Supreme Court of New Jersey

DOCKET NO. 084493

STATE OF NEW JERSEY, Plaintiff-Respondent,	:	Criminal Action On Certification to the Superior Court of New Jersey, Appellate Division.
v.	:	Sat Below: Hon. Ellen Koblitz, J.A.D. Hon. Greta Gooden Brown, J.A.D.
CORNELIUS C. COHEN, Defendant-Petitioner.	:	

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF THE STATE

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

SARAH C. HUNT
ATTORNEY ID NO. 159252015
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
P.O. BOX 086
TRENTON, NEW JERSEY 08625
(609) 376-2400
hunts@njdcj.org

OF COUNSEL AND ON THE BRIEF

September 6, 2022

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

COUNTERSTATEMENT OF PROCEDURAL HISTORY 4

COUNTERSTATEMENT OF FACTS 7

LEGAL ARGUMENT 19

POINT I

OFFICERS HAD PROBABLE CAUSE TO SEARCH THE TRUNK AND ENGINE COMPARTMENT FOR THE SOURCE OF THE MARIJUANA ODOR AFTER RULING OUT ALL OTHER POSSIBLE SOURCES OF THE ODOR. 19

POINT II

AS DEFENDANT'S CAR WAS SEARCHED OVER FIVE YEARS BEFORE L. 2021, c. 16 AND L. 2021, c. 19 TOOK EFFECT, THOSE LAWS DO NOT VITIATE THE PROBABLE CAUSE SUPPORTING THE SEARCH. 34

CONCLUSION 42

TABLE OF APPENDIX

Order and Decision denying defendant's motion to suppress, June 19, 2018[1] Sa1

Letter requesting parties to file supplemental briefs on defendant's petition, February 25, 2022 ..... Sa13

Order granting defendant's petition for certification, May 17, 2022 ..... Sa14

[1] The State appends the order and decision denying defendant's motion to suppress because the version included in defendant's Appellate Division appendix is missing page two of the decision.

TABLE OF AUTHORITIES

Cases

Byars v. United States, 273 U.S. 28 (1927) 30

Illinois v. Gates, 462 U.S. 213 (1983) 21

In re Registrant J.D-F., 248 N.J. 11 (2021) 36

James v. N.J. Mfrs. Ins. Co., 216 N.J. 552 (2014) 37

Johnson v. Roselle EZ Quick LLC, 226 N.J. 370 (2016) 39

Maryland v. Pringle, 540 U.S. 366 (2003) 22

Massachusetts v. Painten, 389 U.S. 560 (1968) 32

State ex rel. D.M., 238 N.J. 2 (2019) 37

State v. Arthur, 149 N.J. 1 (1997) 22

State v. Bacome, 228 N.J. 94 (2017) 27,28,31

State v. Basil, 202 N.J. 570 (2010) 21

State v. Bey, 112 N.J. 45 (1988) 40

State v. Birkenmeier, 185 N.J. 552 (2006) 22

State v. Bruzzese, 94 N.J. 210 (1983), cert. denied, 465 U.S. 1030 (1984) 30,31

State v. Cohen, No. A-2354-18T2 (App. Div. Apr. 20, 2020) 5

State v. Dangcil, 248 N.J. 114 (2021) 29

State v. Doyle, 42 N.J. 334 (1964) 30

State v. Elders, 192 N.J. 224 (2007) 20

State v. Esteves, 93 N.J. 498 (1983) 23,25

State v. Evans, 235 N.J. 125 (2018) 20

State v. Gamble, 218 N.J. 412 (2014) 20

State v. Gathers, 234 N.J. 208 (2018) 20

State v. Gonzales, 227 N.J. 77 (2016) 19,28

State v. Guerra, 93 N.J. 146 (1983) .....passim

State v. Hagans, 233 N.J. 30 (2018) 20,21

State v. Hammer, 346 N.J. Super. 359 (App. Div. 2001) 23

State v. Handy, 206 N.J. 39 (2011) 30

State v. J.V., 242 N.J. 432 (2020) 37

State v. Johnson, 171 N.J. 192 (2002) 21,22

State v. Judge, 275 N.J. Super. 194 (App. Div. 1994) 23,24

State v. Kahlon, 172 N.J. Super. 331 (App. Div. 1980), cert. denied, 454 U.S. 818 (1981) 23,24,26

State v. Lane, 251 N.J. 84 (2022) 39

State v. Lopez-Carrera, 245 N.J. 596 (2021) 36

State v. Mandel, 455 N.J. Super. 109 (App. Div. 2018) 23

State v. Nishina, 175 N.J. 502 (2003) 21,22

State v. O'Driscoll, 215 N.J. 461 (2013) 29

State v. Patino, 83 N.J. 1 (1980) 23

State v. S.S., 229 N.J. 360 (2017) 20

State v. Sarto, 195 N.J. Super. 5655 (App. Div. 1984) 23,24,26

State v. Scriven, 226 N.J. 20 (2016) 20

State v. Shannon, 222 N.J. 576 (2015) 30

State v. Smith, 155 N.J. 83 (1998) 22,25

State v. Terry, 232 N.J. 218 (2018) 21

State v. Tillery, 238 N.J. 293 (2019) 20

State v. Vanderveer, 285 N.J. Super. 475 (App. Div. 1995) 23,30

State v. Vargas, 213 N.J. 301 (2013) 20

State v. Walker, 213 N.J. 281 (2013) 22,25

State v. Watts, 223 N.J. 503 (2015) 40

State v. Witt, 223 N.J. 409 (2015) 21,28,33

Street v. Universal Mar., 300 N.J. Super. 578 (App. Div. 1997) 40

Terry v. Ohio, 392 U.S. 1 (1968) 22

United States v. Goncalves, 642 F.3d 245 (1st Cir. 2011) 24

United States v. Kelly, 961 F.2d 524 (5th Cir. 1992) 24

United States v. Lumpkin, 159 F.3d 983 (6th Cir. 1998) 24

United States v. Marchena-Borjas, 209 F.3d 698 (8th Cir. 2000) 24

United States v. Ross, 456 U.S. 798 (1982) 23

Statutes

L. 2021, c. 16 .....passim

L. 2021, c. 19 5,34

N.J.S.A. 2C:35-2 35

N.J.S.A. 2C:35-5 35

N.J.S.A. 2C:35-5(b)(12)(b)(i) 35,39

N.J.S.A. 2C:35-10 35

N.J.S.A. 2C:35-10(a)(3)(b)(i) 35,39

N.J.S.A. 2C:35-10c.....passim

N.J.S.A. 2C:39-5(b) 4

N.J.S.A. 2C:39-5(c)(1) 4

N.J.S.A. 2C:39-3(f) 4

N.J.S.A. 24:6I-32(a) 34,35

N.J.S.A. 24:6I-33..... 34

PRELIMINARY STATEMENT

When State Troopers effected a roadside stop of defendant's vehicle in 2016 based on several motor-vehicle violations, they immediately detected the strong odor of raw marijuana emanating from the vehicle. Upon approaching the vehicle, troopers further observed marijuana leaves on defendant's beard and shirt and several air fresheners hanging from the rearview mirror, additional indicia of the presence of marijuana in the vehicle. The troopers proceeded to search the vehicle for the source of the strong odor of marijuana, which lingered after both passengers were removed from the car and remained throughout the search. Officers first searched the passenger compartment, but after searching every area in which marijuana could be found failed to uncover the source of the odor. Only when the initial search was unsuccessful did the police expand the search to the engine compartment, which one trooper knew was an area where marijuana could be hidden and from which the odor can travel to the interior through the air vents. Troopers instead uncovered two guns hidden in the engine compartment. Because the police still had not found the source of the odor, they extended the search to the trunk, the only logical compartment left where marijuana might be found. The police instead discovered ammunition, including multiple hollow-point rounds, in the trunk.

At every step along the way, the search of defendant's vehicle was

reasonable and supported by probable cause specific to the area being searched. There is no serious dispute that troopers had probable cause to initiate a search based on the strong odor of raw marijuana, visible marijuana leaves on defendant's person, and multiple air fresheners in the vehicle. Consistent with longstanding search-and-seizure principles, troopers extended the search to the engine and trunk compartments only after exhausting every area of the interior in which marijuana could be found. Because the strong odor of marijuana and additional indicia of the presence of marijuana in the vehicle were spontaneous and unforeseeable circumstances, the search was constitutional in its entirety pursuant to the automobile exception to the warrant requirement. That police had a parallel investigation going into defendant's suspected trafficking of firearms into New Jersey has no impact on the validity of the search of the vehicle, as there is ample record support for the trial court's express fact finding that it was the odor of marijuana—and not any separate information from that investigation—that was the circumstance giving rise to probable cause to search.

Finally, defendant's reliance on recent legislative changes to marijuana policy is beyond the scope of this Court's order granting certification, and in any event fails on its merits. The recent legislation unambiguously does not vitiate probable-cause findings underlying searches that predate the February

22, 2021 effective date. Under settled rules of statutory interpretation, the plain language and structure of the enactments demonstrate a legislative intent for these changes to have prospective-only effect. Nothing in the legislation so much as suggests that the Legislature intended to retroactively invalidate thousands of searches that were firmly based on well-established law at the time they were conducted. Simply, the decriminalization of cannabis does not retroactively invalidate a search that revealed evidence of other crimes, such as unlawful gun possession. Instead, under well-settled search-and-seizure rules in effect at the time of the search of defendant's vehicle, the search was wholly lawful pursuant to the automobile exception to the warrant requirement.

COUNTERSTATEMENT OF PROCEDURAL HISTORY[2]

On October 17, 2016, a State Grand Jury returned Indictment No. 16-10-162-S, charging defendant with second-degree unlawful possession of a weapon, a revolver, N.J.S.A. 2C:39-5(b) (count one); third-degree unlawful possession of a weapon, a rifle, N.J.S.A. 2C:39-5(c)(1) (count two); and fourth-degree possession of a prohibited device, hollow-point bullets, N.J.S.A. 2C:39-3(f) (count three). (Da43 to 45).

On December 20, 2017, and March 1 and June 15, 2018, the Honorable Benjamin S. Bucca Jr., J.S.C., heard testimony and arguments on defendant's motion to suppress evidence. (1T; 3T; 4T). On June 19, 2018, the judge issued an order and written decision denying defendant's motion. (Sa1 to 12).

---

[2] "Sa" refers to the State's appendix.
"Dsb" refers to defendant's supplemental brief, dated July 5, 2022.
"Dpb" refers to defendant's petition for certification.
"Dpa" refers to the appendix to defendant's petition.
"Pa" refers to the State's Appellate Division appendix.
"Da" refers to defendant's Appellate Division appendix.
"1T" refers to transcript of motion, December 20, 2017.
"2T" refers to transcript of motion, April 19, 2018.
"3T" refers to transcript of motion, June 15, 2018.
"4T" refers to transcript of motion, March 1, 2018.

Defendant's motion to suppress was heard and decided together with his motions to reveal the identity of a confidential informant and to suppress his statement to police. Defendant did not provide transcripts of the plea or sentencing.

On July 6, 2018, defendant pleaded guilty to second-degree unlawful possession of a weapon, as charged in count one. (Da58; Pa1 to 5).

On December 21, 2018, defendant was sentenced in accordance with his negotiated plea agreement to a five-year term of imprisonment, subject to a forty-two-month period of parole ineligibility. (Da58; Pa3).

Defendant appealed, (Da35 to 37; Pa6 to 8), and on April 20, 2020, the Appellate Division issued an opinion affirming the denial of defendant's motion to suppress and his conviction. State v. Cohen, No. A-2354-18T2 (App. Div. Apr. 20, 2020) (Dpa4, 7 to 23).

Defendant filed a Notice of Petition in this Court on May 8, 2020, followed by a Petition for Certification on May 20, 2020. (Dpa1 to 3).

On February 25, 2022, this Court requested the parties file briefs "addressing the impact, if any, of the enactment of L. 2021, c. 16 and/or L. 2021, c. 19, on this matter." (Sa13). Defendant and the State filed responsive briefs on March 18 and April 7, 2022, respectively.

On May 17, 2022, this Court granted defendant's petition, "limited to the issue of whether officers were authorized to search defendant's trunk and engine compartment, based on the odor of marijuana in the vehicle." (Sa14).

On August 2, 2022, defendant filed a motion to supplement the record with the transcript of an additional hearing day on his motion to suppress,

March 1, 2018 (4T). Given the importance of a complete record, the State did not oppose the motion, which remains pending before this Court.

COUNTERSTATEMENT OF FACTS

The following facts are adduced from the hearing on defendant's motion to suppress physical evidence, including the documents considered by the motion judge.

In January 2016, Detective Joseph Czech of the New Jersey State Police (NJSP) Trafficking North Unit received information from a confidential informant (C.I.) who had provided reliable information to the NJSP and Toms River Police Department in the past. (1T7-5 to 9-16). The C.I. told Czech that twice a month defendant traveled to North Carolina to "pick[] up firearms," which he would then sell in New Jersey. (1T5-14 to 18; 1T7-5 to 15; 1T8-16 to 9-16; 1T48-7 to 9). The C.I. identified for Czech two vehicles defendant used for this purpose — a gray Infiniti and a black Honda Civic, with specific license plate numbers. (1T9-20 to 10-1). When Czech looked up the vehicles' registration information, he learned that the Infiniti was registered to defendant and the Honda was registered to Nazsa Baker, with whom defendant had a dating relationship. (1T11-4 to 11; 1T35-8 to 10). The C.I. also told Czech that defendant had made several such trips to North Carolina in November 2015 — information the NJSP was able to corroborate by checking law enforcement databases — and that he would be making another trip in the near

future. (1T10-14 to 11-3; 1T45-5 to 8; Da3).[3]

Detective Czech later learned from the C.I. that defendant would be leaving New Jersey for North Carolina on January 15 to purchase weapons and returning to New Jersey January 17, 2016. (1T11-12 to 14-6; 1T56-24 to 57-7). With this information, Czech entered the vehicles' information into various databases that would alert him if the plates were run by law enforcement or picked up on an automatic license-plate reader. (1T14-12 to 25). Czech's supervisor, Detective Sergeant John Cipot, sent a "Be on the Lookout" (BOLO) email to the various NJSP stations advising them of the nature and timing of defendant and Baker's planned trip and of the vehicles they might be using, and requesting that any officer who encountered them notify Detective Czech or other members of his unit. (1T16-1 to 19-12).

Shortly before 10:00 p.m. on January 17, 2016, Trooper Charles Travis IV — then an eight-year veteran of the NJSP — was patrolling the New Jersey Turnpike northbound when he encountered the black Honda Civic near milepost ninety. (1T84-23 to 86-25; 1T95-16 to 96-23; 4T5-5 to 7-22; 4T34-

---

[3] Though the NJSP Investigation Report and Supplemental Investigation Report, (Da1 to 6; Da10 to 15), were not admitted into evidence at the suppression hearing, they were appended to defendant's Law Division brief and considered by the motion judge in his written decision, and were thus properly part of record before the Appellate Division and this Court.

12 to 23; Da16). Recognizing the Honda's license plate from the BOLO on which he was briefed by his supervisors, Travis began following it and saw it fail to maintain its lane, swerving left and right, before exiting at Exit 11. (1T86-16 to 87-25; 1T91-21 to 97-1; 4T5-5 to 9-3; 4T14-1 to 18-22; 4T28-8 to 19; Da11 to 12). As the vehicle drove through the toll to enter the Garden State Parkway, the E-ZPass reader indicated the toll was unpaid. (1T86-24 to 87-3; 1T98-1 to 13; 4T28-20 to 25; Da12). Travis continued to follow the Honda onto the Parkway northbound, and saw the vehicle swerve over the lines, which he knew to be an indication the driver may be falling asleep or intoxicated. (1T87-3 to 8; 1T99-14 to 18; 4T29-16 to 19).

While looking for a safe place to pull over the vehicle, Trooper Travis confirmed the Honda was the vehicle included in the BOLO and called Detective Czech to notify him that he was following the vehicle and would be pulling it over for the observed moving violations. (1T98-18 to 100-14; 4T47-15 to 47-21; Da12). Travis told Czech where he was and, near milepost 137, pulled over the Honda for the observed violations. (1T98-24 to 100-19). Shortly thereafter, Trooper Caitlin Brennan arrived to backup Travis. (1T111-4 to 9; 4T23-18 to 27-24; Da12). Because of the BOLO, Travis was particularly cognizant of the risk that there could be guns in the vehicle. (4T45-16 to 47-11; 4T50-16 to 19).

When Trooper Travis approached the Honda, he found defendant in the driver's seat and Baker in the front passenger seat. (1T109-20 to 110-5; 4T33-22 to 34-1). Right away, Travis smelled a "strong odor of raw marijuana" and saw "shake" — a term for "the tail-end of marijuana . . . the marijuana leaves and everything like that" — in defendant's beard and on his shirt. (1T108-21 to 109-12; 4T78-14 to 80-2). Travis also saw multiple air fresheners hanging from the rearview mirror — a practice he knew is often used to mask the smell of marijuana. (1T108-14 to 17; 1T109-2 to 10; 4T67-7 to 18). Travis asked defendant for his driving credentials and noted that defendant was shaking, failing to maintain eye contact, and appeared to be nervous; Travis ultimately had to request defendant's credentials several times. (1T109-16 to 17; 4T80-17 to 19; Da12). To confirm the leaves he saw on defendant's beard and shirt were not tobacco, Travis asked defendant and Baker whether they smoked cigarettes.[4] (1T110-10 to 22; 4T81-7 to 82-16). He also asked defendant where they were coming from, and defendant said they had been in Washington, D.C. visiting friends. (4T54-17 to 23; Da12).

Trooper Travis told Trooper Brennan that he smelled raw marijuana and that he would be removing defendant and Baker from the vehicle after

[4] The record does not reflect defendant's and Baker's answers.

updating dispatch. (1T111-4 to 9; 4T54-24 to 55-2; 4T82-18 to 84-19; Da12). After a brief trip to his patrol car to update dispatch, Travis returned to the Honda, asked defendant and Baker if they were medical-marijuana patients, which both denied, and told them that he smelled raw marijuana and would be searching the vehicle. (1T115-5 to 9; 1T119-20 to 120-3; 4T55-14 to 18; 4T83-22 to 85-18; Da12). Travis then removed defendant from the car, handcuffed him, advised him of his Miranda rights, and searched him before placing him in the patrol car. (1T115-12 to 119-2; 4T55-22 to 56-5; 4T62-11 to 15; Da12 to 13). Travis then removed Baker from the vehicle and placed her in handcuffs, and Brennan informed Baker of her rights and searched her before placing her in the other patrol car. (1T119-6 to 10; 4T62-19 to 63-1; Da13).

Additional backup arrived and Trooper Travis told them he was going to search the vehicle because he had smelled the odor of raw marijuana. (4T86-6 to 11). One of the other officers indicated that he too smelled marijuana, and the officers began to search the areas of the vehicle where marijuana could be found. (1T119-20 to 122-18; 4T88-14 to 90-18; Da13). They began with a thorough search of the passenger compartment "from one side to the other," moving and opening things as necessary to search "any place that marijuana can fit." (1T122-10 to 16). In the glove box, Travis found a 9mm spent shell

casing. (1T120-24 to 25; 4T69-15 to 18; Da13). Now that ammunition had been found, Travis told two of the troopers to re-search defendant and Baker to be certain they were not concealing any weapons on their persons while in police custody. (1T120-22 to 121-5). When asked, defendant said he had been at the firing range. (1T121-13 to 16).

After a search of the entire interior of the vehicle turned up no marijuana, Trooper Travis — knowing that marijuana can be hidden in the engine compartment and can get sucked into the air vents — opened the hood. (1T122-22 to 125-1). In the engine compartment, Travis found a black canvas bag and picked it up, suspecting there was marijuana inside, only to realize from the weight and feel that it contained a gun. (1T126-12 to 127-2; 4T70-1 to 16; Da13). A smaller silk gear bag was also found in the engine compartment. (1T127-6 to 19; Da13). When the bags were opened to make the guns safe for transport, they were found to contain a .45-caliber rifle and .38-caliber revolver. (1T127-20 to 128-14; Da13). When Travis told defendant he had found two guns in the car and asked if there were any others, defendant quietly responded that "she [Baker] had no idea the guns were in the car" and that there were no others. (1T128-18 to 23; 4T95-15 to 96-8; Da13).

After the guns were safely secured in his patrol car, Trooper Travis continued to look for the marijuana whose smell had prompted the search and

which had not been found in the engine compartment either. (1T129-2 to 8). In the trunk, he found a black duffle bag containing men's clothing and a small Velcro pouch that contained multiple rounds of ammunition of various calibers, including six .38-caliber hollow-point rounds. (1T130-1 to 9; Da13).

Though no marijuana was found in the vehicle, Travis explained at the suppression hearing that it is not uncommon for the odor of marijuana to be present without any marijuana itself being found. (4T56-21; 4T93-1 to 17). As he knew from his training and experience, this might occur for several reasons: the odor of raw marijuana can linger after the substance itself is removed, the marijuana may be hidden in a trap compartment that is not discovered, or it may be in the vehicle's air filter. (4T92-9 to 93-17). In the academy, Travis was specifically trained to recognize the odors of raw and burnt marijuana and to distinguish between the two. (4T97-15 to 98-4). And in his years of experience since then, he had been involved in "well over 50" cases in which he had smelled raw marijuana and raw marijuana was later found, including cases where "caches of marijuana" were found. (4T98-5 to 16).

When the search was complete, defendant and Baker were transported to the Cranberry NJSP barracks, the Honda was towed to the impound lot, and defendant was issued motor-vehicle summonses for failure to pay tolls and

unsafe lane change. (1T130-16 to 133-18; 4T37-1 to 39-14; Da8 to 9, 13). Defendant ultimately pleaded guilty to second-degree unlawful possession of a firearm for his possession of the revolver found in the engine compartment on January 17, 2016, as charged in count one of the October 17, 2016 indictment. (Da58; Pa1 to 5).

At the June 15, 2018 suppression hearing, Judge Bucca heard the parties' arguments on defendant's motion to suppress the evidence found in the Honda defendant was driving. (3T). Defendant questioned whether Trooper Travis in fact observed any motor-vehicle violations and, if he did, why he waited to pull the car over until after it passed through the tollbooth, arguing that the stop was preplanned based on the information contained in the BOLO and that Troopers Travis and Brennan lied about smelling raw marijuana to justify searching the car. (3T30-22 to 60-21). To this point, defendant also relied on Baker's E-ZPass records, arguing they showed that the toll was in fact paid. (3T32-5 to 39-5; Da15-17). The State argued that, even though Travis was aware of the BOLO, the stop was justified by the motor-vehicle violations he observed, independently and together, and that the trooper's observations upon approaching the car — specifically, the strong odor of raw marijuana, the shake observed on defendant's body, and multiple air fresheners hanging from the rearview mirror — were spontaneous and unforeseen circumstances

justifying the search of the car. (3T60-22 to 70-4).

On June 19, 2018, Judge Bucca issued an order and written decision denying defendant's motion to suppress. (Sa1 to 12). The judge first found Trooper Travis to be credible based on his viewing of the MVR from Travis's vehicle and observing Travis testify. (Sa6). Finding Travis's testimony about observing the motor-vehicle violations to be credible, the judge found the stop was justified by those violations. (Sa6).

The judge specifically addressed the dispute over Baker's E-ZPass records and dismissed defendant's attempt to challenge the credibility of Travis's testimony that the sign indicated the toll was unpaid, noting that the E-ZPass records showed that Baker's account had a negative balance on the day in question and that the toll was not recorded as paid until four days later — two days after a $50 payment was posted to Baker's account. (Sa6). The judge also rejected defendant's reliance on Trooper Brennan's testimony that she did not personally observe the violations Trooper Travis witnessed, noting that Brennan had no reason to focus on the vehicle Travis was following because she did not know who Travis was following or why, and was unable to see the car he was following from her position behind him. (Sa6 to 7).

The judge then considered whether the odor of raw marijuana in the car established probable cause for the search. (Sa7). After repeating that he found

Trooper Travis to be credible, the judge detailed the relevant portions of the MVR, including Travis's statements about smelling raw marijuana, the corroborative unsolicited statement of another officer — whom Travis had never met before — that he too clearly smelled raw marijuana, Travis's quiet statements to himself while searching the car that he did not understand why he was not finding any marijuana and that perhaps there had been some in the car earlier, and Travis's again asking defendant about whether there was marijuana in the vehicle. (Sa7). Based on the MVR and the credible testimony of Trooper Travis, as corroborated by the unsolicited statement of the unknown officer, the judge found that Travis smelled raw marijuana and that the search of the car was therefore supported by probable cause. (Sa7). The judge also found that, though Travis knew of the ongoing investigation involving defendant, the stop and subsequent search of the car were justified independent of this knowledge. (Sa7). The judge noted that Travis's motive for beginning to follow the vehicle was inconsequential because the stop was justified by the observed motor-vehicle violations and the search was justified by the spontaneous and unforeseen smell of raw marijuana upon approaching the car. (Sa7 to 8).

The judge further held that probable cause existed for the search of the entire car based on the C.I's tip, as corroborated by the information defendant

provided about his travels and the shell casing discovered in the glove compartment during the search for the source of the raw-marijuana odor. (Sa7 to 8). Finding the stop and search of the car to be lawful, the judge denied defendant's motion to suppress the guns and ammunition found in the car. (Sa8).

The Appellate Division affirmed the denial of defendant's motion and his conviction, concluding that the search of defendant's vehicle was lawful under the automobile exception based on the odor of raw marijuana emanating from the vehicle's interior. (Dpa4, 7 to 23). Finding the motion judge's factual findings to be "amply supported by the record," the panel afforded the appropriate weight to his findings that, upon approaching the car, Trooper Travis smelled the strong odor of raw marijuana and saw shake on defendant's body and multiple air fresheners in the car. (Dpa19 to 20). The panel concluded that these "unforeseeable and unanticipated circumstances" during the course of a lawful motor-vehicle stop gave rise to probable cause to search the vehicle. (Dpa 20).

The panel rejected defendant's claim that expanding the search to the engine compartment and trunk was unlawful, reasoning that the officers' inability to locate the source of the odor in the passenger compartment — coupled with Travis's explanation that the odor of marijuana can travel from

the engine compartment to the passenger compartment through the air vents — justified searching the trunk and engine compartment. (Dpa20 to 22). The panel concluded that the search was lawfully initiated and its scope was limited to those areas where the police had probable cause to believe marijuana may be found, and found unpersuasive the "irrelevant" fact that the police also suspected defendant of trafficking weapons and that no marijuana was ultimately recovered. (Dpa19 to 23).

LEGAL ARGUMENT

POINT I

OFFICERS HAD PROBABLE CAUSE TO SEARCH THE TRUNK AND ENGINE COMPARTMENT FOR THE SOURCE OF THE MARIJUANA ODOR AFTER RULING OUT ALL OTHER POSSIBLE SOURCES OF THE ODOR.

The search of defendant's vehicle was constitutionally permissible in its entirety under the automobile exception to the warrant requirement. Having lawfully stopped the car based on several moving violations, Trooper Travis developed probable cause to search the vehicle based on the spontaneous detection of the strong smell of marijuana emanating from its interior. Travis extended the search to the engine and later the trunk only after a complete search of every area in the interior in which marijuana could be found failed to identify the source of the smell. The scope of the search was supported by probable cause at every step, and the circumstances giving rise to this probable cause were spontaneous and unforeseeable and arose independent of the ongoing firearms-trafficking investigation of defendant.

"Appellate review of a motion judge's factual findings in a suppression hearing is highly deferential." State v. Gonzales, 227 N.J. 77, 101 (2016). Since the motion judge "had the opportunity to hear and see the sole witness at the suppression hearing and to evaluate the credibility of his testimony," State

v. Scriven, 226 N.J. 20, 32 (2016), the factual findings underpinning the judge's decision must be upheld "so long as those findings are supported by sufficient credible evidence in the record." State v. Gamble, 218 N.J. 412, 424 (2014). Such "findings should not be overturned merely because an appellate court disagrees with the inferences drawn and the evidence accepted by the [judge] or because it would have reached a different conclusion." State v. S.S., 229 N.J. 360, 374 (2017). Rather, "[t]he motion [judge]'s findings should be overturned 'only if they are so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Evans, 235 N.J. 125, 133 (2018) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). This deferential standard applies "even when the [judge]'s findings are premised on a recording or documentary evidence." State v. Tillery, 238 N.J. 293, 314 (2019); see also S.S., 229 N.J. at 381; State v. Hagans, 233 N.J. 30, 38 (2018). Legal conclusions are reviewed de novo. State v. Vargas, 213 N.J. 301, 327 (2013).

Applying that standard, this Court's review is guided by settled principles of constitutional law. The Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution "protect citizens against unreasonable searches and seizures." State v. Gathers, 234 N.J. 208, 219 (2018). The State must prove "by a preponderance of the

evidence not only that the [warrantless] search . . . was premised on probable cause, but also that it f[ell] within one of the few well-delineated exceptions to the warrant requirement." Hagans, 233 N.J. at 38-39 (alterations in original) (internal quotation marks omitted).

"One of the well-established exceptions to the warrant requirement is the automobile exception." State v. Terry, 232 N.J. 218, 231 (2018). Under this exception, the warrantless search of a vehicle is constitutionally permissible where (1) "the police have probable cause to believe that the vehicle contains contraband or evidence of an offense" and (2) "the circumstances giving rise to probable cause are unforeseeable and spontaneous." State v. Witt, 223 N.J. 409, 447 (2015).

Probable cause requires only a "well-grounded suspicion," which is "nothing more than a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Nishina, 175 N.J. 502, 515 (2003) (citing State v. Johnson, 171 N.J. 192, 214 (2002)). The concept of probable cause "address[es] 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." State v. Basil, 202 N.J. 570, 585 (2010) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)). Thus, probable cause is determined based on the

totality of circumstances, viewed "from the standpoint of an objectively reasonable police officer." Ibid. (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003)). And in making a probable-cause determination, "courts should 'ascribe sufficient weight to the officer's knowledge and experience and to the rational inferences that could be drawn from the facts objectively and reasonably viewed in light of the officer's expertise.'" State v. Smith, 155 N.J. 83, 99 (1998) (quoting State v. Arthur, 149 N.J. 1, 10 (1997)). After all, "[c]ertain suspicious behavior may lead an experienced police officer to suspect that a person is engaged in criminal activity" and "experience may enable the officer to draw inferences that an untrained, inexperienced person could not." Ibid.; see also Johnson, 171 N.J. at 215 (in assessing probable cause, courts must consider "the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience." (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968))).

At the time of the search of defendant's vehicle in 2016, decades of precedent in New Jersey "recognized that the smell of marijuana itself constitutes probable cause 'that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Walker, 213 N.J. 281, 290 (2013) (quoting Nishina, 175 N.J. at 516-17); accord, e.g., State v. Birkenmeier, 185 N.J. 552, 563 (2006); State v. Guerra, 93 N.J. 146, 148-50

(1983); State v. Mandel, 455 N.J. Super. 109, 115 (App. Div. 2018); State v. Vanderveer, 285 N.J. Super. 475, 479 (App. Div. 1995); State v. Judge, 275 N.J. Super. 194, 201-02 (App. Div. 1994); State v. Sarto, 195 N.J. Super. 565, 574-75 (App. Div. 1984); State v. Kahlon, 172 N.J. Super. 331, 335-38 (App. Div. 1980), cert. denied, 454 U.S. 818 (1981).

To be sure, for a search to be lawful under the automobile exception, "[a] police officer must not only have probable cause to believe that the vehicle is carrying contraband[,] the search must [also] be reasonable in scope." State v. Patino, 83 N.J. 1, 10 (1980). The permissible scope of a search under the automobile exception "is defined by the object of the search and the places where there is probable cause to believe that it may be found." State v. Esteves, 93 N.J. 498, 508 (1983). Thus, "once probable cause exists to search the interior of a motor vehicle, the police may search every part of the vehicle, including containers in which there is probable cause to believe that the object of the search may be found." State v. Hammer, 346 N.J. Super. 359, 367 (App. Div. 2001); see also United States v. Ross, 456 U.S. 798, 824 (1982); Esteves, 93 N.J. at 508; Patino, 83 N.J. at 10; Guerra, 93 N.J. at 151.

That of course means a search may extend to the vehicle's trunk provided that, as with any other part of the vehicle, there is probable cause to believe the contraband sought may be found there. See, e.g., Guerra, 93 N.J. at

148-50; Judge, 275 N.J. Super. at 201-02; Sarto, 195 N.J. Super. at 574-75; Kahlon, 172 N.J. Super. at 335-38. In Guerra, after effecting a roadside stop based on an inoperable taillight, the trooper detected the strong odor of marijuana emanating from the car's interior. 93 N.J. at 149. After determining a small suitcase in the passenger compartment "could not have been the source of the odor," the trooper expanded the search to the trunk where he discovered plastic bags containing marijuana. Id. at 149-50. In holding that the search came within the scope of the automobile exception, this Court reasoned that once the trooper ruled out the suitcase in the interior as the source of the odor, he "had probable cause to search the trunk for evidence of contraband." Id. at 150. Nor is the rule any different for a search that includes the vehicle's engine compartment. See, e.g., United States v. Goncalves, 642 F.3d 245, 249-50 (1st Cir. 2011); United States v. Marchena-Borjas, 209 F.3d 698, 700 (8th Cir. 2000); United States v. Lumpkin, 159 F.3d 983, 987 (6th Cir. 1998); United States v. Kelly, 961 F.2d 524, 527-28 (5th Cir. 1992).

Under these settled legal principles, the search of defendant's vehicle was justified in its entirety under the automobile exception. At the outset, there can be no serious dispute that the strong odor of raw marijuana, visible shake on defendant's beard and shirt, and multiple air fresheners hanging from the rearview mirror gave rise to probable cause for Trooper Travis to believe

there was marijuana inside the car. See, e.g., Walker, 213 N.J. at 290. As such, the police had a lawful basis to search all areas of the car where there was "probable cause to believe that [marijuana] may be found." Esteves, 93 N.J. at 508. Officers thus appropriately began the search by methodically searching every area of the passenger compartment where marijuana could be found. Supra at 11-13.

In light of the totality of the circumstances, when no marijuana was found anywhere in the passenger compartment, officers had probable cause to expand the search to other areas where marijuana could be found. First, the motion judge credited Trooper Travis's testimony, specifically his explanation that the smell of marijuana can travel from the engine compartment through the air vents into the vehicle's interior. See Smith, 155 N.J. at 99 (courts owe weight to reasonable inferences an officer is entitled to draw from the facts viewed in light of the officer's expertise). Travis thus had probable cause specifically to believe there may be marijuana in the engine compartment, which officers reasonably searched next. And when a search of the engine turned up guns but not the source of the strong odor of marijuana, the only logical section of the vehicle left to search for that source was the trunk. That the officers had ruled out every other area of the vehicle where marijuana could be found gave rise to probable cause to search the trunk. See, e.g.,

Guerra, 93 N.J. at 148-50 (finding probable cause to search trunk where strong odor of marijuana could not have come from small suitcase in passenger compartment); Sarto, 195 N.J. Super. at 574-75 (finding probable cause to search trunk where strong odor of marijuana could not have come from the small bag found in passenger compartment); Kahlon, 172 N.J. Super. at 335-38 (same, where officer was unable to locate marijuana in the area from which the odor appeared to emanate and it was reasonable under the circumstances to conclude the odor came from the trunk).

At every step, the officers ruled out the most logical areas of a car to search for marijuana before expanding the search to the other compartments. It was only when no marijuana was found in the passenger compartment and the strong odor remained that the officers expanded their search to the other areas in which there was reason to believe marijuana may be found. Under the totality of the circumstances, including the rational inferences Trooper Travis drew from the facts based on his training and experience, probable cause existed to believe marijuana was in one of those other areas. See, e.g., Guerra, 93 N.J. at 150-51; Kahlon, 172 N.J. Super. at 338.

Further, the circumstances that gave rise to the probable cause supporting the search were spontaneous and unforeseeable. Defendant's theory that the police sat on probable cause arising from their firearms-

trafficking investigation is unsupported by the record or precedent. (Dpb4 to 10). Whether the police had probable cause to believe defendant was trafficking firearms at the time of the stop and roadside search is immaterial to the inquiry here, as the circumstances of that investigation were wholly unrelated to those that gave rise to the probable cause to search. Indeed, that the object of the search was the source of the strong raw-marijuana odor and not evidence of firearms trafficking is shown by the fact that, even after finding two guns in the engine compartment, the officers continued to look for the source of the marijuana odor and expanded the search to the trunk. In short, the motion judge's finding that the initial stop and subsequent search were "independent" of Travis's awareness of the BOLO is amply supported by the record.

And as a matter of law, that probable cause for separate offenses may have existed cannot preclude officers from independently developing probable cause based on newly discovered facts, as occurred here. Because the initial stop was justified by the motor-vehicle violations observed by Trooper Travis, his awareness of the BOLO was irrelevant, even if that was initially his subjective reason for following the car. See State v. Bacome, 228 N.J. 94, 103 (2017) (where stop was justified by driver not wearing seatbelt, officers' original decision to follow car based on suspicion of drug activity was

irrelevant). And because the search was based on the spontaneous and unforeseeable circumstance of Travis smelling the strong odor of raw marijuana upon approaching the vehicle, the fact of the parallel investigation into defendant's suspected weapons trafficking is legally irrelevant. See ibid.; Witt, 223 N.J. at 450 (setting forth automobile-exception standard). After all, the "[t]he objective reasonableness of police officers' actions—not their subjective intentions—is the central focus of federal and New Jersey search-and-seizure jurisprudence." Bacome, 228 N.J. at 103.

Even if the officers conducting the firearms-trafficking investigation had information giving rise to probable cause to believe defendant had weapons in the vehicle, Trooper Travis's initial stop and subsequent search were not based on that information. And the fact that the police may have had probable cause from that separate investigation does not preclude them from exercising their seasoned judgment to decide against acting on it immediately and risk potentially compromising their ongoing investigation. Nor would such a decision mean that they were precluded from developing independent and unrelated probable cause to search defendant's vehicle during a motor-vehicle stop. Cf. Gonzales, 227 N.J. 77, 102-03 (2016) (finding no error in police's decision to rely on plain-view observation during routine vehicle stop to obtain evidence rather than act on probable cause from long-term investigation).

Finally, nothing in amici's briefs casts doubt on the validity of the search of defendant's vehicle. In particular, the sweeping bright-line rules proposed by the Association of Criminal Defense Lawyers of New Jersey (ACDL) effectively ask this Court to overrule decades of its own precedent and would produce untenable consequences for criminal defendants and police officers alike.[5] Their first proposed rule – that when the odor of marijuana supplies probable cause to search a vehicle but no marijuana is ultimately found, "any other evidence obtained during the search should be suppressed," ACDLb3 – has no basis in the facts of this case and is foreclosed by precedent. As an initial matter, the ACDL's suggestion that the officers here feigned the odor of marijuana to justify searching the vehicle (ACDLb3, 13-16), is refuted by the motion judge's well-supported factual and credibility findings. To be sure, the officers did not find any marijuana in the vehicle. But throughout the search, Trooper Travis continued to be guided by his search for the source of the marijuana odor. He expressed confusion at his inability to find it, and

[5] Initially, the ACDL's bright-line arguments go beyond the scope of the issues raised by the parties and thus should not be considered by the Court. See State v. Dangcil, 248 N.J. 114, 132 n.3 (2021) ("[A]s a general rule, an amicus curiae must accept the case before the court as presented by the parties and cannot raise issues not raised by the parties." (alteration in original) (quoting State v. O'Driscoll, 215 N.J. 461, 479-80 (2013)). In any event, its arguments fail on their merits for the reasons set forth below.

continued his search for it even after recovering guns in the engine compartment. The ACDL's speculation that the officer must have been lying in his report and in his sworn testimony cannot overcome the motion judge's findings which are amply supported by the record.

Moreover, the ACDL's premise that the search's outcome should dictate its legality is contrary to decades of precedent. The validity of a search has long been judged based on "the facts known to the law enforcement officer at the time of the search." State v. Shannon, 222 N.J. 576, 602 (2015) (quoting State v. Handy, 206 N.J. 39, 47 (2011)); see also Byars v. United States, 273 U.S. 28, 29 (1927); State v. Bruzzese, 94 N.J. 210, 221 (1983), cert. denied, 465 U.S. 1030 (1984); State v. Doyle, 42 N.J. 334, 342 (1964). That makes sense: just as a search unsupported by probable cause cannot be justified post-hoc if evidence of criminality is found, it is not rendered unconstitutional after the fact because the anticipated evidence was not found. See Bruzzese, 94 N.J. at 221 ("It is beyond dispute . . . that '[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light.' Nor will information discovered . . . after the search excuse the ignorance of the searching officers." (quoting Byars, 273 U.S. at 29 (second alteration in original))); Vanderveer, 285 N.J. Super. at 479 ("The fact that cocaine turned up instead of marijuana does not invalidate the search."). The ACDL's rule

would do away with one of the foundations of search-and-seizure law.

Equally inconsistent with binding precedent is the ACDL's proposed rule that an officer's awareness of a pre-existing investigation would preclude them from conducting a search under the automobile exception. Such a rule cannot be squared with decades of precedent holding that it is "[t]he objective reasonableness of police officers' actions—not their subjective intentions—[that] is the central focus of federal and New Jersey search-and-seizure jurisprudence." Bacome, 228 N.J. at 103; accord Bruzzese, 94 N.J. at 219 ("[T]he proper inquiry for determining the constitutionality of a search-and-seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent."). And the ACDL's rule has been rejected for good reason, as this Court has recognized that "there is no useful or practical reason to adopt the subjective test." Bruzzese, 94 N.J. at 222. Under the ACDL's rule, "practically every search-and-seizure case would require the court to engage in a costly and time-consuming expedition into the state of mind of the searching officer" with "little reliable evidence" of the officer's true motive. Id. at 221. And "[e]ven where motives are evident, the analysis may still pose problems. . . . , [as] humans usually have several motives" and "[a] judge cannot and should not be required to weigh the motives to determine which one guided the

officer's behavior." Ibid. Put simply, "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." Id. at 222 (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J. dissenting)).

Nor is the ACDL's subjective test a workable rule. "A further weakness of the subjective approach is that it is neither reliable nor predictable." Ibid. Appellate courts would not only "be tempted to second-guess the [trial court's] assessment of the searching policeman's 'true' intentions," but "the precedential significance of every search challenged on 'bad faith' grounds would be ambiguous." Ibid. "[L]itigated cases would serve less as guidelines for proper police conduct than as proscriptions on certain police thoughts" and, in the end, "the law would become as unfathomable as the policeman's motives themselves." Ibid. As this Court concluded, a subjective test "is a poor way to distinguish which defendants subject to identical intrusions on their privacy shall receive the constitutional benefit of the exclusionary rule." Id. at 222-23.

Still more, precluding officers who have any knowledge of a pre-existing investigation from conducting a search would put the officer and the public at risk and would sacrifice the benefits of an immediate probable-cause search of a vehicle under the automobile exception. For example, a gun that could immediately be found and seized pursuant to the automobile exception would

instead be left unsecured in the vehicle until police are able to obtain a search warrant. That would leave officers with only the options of the prolonged intrusion required to impound a vehicle and await a search warrant or of relying on the suspect's consent to search – a too-limited set of options that are precisely what led this Court in Witt to reinstate the less-burdensome automobile exception. See Witt, 223 at 423 ("a Fourth Amendment intrusion occasioned by a prompt search based on probable cause is not necessarily greater than a prolonged detention of the vehicle and its occupants while the police secure a warrant"); see also id. at 444, 446-47. The ACDL's preferred rule thus produces results entirely at odds with this Court's teachings.

POINT II

AS DEFENDANT'S CAR WAS SEARCHED OVER FIVE YEARS BEFORE L. 2021, c. 16 AND L. 2021, c. 19 TOOK EFFECT, THOSE LAWS DO NOT VITIATE THE PROBABLE CAUSE SUPPORTING THE SEARCH.

Although this Court granted certification limited to the issue of the permissible scope of the search of defendant's vehicle, defendant nevertheless continues to press arguments about the impact of recent legislative changes to state marijuana policies that go beyond the scope of this Court's order granting certification. (Dsb5 to 12). Should this Court consider defendant's arguments, it should reject them for the reasons the State previously laid out in its April 7, 2022 supplemental brief on the issues. The State responds below only to his argument regarding the impact of N.J.S.A. 2C:35-10c on the search of his car. (Dsb8 to 12).

On February 22, 2021, New Jersey "adopt[ed] a new approach to our marijuana policies" with the enactment of the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), L. 2021, c. 16, and L. 2021, c. 19 (Marijuana Decriminalization Act). N.J.S.A. 24:6I-32(a). The legislation distinguished between two terms for the same substance — "cannabis," which is now regulated and legal, and "marijuana," which is neither. See N.J.S.A. 24:6I-33 (defining cannabis as

excluding marijuana); N.J.S.A. 2C:35-2 (excluding cannabis from definitions of marijuana and controlled dangerous substance, which includes marijuana); N.J.S.A. 24:6I-32(a). But while those Acts brought about significant changes in the marijuana landscape going forward, they have no impact on the validity of the search of defendant's vehicle conducted over five years before the legislation took effect because the Acts nowhere even suggest that a *previous* search based on marijuana-related probable cause, and that produced a conviction for non-marijuana offenses, is somehow invalid.

Through amendments to N.J.S.A. 2C:35-10 and 2C:35-5, the Legislature did change the role of odors in the investigation of criminal activity. In amending the possession and distribution statutes, the Legislature added language to each providing that "[t]he odor of marijuana . . . shall not constitute reasonable articulable suspicion to initiate a search of a person to determine a violation" of the subsections addressing post-legislation possession and fourth-degree distribution. N.J.S.A. 2C:35-5(b)(12)(b)(i) (applying to violations of (12)(b) of "this subsection," which was marijuana distributed on or after February 22, 2021); N.J.S.A. 2C:35-10(a)(3)(b)(i) (applying to violations of (3)(b) of "this subsection," which was marijuana possessed after on or after February 22, 2021). The Legislature also created a new statute providing that, unless on school property or at a detention or

correctional facility, "[n]one of the following shall, individually or collectively, constitute reasonable articulable suspicion of a crime":

> a. The odor of cannabis or burnt cannabis;
>
> b. The possession of or the suspicion of possession of marijuana or hashish without evidence of quantity in excess of any amount that would exceed the amount of cannabis items which may be lawfully possessed . . . ; or
>
> c. The possession of marijuana or hashish without evidence of quantity in excess of any amount that would exceed the amount of cannabis items which may be lawfully possessed . . . , in proximity to any amount of cash or currency.
>
> [N.J.S.A. 2C:35-10c.]

But there is no support for Defendant's claims that this statute retroactively upends a probable-cause determination made five years before marijuana was decriminalized. "The primary goal of statutory interpretation is to determine as best [as possible] the intent of the Legislature, and to give effect to that intent." In re Registrant J.D-F., 248 N.J. 11, 20 (2021) (alteration in original) (citation omitted). In doing so, "courts start with the plain language of the statute, 'which is typically the best indicator of intent.'" State v. Lopez-Carrera, 245 N.J. 596, 612-13 (2021) (citation omitted). If "the Legislature's chosen words lead to one clear and unambiguous result," then "the interpretive process comes to a close" and the law is applied as written.

State ex rel. D.M., 238 N.J. 2, 16 (2019) (citation omitted).

Thus, when the language of a statute clearly expresses the Legislature's prospective intent for a statute, the inquiry is over. See State v. J.V., 242 N.J. 432, 444 (2020). But "[w]hen the Legislature does not clearly express its intent to give a statute prospective application, a court must determine whether to apply the statute retroactively." Id. at 443 (citation omitted). A new statute will be applied retroactively only if (1) "the Legislature intended to give the statute retroactive application" and (2) "retroactive application of that statute will [not] result in either an unconstitutional interference with vested rights or a manifest injustice." Id. at 444 (alteration in original) (quoting James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 556 (2014)).

"Generally, new criminal statutes are presumed to have solely prospective application." Id. at 443. To overcome this presumption, this Court "must find the 'Legislature clearly intended a retrospective application' of the statute through its use of words 'so clear, strong, and imperative that no . . . meaning can be ascribed to them' other than to apply the statute retroactively." J.V., 242 N.J. at 443 (alteration in original) (citation omitted). This Court has recognized three exceptions to the presumption of prospective application that warrant retroactive application of a new law:

> (1) the Legislature provided for retroactivity expressly, either in the language of the statute itself or its

> legislative history, or implicitly, by requiring retroactive effect to 'make the statute workable or to give it the most sensible interpretation'; (2) 'the statute is ameliorative or curative'; or (3) the parties' expectations warrant retroactive application.
>
> [Id. at 444 (citation omitted).]

"But [this Court] look[s] to those exceptions only in instances 'where there is no clear expression of intent by the Legislature that the statute is to be prospectively applied only.'" Ibid. (citation omitted).

Here, N.J.S.A. 2C:35-10c provides no support for defendant's argument, both because the language on which he relies does not apply and because the new statute was not intended to apply retroactively. First, consistent with the entire Act, N.J.S.A. 2C:35-10c maintains the distinction between cannabis and marijuana — referring to cannabis in subsection (a), and marijuana separately in subsections (b) and (c). But there was no lawful and regulated cannabis when defendant's vehicle was searched in January 2016, meaning the odor was necessarily relating to unlawful contraband, and thus does not fall under N.J.S.A. 2C:35-10c(a). Second, the plain language and legislative context establish that the Legislature did not intend for N.J.S.A. 2C:35-10c to apply retroactively. CREAMMA states that the section establishing N.J.S.A. 2C:35-10c "shall take effect immediately," CREAMMA § 87(a)(1), language this Court has repeatedly recognized "bespeak[s] an intent contrary to, and not

supportive of, retroactive application." State v. Lane, 251 N.J. 84, 96 (2022); see also Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 389 (2016).

That N.J.S.A. 2C:35-10c is intentionally limited to the odor of cannabis also aligns with the amendments to the possession and distribution statutes addressing the odor of marijuana. Both limitations on the odor of marijuana no longer constituting suspicion to search a person only apply to possession or distribution of marijuana that occurs on or after February 21, 2021. N.J.S.A. 2C:35-5(b)(12)(b)(i); N.J.S.A. 2C:35-10(a)(3)(b)(i). Had the Legislature intended N.J.S.A. 2C:35-10c to apply to both cannabis and marijuana despite its plain language indicating otherwise, the amendments to the possession and distribution of marijuana statutes would have been redundant and unnecessary. And even the Legislature's choice to include express prospective language in the possession and distribution statutes but not in N.J.S.A. 2C:35-10c supports its prospective nature. Unlike N.J.S.A. 2C:35-10c, which needs no such express language because its use of the term cannabis renders it necessarily prospective, the possession and distribution statutes had to specify their prospective nature—on or after February 21, 2021—as marijuana refers to the substance's unlawful form that exists both pre- and post-legislation.

To apply N.J.S.A. 2C:35-10c retroactively would not only overlook the statute's plain language, but would hold police to a standard inconsistent with

the law in place at the time of their conduct. That is inconsistent with settled constitutional precedent, which holds that the reasonableness of police conduct — "[t]he touchstone of the Fourth Amendment and Article I, [P]aragraph 7 of the New Jersey Constitution — is judged according to the circumstances that existed at the time of the search, not according to how the Legislature might later change a law. State v. Watts, 223 N.J. 503, 514 (2015) (second alteration in original). And that would serve no ameliorative or curative purpose, as it would neither "effect a reduction in a criminal penalty, Street v. Universal Mar., 300 N.J. Super. 578, 582 (App. Div. 1997), nor "repair the consequences of [any] legal accident or mistake." State v. Bey, 112 N.J. 45, 102 (1988).

Moreover, suppressing the seizure of a firearm found lawfully five years before CREAMMA and the Marijuana Decriminalization Act were enacted would not in any way advance the purposes of those Acts to prospectively legalize cannabis and decriminalize most marijuana possession. And given those purposes behind the legislation, the Legislature's pronouncements that the odor of marijuana no longer provides reasonable and articulable suspicion to initiate a search of a person to determine marijuana possession and fourth-degree distribution, and that the odor of cannabis no longer provides reasonable and articulable suspicion of any offense, are understandable. With cannabis being legal, it would make little sense for its odor to constitute

reasonable suspicion that an offense is being committed. And with most marijuana possession being decriminalized and the consequences of low-level distribution being limited, the Legislature could fairly determine that the odor of marijuana should no longer be used to justify searching a person to investigate what is left of marijuana-possession and –distribution offenses.

Likewise, it is doubtful that the Legislature intended to retroactively vitiate probable-cause determinations that were based on the odor of marijuana and grounded in long-standing constitutional precedent in place at the time the searches were conducted, and to invalidate the searches conducted based on those determinations – particular without any evidence in the statute or even in the legislative history that they had done so. Indeed, a finding of retroactivity could potentially require revisiting every case in which a search was based in part on the odor of marijuana. Had the Legislature intended such a significant upheaval of the criminal justice system, surely it would have expressed that intent in clear and unequivocal terms.

At bottom, at the time of the search of defendant's vehicle in 2016, settled precedent made clear that the odor of marijuana alone can establish probable cause to support a search. Nothing in CREAMMA or the Marijuana Decriminalization Act retroactively affects probable cause for pre-CREAMMA searches, and the search of defendant's vehicle remains wholly lawful.

CONCLUSION

This Court should affirm the decision of the Appellate Division.

Respectfully submitted,

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: /s/ *Sarah C. Hunt*
Sarah C. Hunt
Deputy Attorney General
hunts@njdcj.org

SARAH C. HUNT
ATTORNEY NO. 159252015
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU

OF COUNSEL AND ON THE BRIEF

DATED: September 6, 2022

BY ORDER OF THE COURT

State of New Jersey,	:	SUPERIOR COURT OF NEW JERSEY
	:	COUNTY OF MIDDLESEX
Plaintiff	:	LAW DIVISION
	:	
v.	:	CRIMINAL ACTION
	:	
Cornelius Cohen,	:	Ind. No. 16-10-00162-S
	:	Pros. No.: 16-000180
Defendant.	:	
	:	

FILED
JUN 20 2018
Benjamin S. Bucca, Jr., J.S.C.

ORDER

THIS MATTER having been brought before the Court by Ray Hamlin, Esq., appearing on behalf of defendant, Cornelius Cohen; and Deputy Attorney General Sarah Mielke, Esq., appearing on behalf of the State; and the Court having reviewed all papers submitted, all evidence presented and having heard oral argument; and for good cause shown;

IT IS ON THIS 19TH DAY OF JUNE, 2018,

ORDERED that the Defendant's Motion to Suppress Evidence, Motion to Suppress the Defendant's Statement and Motion to Reveal the Confidential Informant are hereby **DENIED** for the reasons set forth in the attached opinion.

Hon. Ben Bucca, Jr. J.S.C..

[X] Defense Brief
[X] Defense Responsive Brief
[X] State Brief
[X] State Responsive Brief

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX VICINAGE

Benjamin S. Bucca, Jr.
Judge of the Superior Court

Phone: 732-645-4300
Fax: 732-645-4304

New Jersey Courts
Independence • Integrity • Fairness • Quality Service

Middlesex County Courthouse
56 Paterson Street – 5th Floor
New Brunswick, NJ 08903-0964

June 19, 2018

DAG Sarah M. Mielke
25 Market Street
P.O. Box 94
Trenton, NJ 08625

Raymond L. Hamlin
Hunt Hamlin & Ridley
60 Park Place, 16th Floor
Newark, NJ 07102

RE: **State of New Jersey v. Cornelius Cohen**
Indictment No. 16-10-00162-S

Counselors:

On or about October 17, 2016, a State Grand Jury returned Indictment 16-10-00162-S, charging Cornelius Cohen, (hereinafter "Defendant"), with one count of second-degree Unlawful Possession of a Weapon, contrary to N.J.S.A. 2C:39-5(b), one count of third-degree Unlawful Possession of a Weapon, contrary to N.J.S.A. 2C:39-5c(1) and one count of fourth-degree Possession of a Prohibited Device, contrary to N.J.S.A. 2C:39-3f. Subsequently, the Defendant filed a Motion to Suppress Evidence, a Motion to Suppress the Defendant's Statement and a Motion to Reveal the Confidential Informant.

I. Facts

In January of 2016, a confidential source notified detectives with the New Jersey State Police the Defendant was involved in weapons sales in Essex and Middlesex Counties. The confidential informant stated the Defendant traveled outside of New Jersey to obtain weapons and then returned to New Jersey to sell them. The confidential source informed detectives the Defendant used two different vehicles to transport the weapons. One vehicle was the Defendant's own vehicle. The other vehicle was a black Honda Civic with New Jersey registration number Z50EYH and registered to Nazsa Baker.

On January 15, 2016, the confidential source informed detectives the Defendant was traveling to North Carolina on the weekend of January 16, 2016. Based on this information, detectives notified all New Jersey State Police stations of the Defendant's vehicle descriptions and began conducting surveillance in an attempt to locate the Defendant.

On January 17, 2016 Trooper Chuck Travis observed a black Honda Civic, registration number Z50EYH, traveling on the New Jersey Turnpike in Woodbridge Township. Trooper Travis allegedly observed the vehicle failing to maintain its lane of travel. Trooper Travis recognized the vehicle as the Defendant's and began to follow the vehicle in order to find a safe place to stop the vehicle. While following the vehicle, Trooper Travis allegedly observed the vehicle drive through the EZ Pass lane where the toll reader indicated no toll was paid. The vehicle continued onto the Garden State Parkway and Trooper Travis conducted a traffic stop close to milepost 137.

Trooper Travis walked to the passenger side window of the vehicle and observed the Defendant and Nazsa Baker in the vehicle. Trooper Travis requested the Defendant's license, insurance and registration. While awaiting the Defendant's documents, Trooper Travis allegedly smelled the odor of raw marijuana. With the help of the backup officer, both the Defendant and Nazsa Baker were put in handcuffs and placed in separate police cars.

In response to the odor of raw marijuana, Trooper Travis conducted a search of the vehicle. Inside the glove compartment, Trooper Travis discovered a plastic bag containing two shot glasses, one of which contained a spent 9mm shell casing. At this point, additional back up arrived on scene and several officers began searching the vehicle. Trooper Travis then searched the hood of the vehicle, where he found two firearms in separate bags. In the trunk, six .38 caliber hollow point bullets were found inside a black bag.

II. Motion to Suppress Evidence

The Defendant seeks to suppress the evidence found during the search of his vehicle. The Defendant asserts the motor vehicle stop was a preplanned stop based on a tip received from a confidential informant. The confidential source told detectives the Defendant was allegedly trafficking weapons and would be traveling from North Carolina to New Jersey with weapons during the weekend of January 16, 2016. The Defendant asserts that since Trooper Travis received a notice about the Defendant prior to stopping the Defendant for an alleged traffic violation the stop was pre-planned and could not have occurred as a result of unforeseeable and spontaneous events. As a result, the Defendant asserts there was ample time to secure a warrant before conducting the search of the vehicle.

In response, the State argues Trooper Travis stopped the Defendant's vehicle after observing the Defendant failing to maintain his lane of traffic and failing to pay the toll when driving through an EZ Pass lane. The State asserts when Trooper Travis pulled over the Defendant and walked up to the passenger side window he instantly smelled the odor of raw marijuana. Trooper Travis also alleged there were multiple air fresheners. Through his training and experience, Trooper Travis asserts multiple air fresheners is an indicator of marijuana.

The State asserts Trooper Travis' detection of raw marijuana was unforeseen and spontaneous, as he had no belief marijuana was in the vehicle prior to the stop. Additionally, the State asserts the detection of raw marijuana was probable cause to believe contraband was in the vehicle, thus justifying the warrantless search of the entire vehicle.

Lastly, the State asserts Trooper Travis' prior notice of the Defendant possibly transporting weapons is ancillary because the search of the vehicle is valid regardless of the information from the confidential informant. The motor vehicle stop here was a result of a motor vehicle violation. The search here stemmed from the unforeseeable and spontaneous detection of raw marijuana, not from the notice involving potential weapon trafficking.

a. Applicable Law

There are three areas of law that this Court will apply in its analysis: 1) the automobile exception, 2) the impact of the smell of raw marijuana, and 3) independent corroboration of a confidential informant's tip.

Where no warrant was sought for the search and arrest of a defendant, the State bears the burden of showing that the warrantless seizure falls within one of the few well-delineated exceptions to the warrant requirement. The State has the burden of proof to demonstrate by a preponderance of the evidence that the warrantless seizure was valid. State v. O'Neal, 190 N.J. 601, 606 (2007).

"A lawful stop of an automobile must be based on reasonable and articulable suspicion that an offense, including a minor traffic offense, has been or is being committed." State v. Carty, 170 N.J. 632, 639-640 *citing* Delaware v. Prouse, 440 U.S. 648, 663 (1979). The "reasonable suspicion necessary to justify an investigatory stop is a lower standard than the probable cause necessary to sustain an arrest." State v. Stovall, 170 N.J. 364, 356 (2002). There must be a "minimal level of objective justification for making the stop." State v. Nishina, 175 N.J. 502, 511 (2003) *quoting* United States v. Sokolow, 490 U.S. 1, 7 (1989).

"It is firmly established that a police officer is justified in stopping a motor vehicle when he has an articulable and reasonable suspicion that the driver committed a motor vehicle offense." State v. Smith, 306 N.J. Super. 370, 380 (App. Div. 1997) *citing* Delaware v. Prouse, 440 U.S. 648, 663 (1979). An investigatory stop is valid only if the officer has a "particularized suspicion" based upon an objective observation that the person stopped has been engaged or is about to engage in criminal wrongdoing. The "articulable reasons" or "particularized suspicion" of criminal activity must be based upon the law enforcement officer's assessment of the totality of circumstances with which he is faced. Such observations are those that, in view of the officer's experience and knowledge, taken together with rational inferences drawn from those facts, reasonably warrant the limited intrusion upon the individual's freedom. State v. Nishina, 175 N.J. 502, 511 (2003) *citing* State v. Davis, 1004 N.J. 490, 504 (1986).

The automobile exception holds a search warrant unnecessary when the police stop an automobile on the highway and have probable cause to believe that it contains contraband or evidence of a crime. State v. Witt, 223 N.J. 409, 450 (2015); State v. Alston, 88 N.J. 211, 231

(1981). "The primary rationale for this exception lies in the exigent circumstances created by the inherent mobility of vehicles that often makes it impracticable to obtain a warrant." Id. "These exigent circumstances do not dissipate simply because the particular occupants of the vehicle may have been removed from the car, arrested, or otherwise restricted in their freedom of movement." Id. at 234 *citing* State v. Waltz, 61 N.J. 83; State v. Session, 172 N.J. Super. 558 at 566; State v. Kahlon, 172 N.J. Super. 331, 340 (app. Div. 1980).

Law enforcement's inability to pinpoint the source of the smell of raw marijuana while in the area of an automobile can establish by itself probable cause to search the entire vehicle. State v. Kahlon, 172 N.J. Super. 331, 338 (App. Div. 1980).

The scope of a warrantless search is defined by the object of the search and the places in which there is probable cause to believe that it may be found. State v. Esteves, 93 N.J. 498 (1983); United States v. Ross, 456 U.S. 798, 799, (1982).

To justify action based on an anonymous tip, the police must verify that the tip is reliable by some independent corroborative effort in order to conduct a search or effectuate an arrest. Generally, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. Stated differently, courts find no constitutional violation when there is independent corroboration by the police of significant aspects of the informer's predictions. The analysis in any given case turns ultimately on the totality of the circumstances. State v. Golotta, 178 N.J. 205, 209 (2003).

The veracity of an informant's tip, who has not previously been deemed reliable, can be bolstered by observations of the police during an investigation. It is well settled that the observations of police during an investigation may be used to bolster the veracity of an informant's information offered to establish probable cause to obtain a search warrant as well as observations may be similarly used to establish probable cause to conduct a warrantless search, even when the informant had not been previously deemed reliable. State v. Probasco, 220 N.J. Super. 355 at 358-359.

In State v. Foreshaw, the Court ruled the police properly relied on an informant's tip that was not previously deemed reliable in establishing probable cause to conduct a search. State v. Foreshaw, 245 N.J. Super. 166 at 176-177. In Foreshaw, the informant provided police with detailed information about the defendants' vehicle. Id. at 177. The police subsequently confirmed the information was correct, down to the smallest of details. Id. The informant correctly indicated the defendants drove a silver-gray Eldorado with a spare tire mount and New Jersey license plates. Id. Additionally, the suspect left the Turnpike at the exit described by the informant and headed in the direction predicted by the informant. Id. These facts, coupled with the police officers' years of training and experience and their investigation of the matter, were sufficient to establish probable cause. Id.

The proper inquiry for determining the constitutionality of a search and seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent. State v. Kennedy, 247 N.J. Super. 21,

27 (App. Div. 1991). It has been said that the courts will not inquire into the motivation of a police officer whose stop of an automobile is based upon a traffic violation committed in his presence. Id. at 28.

b. Court's Finding

In viewing the MVR of the stop and search of the Defendant's vehicle and observing Trooper Travis during testimony, this Court finds Trooper Travis to be credible. At 22:02 of the MVR, Trooper Travis explains to the Defendant he has been stopped for failure to maintain his lane of traffic. Trooper Travis informs the Defendant he thought the Defendant may have been falling asleep or driving while intoxicated. Additionally, Trooper Travis goes into detail as to why he pulled over the Defendant during his testimony on December 20, 2017, stating based on his training and experience, the Defendant's driving behavior indicated possible intoxication. (T97:2-25). Although there is no independent corroboration of the Defendant's driving infraction, this Court finds Trooper Travis to be credible. His observations of the Defendant's driving provided him with an "articulable and reasonable suspicion that the driver committed a motor vehicle offense." State v. Smith, 306 N.J. Super. 370, 380 (App. Div. 1997).

Trooper Travis also testified he observed the Defendant drive through the EZ Pass lane without paying the toll. Specifically, when the Defendant drove through the EZ Pass lane, the toll sign indicated "No Toll Paid." To contradict this observation, the Defendant provided the Court with Nazsa Baker's EZ Pass records and argued the toll was paid. Based on the Court's review and interpretation of the records, it appears Nazsa Baker's EZ Pass account had a negative balance on January 17, 2016. The records also indicate the toll charged on January 17, 2016 was not actually recorded as paid until January 21, 2016, two days after a prepaid payment of $50.00 posted to the account. Although there is no evidence to prove what the toll sign read when the Defendant drove through the EZ Pass lane on January 17, 2016, this Court's interpretation of Nazsa Baker's EZ Pass records suggest that on January 17, 2016 Nazsa Baker had a negative balance on her account.

On January 19, 2016 a payment was made on her account and the toll charge for January 17, 2016 was not recorded as paid until January 21, 2016. Thus the Defendant's efforts to impeach the credibility of Trooper Travis with the EZ-Pass records is misplaced because it appears from the record she had a negative balance on her account on January 17,2016 and the toll was not recorded as paid until January 21, 2016. As a result of these facts, this Court finds the EZ Pass records do not support the defense argument that Trooper Travis was not truthful when he testified that a "No Toll Paid" message was displayed when the vehicle the Defendant was driving drove thru the toll at exit 11 on the New Jersey Turnpike. Rather, if anything the EZ Pass record supports the likelihood that Trooper Travis correctly observed the message that was displayed.

Finally, this Court finds Trooper Brennan's testimony ancillary to the core issues of this case. According to Trooper Brennan, she and Trooper Travis were parked next to each other on the Turnpike when Trooper Travis quickly drove off. At this time, Trooper Brennan was unaware as to why Trooper Travis unexpectedly drove off. Trooper Brennan decided to follow Trooper Travis as back up. However, Trooper Brennan had no reason to focus her attention on the vehicle pursued by Trooper Travis because she was unaware of who Trooper Travis was pursuing, or why. In addition to Trooper Brennan's lack of knowledge, she was physically unable to observe the

Defendant's vehicle as she traveled behind Trooper Travis. As a result, Trooper Brennan was unable to provide testimony regarding the validity of the motor vehicle stop.

This Court finds the core issue of this motion to be whether the smell of raw marijuana was actually detected. As discussed above, this Court finds Trooper Travis to be credible. Trooper Travis first indicates the smell of raw marijuana at 22:05 of the MVR. At 22:06 Trooper Travis asks the Defendant and Nazsa Baker if either of them smoke medical marijuana. At 22:07 Trooper Travis removes the Defendant from the vehicle, tells him not to speak, and informs the Defendant he smells raw marijuana. Then, at 22:10, Trooper Travis tells the Defendant he has smelled raw marijuana many times and has made numerous arrests from it.

After removing the Defendant and Nazsa Baker from the vehicle, Trooper Travis begins the search of the vehicle. At this time, an unidentified detective walks up to Trooper Travis. Trooper Travis introduces himself and explains to the detective he is searching the vehicle after detecting raw marijuana. At 22:18 of the MVR, the unidentified detective confirms the smell of raw marijuana by saying, "yeah, you can really smell it." Then, at 22:36 of the MVR, Trooper Travis is unsuccessful in his search for marijuana and states quietly he doesn't know why there isn't marijuana, and maybe the Defendant had the marijuana in the car earlier. At 22:37, Trooper Travis questions the Defendant one more time about possible marijuana.

Although no marijuana was subsequently found in the vehicle when the officer claimed the smell of raw marijuana, this Court finds Trooper Travis' credibility coupled with the corroboration of the unidentified detective enough to support probable cause of the search by a preponderance of the evidence. First, as evidenced by the MVR, Trooper Travis and the unidentified detective were meeting for the first time before conducting the search. The unidentified detective's corroboration of the raw marijuana smell was unsolicited by Trooper Travis, and there is no evidence to suggest the two preplanned the conversation to support the search as a result of the notice.

This Court evaluated the issue of raw marijuana with great care, especially considering no marijuana was found in the vehicle. However, this Court finds as credible Trooper Travis's testimony that he smelled raw marijuana. The odor of raw marijuana emanating from a vehicle without a detectible pinpoint establishes probable cause to search the entire vehicle. State v. Kahlon, 172 N.J. Super. 331, 338 (App. Div. 1980).

Although Trooper Travis was made aware of the Defendant and alleged weapon trafficking prior to making the motor vehicle stop, this Court finds the stop and subsequent warrantless search were independent of the notification. Trooper Travis' motive for following the Defendant is inconsequential as the analysis of the stop is based solely on the objective facts involving the motor vehicle violations observed. Here, Trooper Travis observed the Defendant committing motor vehicle violations. When the smell of raw marijuana was detected, a warrantless search became permissible to locate the marijuana. State v. Kahlon, 172 N.J. Super. 331, 338 (App. Div. 1980).

The search of the Defendant's vehicle is further supported by the confidential informant's tip. For an anonymous tip, police must verify the tip is reliable by independent corroboration. State v. Foreshaw, 245 N.J. Super. 166 at 176-177; State v. Probasco, 220 N.J. Super. 355 at 358-359. In

this matter, Trooper Travis independently corroborated the confidential informant's tip. The confidential informant told police the Defendant would be traveling from North Carolina to New Jersey with weapons on the weekend of January 16, 2016. The confidential informant also provided police with the make, model and license plate of both the Defendant and Nazsa Baker's vehicle. On Sunday, January 17, 2016, Trooper Travis located the Defendant traveling northbound. The Defendant was driving Nazsa Baker's vehicle. The vehicle was the same make, model and license plate number as detailed by the confidential informant. Here, Trooper Travis independently corroborated the traveling details of the Defendant as provided by the confidential informant.

Then, when the Defendant's passenger side glove compartment was searched as a result of the odor of raw marijuana, Trooper Travis found a 9mm shell casing. The shell casing in the glove compartment independently corroborated the confidential informant's tip that the Defendant was trafficking weapons and specifically on the weekend of January 16, 2016. The independent corroboration of both the travel details and the weapon trafficking on the specific dates provided by the confidential informant is synonymous to the facts in State v. Probasco and State v. Foreshaw, and as in those cases, the independent corroboration of the confidential informant's information established probable cause and supported the warrantless search for weapons. The probable cause resulting from the shell casing further justifies the search of the entire vehicle for possible weapons.

As a result, this Court finds Trooper Travis had an articulable and reasonable suspicion the Defendant committed motor vehicle violations. Once the Defendant's vehicle was lawfully stopped, Trooper Travis' detection of the odor of raw marijuana emanating from the vehicle was unforeseeable and spontaneous, permitting a warrantless search of the entire vehicle. Almost immediately into the search of the vehicle's interior compartment, and thus a minor intrusion to the Defendant's expectation of privacy, Trooper Travis observed a shell casing in the interior glove compartment. The finding of a shell casing, along with other corroborated facts from the confidential informant, provided additional probable cause to search the entire vehicle for weapons. Therefore, the Defendant's Motion to Suppress Evidence is denied.

III. Motion to Suppress Defendant's Statement:

The Defendant seeks to suppress the on-scene statement made by Defendant when questioned by Trooper Travis about the weapons. The Defendant asserts he was not properly informed of his Miranda warnings prior to stating Nazsa Baker did not know about the weapons, and only the Defendant was culpable. In response, the State asserts the Defendant was provided with his Miranda warnings prior to the statement.

a. Applicable Law

Admission of a defendant's statements is governed by the principles established in Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny. The warnings set forth in Miranda—the right to remain silent, the right to legal counsel, etc.—are required whenever a suspect is subjected to custodial interrogation by a law enforcement officer. Miranda, 384 U.S. at 444; State v. Williams, 59 N.J. 493 (1973). Miranda bars the admission during the state's case in

chief of any statement elicited from the defendant through custodial questioning, unless the defendant received his Miranda warnings and knowingly waived those rights prior to making the statement. Once Defendant invokes his right to remain silent his request must be scrupulously honored and the investigators must cease all questioning. See State v. Johnson, 120 N.J. 263, 281 (1990); see also State v. Mallon, 288 N.J. Super. 139, 149 (App. Div. 1996). "If the individual indicates in any manner at any time prior to or during questioning a wish to remain silent, interrogation must cease." Miranda v. Arizona, 384 U.S. 436, 473-74 (1966); See State v. Johnson, 120 N.J. 263, 281 (1990).

A defendant is in custody where the police have formally taken him into custody or have deprived his freedom of action in any way. See State v. Brown, 352 N.J. Super. 338, 351 (App. Div. 2002). The test for whether a suspect is in custody is an objective consideration of the totality of circumstances. Id. at 352. Custody need not require a formal arrest or handcuffs, and could even occur in one's home. Id. Some of the relevant factors a court should consider in deciding whether a suspect is in custody include "the duration of the detention, the place and time of the interrogation, the nature of the questions and the language employed by the interrogator, the conduct of the police, the status of the interrogator, the status of the suspect, and any other relevant circumstances." Id.

In State v. Stott, the Supreme Court found a suspect was in custody where the suspect, a psychiatric patient, was isolated in a basement from other patients and questioned by four investigators concerning illegal drug activity, with his statement being recorded. State v. Stott, 171 N.J. 343, 365 (2002). Based on this, the Supreme Court held that it was clear to the patient that he was a suspect. Id. at 366. The Supreme Court concluded that a reasonable person under these circumstances would feel that his freedom of movement was restricted. Id.

For the Miranda warnings to be necessary, the questioning of a suspect in custody must amount to interrogation. Interrogation has been defined as "express questioning and any words or actions by the police that they 'should know are reasonably likely to elicit an incriminating response from the suspect.'" State v. Bohuk, 269 N.J. Super. 581, 594 (App. Div. 1994) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

For a confession to be admissible as evidence, the state must prove beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary in light of all the circumstances. State v. Bey (II), 112 N.J. 123 (1988); *see also* State v. Galloway, 133 N.J. 631, 654 (1993). Thus, in determining whether a defendant has waived his or her constitutional rights, the court must examine the totality of the circumstances surrounding the interrogation. Fare v. Michael C., 442 U.S. 707 (1979).

b. Court's Findings

To determine whether the Defendant properly received his Miranda warnings prior to his on-scene statement, this Court must determine the timeline of the motor vehicle stop. In reviewing Trooper Travis' MVR, the Defendant is removed from the vehicle and put in handcuffs around 22:06. At 22:07, Trooper Travis warns the Defendant not to speak to protect the Defendant's

rights. At 22:09 Trooper Travis reads the Defendant his Miranda warnings while the Defendant is sitting in Trooper Travis' vehicle.

At 22:21 Trooper Travis finds the two guns in the hood of the vehicle. Trooper Travis then returns to the vehicle to question the Defendant about the weapons. Here, Trooper Travis asks the Defendant if there are more weapons in the vehicle and if the guns found are loaded. It is at this point the Defendant tells Trooper Travis he is the only one who knew about the weapons, exculpating Nazsa Baker.

Here, the Defendant was taken into custody when Trooper Travis removed him from the vehicle and placed him in hand cuffs. Interrogation began when Trooper Travis found the guns in the vehicle's hood and began questioning the Defendant about the weapons. It is reasonable to conclude questioning an individual about weapons found during a motor vehicle search would, "elicit an incriminating response from the suspect", constituting interrogation. Rhode Island v. Innis, 446 U.S. 291, 301 (1980). As both custody and interrogation were found in this matter, Miranda warnings were necessary.

As evident from the above discussed timeline, the Defendant received his Miranda warnings prior to Trooper Travis' questioning and prior to making the on-scene statement. The question now is whether the Defendant's waiver was knowing, intelligent, and voluntary in light of all the circumstances. State v. Bey (II), 112 N.J. 123 (1988); *see also* State v. Galloway, 133 N.J. 631, 654 (1993). Here, the evidence suggests the Defendant did waive his Miranda rights knowingly, intelligently and voluntarily when making the on-scene statement.

The first indicator the Defendant waived his Miranda rights knowingly, intelligently and voluntarily is Trooper Travis told the Defendant not to speak before he read the Defendant his rights. Trooper Travis even specifically tells the Defendant not to speak so the Defendant can protect his rights. Another indicator the Defendant waived his Miranda rights knowingly, intelligently and voluntarily is the MVR clearly recorded Trooper Travis reading the Defendant his Miranda warnings and asking the Defendant if he understood. Although it can be argued the Miranda warnings were read hurriedly, there is nothing to suggest the Defendant did not understand his rights.

As a result, this Court finds the Defendant did knowingly, intelligently and voluntarily waive his Miranda rights when making the on-scene statement. The Defendant's Motion to Suppress the Statement is hereby denied.

IV. Motion to Reveal the Confidential Informant:

The Defendant seeks to have the identity of the confidential informant revealed. The Defendant asserts the disclosure of the informant's identity will avail him of the opportunity to have a fair determination of the within matter. The Defendant asserts the failure to disclose will deny the Defendant his right to confront the informant and ascertain whether the informant could have possibly had any information on the Defendant.

In response, the State asserts the confidential informant's involvement in the matter ceased prior to the January 17, 2016 motor vehicle stop. The State asserts the confidential informant had no direct involvement in the motor vehicle stop leading to the Defendant's charges. Finally, the State asserts the Defense failed to explain how disclosure of the confidential informant is relevant or would "assure a fair determination of the issues."

a. Applicable Law

The constitutional right of criminal defendants to procure attendance of witnesses who can furnish relevant evidence for their defense is based upon both the Sixth Amendment right of defendant to have compulsory process for obtaining witnesses in his favor and on the fundamental fairness requirement embodied in due process clause of Fifth Amendment. However, N.J.R.E. 516 was precisely written to allow disclosure where such constitutional rights were implicated. U.S. v. Verkuilen, 690 F.2d 648 (1982).

The informant's privilege is not absolute. The State cannot invoke the informant's privilege when the informer is an essential witness on a basic issue in the case, when the informer is an active participant in the crime for which the defendant is on trial, when the defendant may reasonably assert defense of entrapment, or when fundamental principles of fairness to the defendant mandate disclosure. State v. Florez, 134 N.J. 570 (1994). "In determining whether the State must disclose the true identity of an informant, courts weigh and balance the competing considerations on a case-by-case basis." Id. at 579.

As case law makes clear, the defendant bears the burden of making a substantial showing of need that the informant's identity is essential to a fair determination of the issues, or a showing that the informant's testimony "would have been relevant and material to the defense;" for example, an essential witness on a material issue or an active participant in the crime. Absent a strong showing of need, courts will generally deny disclosure of the identity of the informant where the informant plays only a marginal role, such as providing information or tips to the police, while participating in the preliminary stage of a criminal investigation. Proof that the informer witnessed a criminal transaction, without more, is usually considered insufficient to justify disclosure of his identity. State v. Milligan, 71 N.J. 373 (1976).

On motion for disclosure of identity of informant, courts must examine the nature of the accused's defenses and the purpose for which the informer's testimony is sought, as well as the extent of the informer's involvement in the criminal transaction. Id. Under most circumstances, the informant's identity will be kept secret and will not be revealed for insignificant or transient reasons. State v. Foreshaw, 245 N.J. Super. 166 (App. Div.), cert. denied 126 N.J. 327 (1991).

The government has long possessed the right to withhold the identity of informants who assist law enforcement. State v. Milligan 71 N.J. 373, 380 (1976); N.J.R.E. 516. The privilege acknowledges the policy in favor of protecting the identity of informants, as they would otherwise be dismayed from assisting law enforcement if their identities would be compromised. Milligan, supra, 71 N.J. at 381. A defendant must meet a heavy burden to succeed on a motion to compel the disclosure of a confidential informant's identity. State v. Morelli, 152 N.J. Super. 67, 75 (App. Div. 1977).

The privilege, however, is not absolute and must be balanced against a defendant's right of confrontation. The privilege is not available in instances where: (1) the identity of the CI has already been disclosed; (2) the CI is an essential witness or active participant in the crime with which the defendant is charged; (3) a defense of entrapment seems reasonably plausible; and (4) disclosure is mandated by principles of fairness to the accused. Milligan, supra, 71 N.J. at 383 (internal citations omitted).

b. Court's Findings

Here, this Court finds the Defendant has not met the burden of showing why the confidential informant's identity is essential to a fair determination of the issues, or why the informant's testimony "would have been relevant and material to the defense." State v. Milligan, 71 N.J. 373 (1976). First, there is no evidence to suggest the identity of the confidential informant has already been disclosed. Second, there is no evidence to suggest the confidential informant was an active participant in the crime with which the Defendant is charged or an essential witness. Here, the confidential informant told detectives the Defendant would be traveling from North Carolina to New Jersey the weekend of January 16, 2016 with weapons. However, there is nothing to suggest the confidential informant witnessed the actual crime or participated in it. Third, the Defendant is not claiming a defense of entrapment. Finally, there is no evidence to suggest disclosure of the confidential informant's identity is mandated by principals of fairness to the accused, as the Defendant has not made a detailed argument for such.

As a result, the Defendant's Motion to Reveal the Confidential Informant's Identity is hereby denied.

Respectfully submitted,

HON. BENJAMIN S. BUCCA, JR. J.S.C.

BSB:rl

SUPREME COURT OF NEW JERSEY

HEATHER JOY BAKER
CLERK

GAIL GRUNDITZ HANEY
DEPUTY CLERK

OFFICE OF THE CLERK
PO BOX 970
TRENTON, NEW JERSEY 08625-0970
609-815-2955

February 25, 2022

Sent via Email and Regular Mail

Sarah C. Hunt, Deputy Attorney General
Division of Criminal Justice
Richard J. Hughes Justice Complex
25 Market St.
PO Box 085
Trenton, NJ 08625-0085

Raymond L. Hamlin, Esq.
Hunt Hamlin & Ridley
Military Park Building
60 Park Place, 16th Floor
Newark, NJ 07102

Re: State v. Cornelius C. Cohen (084493)

Dear Counsel:

As you are aware, defendant's petition for certification in the above-referenced matter remains pending before the Court. The Court requests that both parties submit supplemental briefs addressing the impact, if any, of the enactment of L. 2021, c. 16 and/or L. 2021, c. 19, on this matter. Defendant's supplemental brief shall be served and filed by March 18, 2022; the State's responsive supplemental brief shall be served and filed on or before April 8, 2022. The supplemental briefs shall be limited to no more than ten pages and otherwise comply with the Rules of Court. Thank you for your anticipated cooperation with the Court's request.

Sincerely,

/s/ Heather Joy Baker

Heather Joy Baker
Clerk

SUPREME COURT OF NEW JERSEY
C-29 September Term 2020
084493

State of New Jersey,
Plaintiff-Respondent,
v.
Cornelius C. Cohen,
Defendant-Petitioner.

ORDER

A petition for certification of the judgment in A-002354-18 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted, limited to the issue of whether officers were authorized to search defendant's trunk and engine compartment, based on the odor of marijuana in the vehicle; and it is further

ORDERED that the appellant may serve and file a supplemental brief on or before July 5, 2022, and respondent may serve and file a supplemental brief thirty (30) days after the filing of appellant's supplemental submission, or, if appellant declines to file such a submission, on or before August 4, 2022.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 17th day of May, 2022.

CLERK OF THE SUPREME COURT