered the ensuing search fatally defective.
> [slip op. at 17] (emphasis supplied)

Significantly, the Court found every action of the police to be reasonable except the last step - securing a warrant. This goes against the policy expressed in Witt of preventing dangerous roadside delays and does not give any added benefit to the citizenry. The Court's rule also serves to undercut the automobile exception to the warrant requirement.

Regarding investigative detentions, "we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." United States v. Sharpe, 470 U.S. 675, 685 (1985) Additionally, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officers' suspicion in a short period of time." Florida v. Royer 460 U.S. 491, 502 (1983.

Here, the Appellate Division concluded that because the result of the canine's alert "changed the equation" in this case, police were required to obtain a warrant merely because it was

"another step" in the search for drugs. No case law prohibits that another reasonable step be taken during an investigative detention. Of course, the canine sniff is not a search and the positive alert alone could not have changed the equation if everything else was constitutional.

> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.
>
> [United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644-45, 77 L. Ed. 2d 110 (1983)]

Hence it was improper for the Court to conclude there was a constitutional violation as a result of police failure to seek a warrant solely because of the canine's positive alert during this roadside encounter.

In effect the Court found the only reasonable means for confirming or dispelling the police suspicions in a roadside encounter was via their sensory perceptions - and that police could take no other steps besides their perceptions that resulted in probable cause without seeking a warrant.

In our view, the dog sniff was the most reasonable and expeditious way for police to confirm or dispel their suspicions.

Requiring police to obtain a warrant after the dog alert promotes form over substance and undercuts the rule and policy expressed in Witt. Indeed, Witt attempted to constrain the time-consuming and dangerous roadside encounters when police are required to get a warrant roadside.

> The current approach to roadside searches premised on probable cause—"get a warrant"—places significant burdens on law enforcement. On the other side of the ledger, we do not perceive any real benefit to our citizenry by the warrant requirement in such cases—no discernible advancement of their liberty or privacy interests.
>
> [State v. Witt, 223 N.J. at 446-47, 126 A.3d 850, 872]

CONCLUSION

For these reasons the Appellate Division's published case in this matter on a novel issue of Statewide importance should be reviewed and this Court should grant the State's application for leave to appeal.

Respectfully submitted,

/s/ Samuel Marzarella
Samuel Marzarella
Chief Appellate Attorney
Of Counsel and on the brief
Atty ID: 038761985
smarzarella@co.ocean.nj.us

Dated: July 20, 2022

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY

THE STATE OF NEW JERSEY :
:
VS. :
: INDICTMENT
: NO. 21-10-1417
KYLE A. SMART :
:
Defendant :

COUNT ONE

POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE-THIRD DEGREE

The Grand Jurors of the State of New Jersey, in and for the County of Ocean, upon their oaths present that KYLE A. SMART, on or about August 4, 2021, in the Township of Toms River, County of Ocean, and within the jurisdiction of this Court, did knowingly or purposely possess a controlled dangerous substance compound containing, FluoroFentanyl, a schedule I drug, and Cocaine, a schedule II drug, contrary to the provisions of N.J.S.A. 2C:35-10a(1), and against the peace of this State, the Government and dignity of the same.

COUNT TWO

POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE-THIRD DEGREE

The Grand Jurors of the State of New Jersey, in and for the County of Ocean, upon their oaths present that KYLE A. SMART, on or about August 4, 2021, in the Township of Toms River, County of Ocean, and within the jurisdiction of this Court, did knowingly or purposely possess a controlled dangerous substance, namely, Fentanyl, a schedule II drug, and said substance was not obtained directly, or pursuant to a valid prescription or order form

from a practitioner, while acting in the course of his professional practice, contrary to the provisions of N.J.S.A. 2C:35-10a(1), and against the peace of this State, the Government and dignity of the same.

COUNT THREE

POSSESSION WITH INTENT TO DISTRIBUTE A CDS- THIRD DEGREE

The Grand Jurors of the State of New Jersey, in and for the County of Ocean, upon their oaths present that KYLE A. SMART, on or about August 4, 2021, in the Township of Toms River, County of Ocean, and within the jurisdiction of this Court, knowingly or purposely did possess or have under his control with intent to distribute a controlled dangerous substance, namely, Fentanyl, a schedule II drug, in a quantity of less than one ounce, contrary to the provisions of N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(5), and against the peace of this State, the Government and dignity of the same.

COUNT FOUR

UNLAWFUL POSSESSION OF A FIREARM-SECOND DEGREE

The Grand Jurors of the State of New Jersey, in and for the County of Ocean, upon their oaths present that KYLE A. SMART, on or about August 4, 2021, in the Township of Toms River, County of Ocean, and within the jurisdiction of this Court, knowingly did possess a certain firearm, that is, a black Taurus G2C .40 handgun, without having first obtained a permit to carry the same as provided in N.J.S.A. 2C:58-4, contrary to the provisions of N.J.S.A. 2C:39-5b(1), and against the peace of this State, the Government and dignity of the same.

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COUNT FIVE

POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE-SECOND DEGREE

The Grand Jurors of the State of New Jersey, in and for the County of Ocean, upon their oaths present that KYLE A. SMART, on or about August 4, 2021, in the Township of Toms River, County of Ocean, and within the jurisdiction of this Court, knowingly did possess a certain weapon, that is, a black Taurus G2C .40 handgun, with the purpose to use it unlawfully against the person or property of another, contrary to the provisions of N.J.S.A. 2C:39-4a(1), and against the peace of this State, the Government and dignity of the same.

COUNT SIX

POSSESSION OF A FIREARM WHILE ENGAGED IN CERTAIN DRUG ACTIVITY-SECOND DEGREE

The Grand Jurors of the State of New Jersey, in and for the County of Ocean, upon their oaths present that KYLE A. SMART, on or about August 4, 2021, in the Township of Toms River, County of Ocean, and within the jurisdiction of this Court, while in the course of committing, attempting to commit or conspiring to commit a violation of N.J.S.A. 2C:35-5, did knowingly possess a firearm, that is, a black Taurus G2C .40 handgun, contrary to the provisions of N.J.S.A. 2C:39-4.1a, and against the peace of this State, the Government and dignity of the same.

COUNT SEVEN

CERTAIN PERSON NOT TO POSSESS FIREARM-SECOND DEGREE

The Grand Jurors of the State of New Jersey, in and for the County of Ocean, upon their oaths present that KYLE A. SMART, on or about August 4, 2021, in the Township of Toms River, County of Ocean, and within the jurisdiction of this Court, having been

previously convicted of a crime pursuant to the provisions of N.J.S.A. 2C:15-1 and N.J.S.A. 2C:39-5b; on Indictment 080100257-I in the County of Essex, State of New Jersey, did purchase, own, possess or control a firearm, that is, a black Taurus G2C .40 handgun contrary to the provisions of N.J.S.A. 2C:39-7b(1), and against the peace of this State, the Government and dignity of the same.

BRADLEY D. BILLHIMER
OCEAN COUNTY PROSECUTOR

DATED: 10-21-2021

BY: _____
JULIE E. PETERSON
ASSISTANT PROSECUTOR

ENDORSED: _____
Foreperson

Ay

GJ Docket # : 21002215

Superior Court of New Jersey
Law Division, Ocean County

THE STATE

VS.

KYLE A. SMART

INDICTMENT NO.
21-10-1417

INDICTMENT FOR

POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE
POSSESSION WITH INTENT TO DISTRIBUTE A CDS
UNLAWFUL POSSESSION OF A FIREARM
POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE
POSSESSION OF A FIREARM WHILE ENGAGED IN CERTAIN DRUG ACTIVITY
CERTAIN PERSON NOT TO POSSESS FIREARM

BRADLEY D. BILLHIMER
Ocean County Prosecutor

A TRUE BILL

Foreperson

ELIGIBLE DEFENDANT UNDER BAIL REFORM

Bail **DETAINED**

Condition Of Bail

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ORDER PREPARED BY THE COURT

STATE OF NEW JERSEY	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - CRIMINAL PART OCEAN COUNTY
Plaintiff,	:	
	:	Indictment No.: 21-10-1417-I
v.	:	
Kyle A. Smart,	:	
DEFENDANT.	:	**SCHEDULING ORDER ON DEFENDANT'S SUPPRESSION MOTION**

THIS MATTER having been opened to the Court by defendant's attorney, and the Court having considered the status of this case and good cause appearing for the confirmation of certain circumstances regarding motions being urged upon the Court and a schedule for handling of same, the Court notes the following:

The nature of the Motion:

1. To suppress evidence seized without a warrant

The Moving Party: Defendant

THEREFORE, IT IS HEREBY **ORDERED** AS FOLLOWS:

1. **Notice of Motion:** Filed 12/14/21

2. **Briefs** shall be filed with the Court and served on the parties as follows:

   - The State's brief is due by January 7, 2022.
   - Defendant's opposing brief is due by January 21, 2022.

3. If a testimonial hearing is required it shall be held on Wednesday, February 2, 2022 @ 9:30 A.M. Oral argument will follow.

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4. Failure by any Moving Party to adhere to the requirements of this Order shall result in the motion being barred.

BY THE COURT

ROCHELLE GIZINSKI, J.S.C.

Date: 12/15/2021

State of New Jersey

Robert J. Cassidy, Esq.

Defense

Clifford P. Yannone, Esq.

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PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CRIMINAL PART
OCEAN COUNTY

STATE OF NEW JERSEY,	:	
Plaintiff,	:	Indictment No.: 21-10-1417
v.	:	
KYLE A. SMART	:	
Defendant.	:	**ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS**

THIS MATTER, having been opened to the court by Clifford P. Yannone, Esq., appearing on behalf of Kyle A. Smart and Robert Cassidy, Esq., appearing on behalf of the State and the Court having considered the briefs submitted by the parties the testimony of witnesses, and oral argument, and the Court finding good cause,

IT IS THEREFORE on this 1st day of March 2022,

ORDERED that for the reasons set forth in the Court's written opinion, Defendant's motion to suppress evidence seized pursuant to the warrantless search is **GRANTED.**

Honorable Rochelle Gizinski, J.S.C.

#8

BRADLEY D. BILLHIMER
OCEAN COUNTY PROSECUTOR
119 HOOPER AVENUE
TOMS RIVER, NEW JERSEY 08754
(732)929-2027

STATE OF NEW JERSEY, Plaintiff, v. KYLE A. SMART, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION (CRIMINAL) OCEAN COUNTY CASE NO. 21002215 Indictment No. 21-10-1417 ORDER

This matter having been brought before this Court by Assistant Prosecutor Robert J. Cassidy, on behalf of the State of New Jersey, on Notice to defendant, Kyle A. Smart, by and through his attorney, Clifford Yannone, Esq.; and the Court having entered an Order dated March 1, 2022 granting defendant's motion to suppress evidence, which now precludes the State from admitting into evidence all evidence seized pursuant to the search of a 2017 GMC Terrain, Georgia Registration CQW7094 that took place on August 4, 2021, including quantities of Controlled Dangerous Substances and a handgun, in the State's case in chief; and the State having represented to the Court that it intends to file a motion pursuant to Rule 2:2-4 seeking leave to file an interlocutory appeal; and the State having hereby

moved pursuant to Rule 2:5-6(a) and Rule 2:9-5 seeking a stay of the trial court proceedings pending the State's motion seeking leave to file an interlocutory appeal;

It is on this 1ST day of March, 2022 ORDERED that all proceedings regarding this matter are hereby stayed pending interlocutory appeal.

Rochelle Gizinski, J.S.C.

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BRADLEY D. BILLHIMER
Ocean County Prosecutor

JOSEPH F. MITCHELL
Chief of Detectives

MICHAEL T. NOLAN, JR.
First Assistant Prosecutor

ROBERT J. ARMSTRONG
Deputy First Assistant Prosecutor

OFFICE OF THE PROSECUTOR
Courthouse Annex Building
119 Hooper Avenue
P.O. Box 2191
Toms River, New Jersey 08754-2191
732-929-2027

January 21, 2022

Via E-Courts

Hon. Rochelle Gizinski
Superior Court of New Jersey
Law Division-Criminal Part
Ocean County Justice Complex
120 Hooper Avenue, Courtroom #11
Toms River, NJ 08754

Re: State v. Kyle Smart
Indictment 21-10-1417

Dear Judge Gizinski:

Please accept this letter in lieu of a formal brief in opposition of defendant, Kyle Smart's, motion to suppress evidence presently scheduled to be heard on Wednesday, February 2, 2022 at 9:30a.m. before Your Honor.

Statement of Facts

On August 4, 2021 at approximately 1400 hours (2:00p.m.), Patrolman Louis Taranto of the Toms River Police Department Special Enforcement Team was conducting narcotics surveillance in the area of

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the Harbor Front Condominium Complex located at 215 Washington Street, Toms River, New Jersey. The area was known to Taranto to be one of frequent narcotics transactions and other criminal activity.

During the course of the surveillance Patrolman Taranto observed an unoccupied white 2017 GMC Terrain bearing Georgia registration CQW7094 parked within the condominium parking lot area. The vehicle has tinted front windows and a white Carvana license plate attached on the front end. Taranto recalled receiving information during the month of July 2021 from C.I. 21-04 describing a black male with facial tattoos, approximately 5'07"-5'09" in height with long dreadlocks, identified by the street name "Killer", that was operating a similar vehicle and distributing Controlled Dangerous Substances (CDS) in the Toms River area.

C.I. 21-04 provided Taranto with a photograph of the white GMC Terrain and with the assistance of that photograph, Taranto was able to positively identify the vehicle in the parking lot as the same one reported by the C.I..

Additionally, Taranto, using the C.I. information, conducted a database search and found Kyle A. Smart listed as 5'07" with a moniker of "Killer". Smart's mugshot also depicted him with long dreadlocks and facial tattoos. Smart was also noted to have several CDS related arrests and multiple felony convictions, including weapons offenses. Based upon this information, Taranto believed Smart to be the suspect described by C.I. 21-04 as "Killer", who was operating the white GMC Terrain and distributing CDS in the Toms River area.

After approximately thirty minutes, Taranto observed a black female, later identified as Constance P. Comrie-Holloway approach and enter the driver's side door of the GMC Terrain. At this time, Taranato also observed a male, later identified as Kyle Smart, enter the front passenger side of the vehicle after placing a small child in the rear passenger compartment. The vehicle proceeded to depart the parking lot and travelled to the Boston Market located at 141 Route 37 East. The vehicle then proceeded to the PNC

Bank located at 1329 Hooper Avenue, Toms River, New Jersey. Taranto observed these stops to be consistent with legitimate patronage. Thereafter, the vehicle travelled to 143 Shenandoah Boulevard, where it parked outside the residence. At this time, Taranto was made aware from Patrolman Sutter that she had been contacted by C.C. 21-05 during the month of June 2021 that he/she believed there to be narcotics related transactions occurring from this residence.

According to C.C. 21-05 he/she had observed several cars arrive at 143 Shenandoah Boulevard and briefly enter the residence before departing, which he/she believed to be indicative of narcotics related activity. On one occasion, C.C. 21-05 observed two black males arrive, enter and depart the residence after being inside the residence for a brief period of time. In this instances, C.C. 21-05 reported that the black males were operating a white GMC Terrain bearing Georgia registration "COW7094". Taranto also documented that Patrolman Sutter was aware of multiple residents of 143 Shenandoah Boulevard being known CDS users.

Taranto observed Smart exit the vehicle and walk through a fence to the backyard of the residence while the female driver remained in the vehicle. After a brief period of time, Smart was then seen reemerging from the backyard with a white female. Smart proceeded to re-enter the GMC Terrain while the white female proceeded to the residence. Based upon Tarnato's training and experience, the totality of the circumstances and the C.I. and C.C. information, it was believed Smart and the female resident had engaged in a narcotics related transaction.

Subsequently, Patrolman Fitzgerald, operating a marked Toms River Police Department patrol vehicle executed a motor vehicle stop of the white GMC Terrain in the area of Hooper Avenue and Feathertree Drive. Upon executing the motor vehicle stop, Taranto made contact with Smart, who was asked to exit the vehicle, was patted down and advised of his Miranda rights, which he indicated he understood. Taranto spoke to Smart about his actions leading up to the motor vehicle stop however, Smart

would only indicate that he had come from Shenandoah Boulevard where he had stopped to "see his people". Smart would not provide any details as to who he had met with or why he was at that location.

Additionally, contact was made with the driver, Ms. Comrie-Holloway, who was the registered owner of the vehicle. Detective Macrae asked Ms. Comrie-Holloway if she would consent to a search of the vehicle however she declined stating that nothing in the car was hers. Following the refusal to consent to a search of the vehicle, a K-9 responded on scene to conduct an exterior sniff of the vehicle. The K-9 sniff was positive. A subsequent search of the interior compartment of the vehicle yielded a small black Coach backpack that was situated on the front passenger side floorboard. Located within the backpack was an unloaded SCCY handgun magazine, a black digital scale, and a small cardboard box containing approximately four hundred (400) wax folds stamped with an indistinguishable green circular logo and approximately ten (10) wax folds stamped "Bentley" in blue ink containing a white powdery substance, suspect heroin. Additionally, located within the vehicle's center console was a black Taurus G2C .40 handgun (Serial# ACC643641) that was loaded with ten (10) rounds of .40 Speer ammunition with a round actively chambered. Finally, within the vehicle, $1600 in assorted US paper currency was located within a purse on the rear driver side seat.

Subsequently, Smart was placed under arrest. Smart indicated to Detective Duncan MaCrae that everything found in the vehicle belonged to him. Comrie-Holloway provided a formal statement, wherein she advised that the heroin, digital scale, and black backpack (where those items were found) did not belong to her. She also stated that while the handgun was registered to her, she did not put it in the vehicle.

Kyle A. Smart was charged with Possession of Heroin NJSA 2C:35-10A(l), Possession of Heroin with Intent to Distribute NJSA 2C:35-5B(3), Possession of CDS Paraphernalia NJSA 2C:36-

2, Possession of a Firearm During the Commission of a CDS Offense NJSA 2C:39-4.1A, and Possession of a Firearm by a Certain Person NJSA 2C:39-7A.

BRADLEY D. BILLHIMER
Ocean County Prosecutor

ANTHONY U. CARRINGTON
Chief of Detectives

MICHAEL T. NOLAN, JR.
First Assistant Prosecutor

ROBERT J. ARMSTRONG
Deputy First Assistant Prosecutor

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February 1, 2022

Via E-Courts

Hon. Rochelle Gizinski
Superior Court of New Jersey
Law Division-Criminal Part
Ocean County Justice Complex
120 Hooper Avenue, Courtroom #11
Toms River, NJ 08754

Re: State v. Kyle Smart
Indictment 21-10-1417

Dear Judge Gizinski:

Please accept this letter in lieu of a formal reply to defendant's brief dated January 28, 2022 submitted in support of his motion to suppress evidence presently scheduled to be heard on Wednesday, February 2, 2022 at 9:30a.m. before Your Honor.

As a preliminary note, I write to advise that the State made an error in its original statement of facts, which I have communicated to defense counsel. Specifically, the State attributed observations made of defendant at 143 Shenandoah Boulevard to Patrolman Louis Taranto when in fact, it was Patrolman Sutter who made those observations. These facts will be clearly established through the testimony at the hearing.

The State intends to call three witnesses at the hearing: (1) Patrolman Louis Taranto, Toms River Police Department; (2) Patrolman Samantha Sutter, Toms River Police Department; and (3) Officer Raymond Vosseller, Ocean County Sheriff's Department.

The State observes defendant has relied heavily on the unpublished opinion, State v. Dixon, 2020 WL 2071059. In fact, defense argues "[T]he facts and circumstances in Dixon are analogous with those in the instant matter." Further noting, that "[Dixon] recognized that there was reasonable suspicion for an investigatory stop of defendant." Notwithstanding, defense asserts the investigatory stop of defendant was unlawful. The State is unsure how these two assertions can co-exist.

While it is the State's position that the Court's reliance on the unpublished opinion in Dixon would be improper in accordance with Rule 1:36-3, the State submits, the facts in the present matter, in their totality, far outweigh those in Dixon, and are clearly distinguishable. In Dixon, the stop was based upon a confidential informant's tip, surveillance of defendant picking up and dropping off a warehouse employee within a period of three minutes, and the officer's training and experience. Here, the facts and circumstances were more favorable to the State and demonstrate that the required level of suspicion was attained prior to the stop. Moreover, that the confidential informant's tip in Dixon is very different from the information Taranto had in the present matter.

In determining the reasonableness of the conduct of the police, an objective test is used. State v. Mann, 203 N.J. 328, 338 (2010) (citing State v. Pineiro, 181 N.J. 13, 21 (2004)). [A] reviewing court must assess whether 'the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate.' " Ibid. (quoting Pineiro, supra, 181 N.J. at 21). An officer's " 'inarticulate hunches' " or " 'subjective good faith' " are not sufficient. Ibid. (quoting State v. Amelio, 197 N.J. 207, 212

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A- 2334-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

KYLE A. SMART,

Defendant-Respondent.

APPROVED FOR PUBLICATION

June 30, 2022

APPELLATE DIVISION

Argued May 31, 2022 – Decided June 30, 2022

Before Judges Messano, Accurso and Rose.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 21-10-1417.

Samuel Marzarella, Chief Appellate Attorney, argued the cause for appellant (Bradley D. Billhimer, Ocean County Prosecutor, attorney; Samuel Marzarella, of counsel and on the brief).

Clifford P. Yannone argued the cause for respondent (Starkey, Kelly, Kenneally, Cunningham & Turnbach, attorneys; Clifford P. Yannone, of counsel and on the brief).

The opinion of the court was delivered by

ROSE, J.A.D.

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By leave granted, the State appeals from a March 1, 2022 Law Division order suppressing evidence seized from a motor vehicle without a warrant. Police conducted an investigatory stop after surveilling the car for more than an hour and developing information that front seat passenger, Kyle A. Smart, was engaged in drug activity. At the roadside stop, no evidence of drug activity was observed in plain view; the occupants of the car neither made incriminating statements nor furtive movements; and the driver denied consent to search. Police then requested a K-9 unit. The dog alerted to the presence of narcotics, leading to a warrantless search of the car and seizure of a loaded handgun and drugs from the cabin.

Finding police had reasonable and articulable suspicion to pull over the vehicle, the motion judge upheld the stop and further determined probable cause arose when the canine sniff revealed the presence of narcotics in the car. However, the judge found the circumstances giving rise to probable cause were not "unforeseeable and spontaneous," justifying a warrantless search under the automobile exception to the warrant requirement pursuant to State v. Witt, 223 N.J. 409, 450 (2015). Accordingly, the judge suppressed the evidence seized.

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 by Witt.

See id. at 431-32. The State therefore maintains the warrantless search and seizure here passed constitutional muster under Witt.

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. Accordingly, our review of the record leads us to affirm the motion judge's order, but we do so for slightly different reasons. See Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) (permitting an appellate court to affirm for other reasons because "appeals are taken from orders and judgments and not from opinions").

I.

Finding the material facts essentially uncontroverted, the judge decided the motion without a testimonial hearing. See R. 3:5-7(c) (requiring a testimonial suppression hearing when material facts are in dispute). That

finding was not contested in the trial court and is not disputed on appeal. We summarize the pertinent facts from the parties' written submissions and arguments before the motion judge.

Around 2:00 p.m. on August 4, 2021, Patrolman Louis Taranto of the Toms River Police Department, Special Enforcement Team (TRPD-SET) was conducting surveillance in the vicinity of a condominium complex located in the township. The complex was known to Taranto as a high crime area, which included frequent drug activity. Taranto noticed an unoccupied white 2017 GMC Terrain vehicle with tinted front windows parked in the complex's lot. The vehicle bore Georgia registration; a Carvana license plate frame was affixed to its front end.

While making these observations, Taranto recalled information he had received the previous month from a registered confidential informant (CI). According to the CI, "a black male with facial tattoos," between five-feet-seven and five-feet-nine inches, "with long dreadlocks," known as "Killer," operated a similar vehicle and distributed drugs "in the Toms River area." The CI had provided Taranto with a photograph of the GMC, which led the officer to identify the parked car. Based on the CI's information, Taranto conducted a database search, which disclosed defendant's name, height, and moniker. Defendant's mugshot depicted him with facial tattoos and long dreadlocks; his

criminal record included drug-related arrests, and several convictions, including weapons offenses. The totality of this information led Taranto to believe defendant was the suspect described by the CI.

Approximately thirty minutes later, a woman entered the driver's side of the car, and defendant entered the front passenger's side after he placed a small child in the rear seat. Taranto followed the vehicle, which made stops at a restaurant and bank in Toms River, characterized by the officer as "consistent with legitimate patronage." Apparently, other TRPD-SET officers joined the surveillance.

Eventually, the car stopped at a residence located on Shenandoah Boulevard. The driver remained in the car. Defendant exited the car, walked to the backyard of the building, and returned shortly thereafter with an unidentified white woman. The woman entered the residence; defendant re-entered the GMC. Police did not observe a hand-to-hand transaction but believed defendant and the woman had engaged in a drug deal based on the totality of the circumstances, including Taranto's training and experience, the information provided by the CI, and information provided by a concerned citizen (CC) to another TRPD-SET officer in June 2021. The officer told Taranto the CC suspected narcotics-related transactions between multiple residents of the building and the occupants of several cars that stopped there.

On one occasion, the CC observed "two black males" arrive in a white GMC Terrain bearing the same Georgia license plate as defendant's vehicle.

At 3:17 p.m. on the date of the incident, approximately one hour and seventeen minutes after Taranto initially identified the car at the condominium complex, police stopped the GMC near Hooper Avenue and Feathertree Drive. Taranto asked defendant to get out of the car. A pat-down revealed no weapons or drugs. After his Miranda[1] rights were read to him, defendant declined to disclose his reason for stopping at the Shenandoah residence or identify anyone with whom he met. Defendant claimed he merely "stopped to 'see his people.'" The driver refused consent to search the GMC but stated "nothing in the car was hers." The officers then called for a K-9 unit, and asked the driver to step out of the vehicle and remove the child.

At 3:40 p.m., approximately twenty-three minutes after police stopped the car and consent to search was refused, the K-9 unit conducted an exterior sniff of the vehicle. Immediately following the canine's positive detection, police searched the vehicle. Inside a backpack located on the front passenger's side floor, police found suspected heroin packaged in more than 400 wax folds, an unloaded handgun magazine, and a digital scale. Police also seized a loaded .40 caliber handgun from the center console, and $1,600 in cash from a

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

purse found on the rear seat. Defendant was arrested; the driver and her child were permitted to leave the scene in the GMC.

Defendant was charged in a seven-count Ocean County indictment with various drug and weapons offenses. He moved to suppress the evidence seized from the GMC, challenging the validity of the stop and the warrantless seizure of evidence. Following oral argument, the motion judge reserved decision.

In her March 1, 2022 decision from the bench, the judge initially found police "had articulable reasonable suspicion that criminal or unlawful activity had just occurred when they stopped the vehicle." Detailing the officers' observations as summarized above, the judge's decision was grounded in the totality of the circumstances during the "long period of surveillance."

Turning to the automobile exception to the warrant requirement, the motion judge noted the parties did not dispute probable cause arose when the canine alerted for the presence of narcotics. Thus, the remaining legal issue before the judge was "whether the police could search the vehicle or if they needed to impound the vehicle and obtain a search warrant." Citing Witt and our decision in State v. Rodriguez, 459 N.J. Super. 13 (App. Div. 2019), the judge was not persuaded by the State's argument that the circumstances giving rise to probable cause to search the GMC were unforeseeable and spontaneous.

Finding "everyone waited twenty-five minutes" for the K-9 unit to arrive, alert to the presence of drugs, and establish probable cause, the judge elaborated:

> The investigatory stop was based on an hour-and-twenty-minute surveillance of the defendant that was initiated by a CI's tip. Stopping defendant's car was not based on some traffic violation which . . . then led to probable cause to conduct a warrantless search. The surveillance, car stop, and K-9 sniff were based solely on the officers' belief that defendant had drugs in the vehicle.
>
> Under Witt, the automobile exception to a warrantless search of defendant's car does not apply as their goal was a clear and deliberate effort to uncover drugs. There was nothing spontaneous about the decision to search defendant's car.

The judge also rejected the State's argument that obtaining a warrant was impracticable due to the inherent mobility of the vehicle in view of the number of officers at the scene, the proximity of the impound lot, and because the occupants had been removed from the vehicle.

II.

Ordinarily, our review of a trial court's decision on a suppression motion is circumscribed. See e.g., State v. Dunbar, 229 N.J. 521, 538 (2017) (stating appellate courts defer to the motion judge's factual and credibility findings provided they are supported by sufficient credible evidence in the record). Deference is not due where, as in the present matter, the trial court has not

conducted a testimonial hearing and the facts are undisputed. Ibid. (recognizing legal conclusions are reviewed de novo).

Well-established constitutional principles guide our review. "Warrantless seizures and searches are presumptively invalid as contrary to the United States and the New Jersey Constitutions." State v. Pineiro, 181 N.J. 13, 19 (2004); see also U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "Our jurisprudence under both constitutional provisions expresses a preference that police officers secure a warrant before they execute a search." Witt, 223 N.J. at 422. To overcome this preference, the State must show by a preponderance of evidence that the search falls within one of the well-recognized exceptions to the warrant requirement. State v. Manning, 240 N.J. 308, 329 (2020). The warrant requirement "is not lightly to be dispensed with, and the burden is on the State, as the party seeking to validate a warrantless search, to bring it within one of those recognized exceptions." State v. Alston, 88 N.J. 211, 230 (1981). "One such exception is the automobile exception to the warrant requirement." Witt, 223 N.J. at 422.

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,[2] returning instead to the standard set forth in Alston. 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 Rodriguez, 459 N.J. Super. at 23 (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").

By resurrecting state constitutional safeguards first enunciated in Alston to the expansive federal interpretation of the automobile exception, the Court reasoned, "Alston properly balances the individual's privacy and liberty interests and law enforcement's investigatory demands." Witt, 223 N.J. at 447. Further, "Alston's requirement of 'unforeseeability and spontaneity,'" does not unduly burden law enforcement. Ibid. (quoting Alston, 88 N.J. at 233). By

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[2] "Under federal law, probable cause to search a vehicle 'alone satisfies the automobile exception to the Fourth Amendment's warrant requirement.'" Witt, 223 N.J. at 422 (quoting Maryland v. Dyson, 527 U.S. 465, 467 (1999)).

way of example, the Witt Court stated, "if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so." Id. at 447-48. Thus, the Court "eliminate[d] the concern expressed in Cooke," that police "could not sit on probable cause and later conduct a warrantless search, for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant." Id. at 448, 431-32 (citing Cooke, 163 N.J. at 667-68).

In the present matter, it is undisputed that police lacked probable cause to search the GMC prior to encountering defendant at the condominium complex. Nor did probable cause arise during the one-hour-and-seventeen-minute surveillance. Because police had only reasonable suspicion, not probable cause, to believe the GMC contained criminal contraband, a warrant would not have issued at any point during the surveillance. Accordingly, this is not a case where police "sat" on probable cause and could have obtained a warrant before stopping the car. Probable cause did not arise until the K-9 unit responded to the scene and the dog positively alerted for the presence of narcotics in the car.

However, 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." 223 N.J. at 450. We have upheld the validity of the warrantless search of an automobile under Witt where police smelled marijuana emanating from the defendant's vehicle after stopping the car for a traffic violation.[3] Rodriguez, 459 N.J. Super. at 25. Based on our review of the record in Rodriguez, we concluded "the police at the roadside had ample probable cause to believe the [vehicle] contained additional quantities of marijuana and potentially other evidence of illegal activity." Ibid. Unlike the present matter, however, police did not summon a K-9 unit to the scene in Rodriguez.

We are not convinced Witt's holding is limited to probable cause that arises after a roadside stop based on a motor vehicle violation, as the motion judge seemingly suggested here. The circumstances giving rise to probable cause may be unforeseeable and spontaneous following an investigatory stop – even if police expect to find contraband in the vehicle. We discern no constitutionally significant distinction between law enforcement's observations

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[3] Rodriguez was decided prior to the February 22, 2021 enactment of The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, N.J.S.A. 24:6I-31 to -56. Under the Act, an "odor of cannabis or burnt cannabis" cannot create a "reasonable articulable suspicion of a crime" under most circumstances. N.J.S.A. 2C:35-10c(a).

of criminal activity after a car is stopped for a motor vehicle violation and those same observations following an investigatory stop.

For example, had police observed drugs in plain view upon effecting the investigatory stop in this case, the automobile exception readopted by the Court in Witt likely would have been satisfied. See, e.g., State v. Gonzales, 227 N.J. 77, 102-03 (2016). Similar to the officer's plain sniff observations after stopping the vehicle we upheld in Rodriguez, 459 N.J. Super. at 25, probable cause would have "aris[en] from unforeseeable and spontaneous circumstances," Witt, 223 N.J. at 450. Here, police conducted the investigatory stop after surveilling the GMC for fewer than two hours, following observations the motion judge credited as establishing articulable suspicion to stop the car. We disagree with the judge that law enforcement's suspicions of drug activity before the stop made the automobile exception unavailing. But the validity of the warrantless roadside search of the GMC does not end with the Court's holding in Witt.

In our view, the issue is whether the canine's alert to the presence of narcotics under the circumstances presented here changed the equation. For guidance, we turn to the Court's subsequent decisions in Dunbar and State v. Nelson, 237 N.J. 540 (2019), as informed by the United States Supreme Court's decision in Rodriguez v. United States, 575 U.S. 348 (2015).

According to the federal high court: "Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission." Rodriguez, 575 U.S. at 356. Absent reasonable and articulable suspicion, the unreasonable extension of a motor vehicle stop to conduct a canine sniff constitutes an unreasonable seizure. Id. at 355. Our Supreme Court adopted this federal standard in Dunbar, 229 N.J. at 533-34.

The Court in Dunbar held an officer "does not need reasonable suspicion independent from the justification for a traffic stop in order to conduct a canine sniff[,]" provided the officer does "not conduct a canine sniff in a manner that prolongs a traffic stop beyond the time required to complete the stop's mission, unless he [or she] possesses reasonable and articulable suspicion to do so." Id. at 540 (citing Rodriguez, 575 U.S. at 357). Beyond issuing a ticket, an officer's traffic mission may include checking the driver's license, inspecting the vehicle's registration and proof of insurance, and ascertaining if there are warrants for the driver's arrest. See Rodriguez, 575 U.S. at 355; Dunbar, 229 N.J. at 533. Police may only continue the roadside detention to summon a K-9 unit if reasonable and articulable suspicion arises independently from the reason for conducting the motor vehicle stop, in the course of completing the mission of the stop. Dunbar, 229 N.J. at 539. Thus,

"in the absence of such suspicion, an officer may not add time to the stop." Id. at 540. "'In determining whether reasonable suspicion exists, a court must consider the totality of the circumstances – the whole picture.'" Nelson, 237 N.J. at 554 (quoting State v. Stovall, 170 N.J. 346, 361 (2002)).

Acting on information provided by the Bureau of Alcohol, Tobacco, and Firearms (ATF), the police in Nelson followed the car and pulled it over for violating certain traffic laws. Id. at 546-47. Upon stopping the defendant's car, the detective "was immediately overwhelmed by the smell of air fresheners emanating from the vehicle." Id. at 547. Thirty-seven minutes after the defendant refused consent to search, a K-9 unit arrived at the roadside scene and the dog alerted to the presence of narcotics in the vehicle. Id. at 546.

The Court concluded the thirty-seven-minute delay between the defendant's denial of consent to search the car and the K-9 unit's arrival "exceeded the time needed to accomplish the tasks." Id. at 554 (internal quotation marks omitted). But the Court held police had reasonable suspicion to justify the delay in completing the dog sniff based on the totality of several factors leading to and during the motor vehicle stop. Id. at 554-55. Those factors included: an anonymous tip from the ATF, disclosing a man fitting the defendant's description would be transporting controlled dangerous substances

on the New Jersey Turnpike; the defendant's "nervous behavior"; the defendant's "conflicting accounts of his trip itinerary"; "large bags in the cargo hold"; the defendant's "admission of prior narcotics arrests"; and "the overwhelming smell of air freshener." Id. at 548.

In the present matter, reasonable articulable suspicion of criminal activity arose prior to the stop. Namely, police suspected defendant of engaging in drug activity based on confidential sources and their observations during their continuous, same-day surveillance. Police also knew defendant had a criminal history, including drug arrests and convictions for weapons offenses. Unlike the circumstances in Nelson, however, the officers' suspicions were not confirmed by their observations after the stop was conducted. Nonetheless, the mission of the stop – an investigation into illegal drug activity – remained ongoing until the K-9 unit arrived. In particular, because the stop was not based on a motor vehicle infraction, the stop's mission did not cease after police conducted "ordinary inquiries incident to [the traffic] stop." Rodriguez, 575 U.S. at 355 (alteration in original) (quoting Illinois v. Caballes, 543 U.S. 405, 408 (2005)). Instead, the totality of the factors that gave rise to reasonable articulable suspicion of drug activity to stop the car, justified prolonging the stop until the K-9 unit arrived because the dog sniff for suspected narcotics was "reasonably related in scope" to the basis

for the stop. See Terry v. Ohio, 392 U.S. 1, 19-20 (1968) (recognizing the validity of a search and seizure turns on "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place").

However, we are 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 unit 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 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 their failure to do so rendered the ensuing search fatally defective.

Affirmed.

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002334-21T2
MOTION NO. M-005986-21
BEFORE PART E
JUDGE(S): CARMEN MESSANO
ALLISON E. ACCURSO
LISA ROSE

STATE OF NEW JERSEY
V
KYLE A. SMART

MOTION FILED: 07/01/2022 BY: STATE OF NEW JERSEY

ANSWER(S) FILED: 07/08/2022 BY: KYLE A. SMART

SUBMITTED TO COURT: July 11, 2022

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 18th day of July, 2022, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION FOR STAY of Appellate Division June 30, 2022 Published Opinion — DENIED

FOR THE COURT:

LISA ROSE, J.A.D.

21-10-01417-I OCEAN
ORDER - REGULAR MOTION
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