FILED, Clerk of the Supreme Court, 14 Oct 2022, **087315**, **AMENDED**

SUPREME COURT OF NEW JERSEY
SUPREME COURT DOCKET NO. 087315 (A-6-22)

CRIMINAL *ACTION*

STATE OF NEW JERSEY,	*ON APPEAL FROM* A Published Opinion of the Appellate Division affirming an Interlocutory Order of the Superior Court of New Jersey, Law Division, Ocean County.
Plaintiff-Appellant,	
v.	
KYLE A. SMART,	*SAT BELOW* Hon. Carmen Messano, P.J.A.D. Hon. Allison E. Accurso, J.A.D. Hon. Lisa Rose, J.A.D.
Defendant-Respondent.	

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS

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

TABLE OF AUTHORITIES

Cases

Statutes

PROCEDURAL HISTORY[2]

On October 21, 2021 an Ocean County Grand Jury charged Kyle Smart with possession of a CDS, compound containing, FluoroFentanyl, and Cocaine, contrary to the provisions of N.J.S.A 2C: 35-10a(1) (Count One – Third degree); possession of a CDS, Fentanyl, contrary to the provisions of N.J.S.A. 2C: 35-10a(1) (Count Two – Third degree); possession with intent to distribute a CDS, Fentanyl, contrary to the provisions of N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(5) (Count Three - Third degree); unlawful possession of a firearm, a black Taurus G2C .40 handgun, without obtaining a permit to carry the same as provided in N.J.S.A. 2C: 58-4, contrary to the provisions of N.J.S.A. 2C:39-5b(1) (Count Four- Second degree); possession of a weapon for an unlawful purpose, a black Taurus G2C .40 handgun, contrary to the provisions of N.J.S.A. 2C: 39-4a(1) (Count Five – Second degree); possession of a firearm while engaged in certain drug activity, attempting or conspiring to commit a violation of N.J.S.A. 2C: 35-5, knowingly possess a black Taurus G2C .40 handgun, contrary to the provisions of N.J.S.A. 2C: 39-4.1a (Count Six – Second degree); certain person not to possess firearm, previously convicted of a crime pursuant to the provisions of N.J.S.A. 2C: 15:1 and

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[2] "A" designates the State's appendix attached hereto.
1T designates transcript of proceedings occurring on February 2, 2022 (wrongly dated March 2 by the reporter – see 1T10-24 for verification of the correct date).
2T designates transcript of proceedings dated March 1, 2022.

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

On December 14, 2021, Defendant filed a motion to suppress evidence seized from his car.

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

On March 1, 2022 the Judge issued an order suppressing the evidence, (A6), and granted a stay pending interlocutory review also on March 1, 2022.

On March 22, 2022 the State moved for leave to appeal before the Appellate Division which was granted, but the State's motion for a stay of the decision was denied. (A7-8)

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

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

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

This supplemental brief follows.

STATEMENT OF FACTS[3]

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

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

[3] It should be noted that the parties agreed on the facts of this case, and the Judge acknowledged that agreement, (see, 1T57-18; see also, 1T62-13 and 1T52-4 to 52-8), although the State was prepared to present 3 witnesses. The facts set forth herein are taken from the State's initial brief and supplemental brief filed in the trial court. The relevant portions of those briefs appear at A9-15.

distributing Controlled Dangerous Substances (CDS) in the Toms River area. (1T3-15 to 4-11)

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

After approximately thirty minutes, Taranto observed a black female, later identified as Constance P. Comrie-Holloway approach and enter the driver's side door of the GMC Terrain. At this time, Taranato also observed a male, later identified as Defendant Kyle Smart, enter the front passenger side of the vehicle after placing a small child in the rear passenger compartment.

The vehicle proceeded to depart the parking lot and travelled to the Boston Market located at 141 Route 37 East. The vehicle then proceeded to the PNC Bank located at 1329 Hooper Avenue, Toms River, New Jersey. Taranto observed these stops to be consistent with legitimate patronage. (1T4-18 to 5-3)

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

Taranto observed Defendant exit the vehicle and walk through a fence to the backyard of the residence while the female driver remained in the vehicle. After a brief period of time, Defendant was then seen reemerging from the backyard with a white female. Defendant proceeded to re-enter the GMC Terrain while the white female proceeded to the residence. Taranto believed Defendant and the female resident had engaged in a narcotics related transaction. (1T5-18 to 6-11) His conclusion was based upon his training and experience, the totality of the circumstances and the C.I. and C.C. information. (A13)

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

At 3:40 p.m., approximately 23 minutes after the automobile was stopped, and following a refusal to consent to a search of the vehicle, a K-9 responded on scene to conduct an exterior sniff of the vehicle. The K-9 sniff was positive. A subsequent search of the interior compartment of the vehicle yielded a small black Coach backpack that was situated on the front passenger side floorboard. Located within the backpack was an unloaded SCCY handgun magazine, a black digital scale, and a small cardboard box containing approximately 400 wax folds stamped with an indistinguishable green circular logo, and approximately 10 wax folds stamped "Bentley" in blue ink containing a white powdery substance, suspected heroin. Additionally, located within the vehicle's center console was a black Taurus G2C .40 handgun (Serial# ACC643641) that was loaded with 10 rounds of .40 Speer ammunition with a round actively chambered. Finally, within the vehicle, $1600 in assorted US paper currency was located within a purse on the rear driver side seat. Subsequently, Defendant was placed under arrest. At that time, he indicated to Detective Duncan MaCrae that everything found in the vehicle belonged to him. (1T7-14 to 8-15)

Comrie-Holloway provided a formal statement later at police headquarters, wherein she advised that the heroin, digital scale, and black

backpack (where those items were found) did not belong to her. She also stated that while the handgun was registered to her, she did not put it in the vehicle. (1T8-16 to 9-3)

Hence the timeline for the events in this case is as follows.

2:00 pm Officer Toranto notices Defendant's car in the condominium parking lot.
2:30 pm, Defendant, a female, and a child enter the car. In the next 47 minutes, the car travels to Boston Market, PNC Bank, and a Shenandoah Boulevard residence to consummate a suspected drug deal.
3:17 pm Defendant's car is stopped. A consent search is refused.
3:30 pm the canine arrives and alerts. Since the stop of the car, 23 minutes have elapsed.

(see, A9-15)

LEGAL ARGUMENT

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

(2015). Hence the Appellate Division concluded the warrantless seizure of evidence as a result of the dog sniff was improper and affirmed the suppression order.

The rule crafted in Smart operates as a *per se* rule in certain cases that reintroduces lengthy roadside encounters eliminated by this Court in Witt, and severely modifies or eliminates the automobile exception in automobile investigative detention cases.

It was error for the Appellate Division to conclude – while all other police actions were found constitutionally sound – that only the positive canine alert resulting from the sniff was not spontaneous and unforeseeable. Indeed, the proper focus is on the developing "circumstances" of the case that are required to be unforeseen and spontaneous – not the ultimate legal conclusion that probable cause exists.

The rule in Smart faults the police for failure to have a warrant in hand at the time they unforeseeably and spontaneously came upon Defendant's vehicle, and obligates them to delay the roadside search until a warrant is first obtained – contrary to the automobile exception to the warrant requirement, and contrary to Witt. Undercutting Witt and its automobile exception will have a devastating impact across the State, exposing police and citizenry to lengthy roadside encounters for little or no benefit to be obtained. In this particular

case the armed and dangerous defendant posed additional risks to police and the public, and requiring police to engage in the lengthy process of obtaining a warrant under such circumstances makes little sense.

Significantly, this is an "investigative detention" case – not a traffic stop case. By definition investigative detention cases are fluid encounters and can be said to most often arise in an unforeseeable and spontaneous manner. Because the Smart Court found that the canine sniff "changed the equation" because there was an investigative detention for drugs instead of a routine traffic stop, it fell into error regarding its conclusion that a warrant was needed based on the positive alert of the canine.

Obviously the most important factor in these types of cases is whether police had probable cause prior to encountering the defendant and could have secured a warrant.

POINT I

THE CIRCUMSTANCES GIVING RISE TO PROBABLE CAUSE IN THIS CASE AROSE IN AN UNFORESEEABLE AND SPONTANEOUS WAY

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

A. THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT IN NEW JERSEY

This Court has stated that when it first articulated the spontaneity and unforeseeable test, it was, "merely following the test set forth by the United States Supreme Court in Chambers." Witt, 223 N.J. at 447 The Carroll-Chambers line of decisions recognize "the exigent circumstances that exist in connection with movable vehicles."

The Chambers Court, discussed the holding in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), wherein the issue was the admissibility in evidence of contraband liquor seized in a warrantless search of a car on the highway.

> We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, **where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.**
>
> [Chambers v. Maroney, 399 U.S. 42, 48, 90 S. Ct. 1975, 1979, 26 L. Ed. 2d 419 (1970) (emphasis added)]

Under federal law, a warrantless search of a vehicle will be permitted as long as the vehicle is "readily mobile" and the search is supported by probable cause. Pennsylvania v. Labron, 518 U.S. 938, 940 (1996). And see, Maryland v. Dyson, 527 U.S. 465 (1999).

In New Jersey, in accordance with what this Court has characterized as the "federal template," the mobility of the automobile and the existence of probable cause is recognized as a result of the Carroll-Chambers line of cases. However, on the probable cause portion of the prong, New Jersey emphasizes that the "circumstances" that give rise to probable cause must arise spontaneously and unforeseeably. Witt, 223 N.J. 409, 427–28. Quoting State v. Alston at 233, this Court wrote,

> In *Alston,* we expressed approval of the federal template for the automobile-exception "recognized in *Carroll* and *Chambers.*" *Id.* at 233, 440 *A.*2d 1311; *see also* Paul Stern, *Revamping Search–and–Seizure Jurisprudence Along the Garden State Parkway,* 41 *Rutgers L.J.* 657, 669 (2010) ("Historically, the New Jersey Supreme Court aligned its analysis [of the automobile exception] with that of the United States Supreme Court."). We did not turn to Article I, Paragraph 7 of our State Constitution as a separate source of rights, but instead to *Chambers* as the controlling law. *Alston, supra,* 88 *N.J.* at 231–35, 440 *A.*2d 1311. In doing so, we stated that "[a]ccording to *Chambers,* the exigent circumstances that justify the invocation of the automobile exception are the *unforeseeability and spontaneity* (emphasis in original) of the circumstances giving rise to probable

> cause, and the inherent mobility of the automobile stopped on the highway. *Id.* at 233.
>
> [State v. Witt, 223 N.J. 409, 427–28, 126 A.3d 850, 860–61 (2015)]

Explaining the origin of the spontaneity and unforeseeability test, this Court wrote,

> The "unforeseeability and spontaneity" requirement in *Alston* came from the United States Supreme Court's language in *Chambers, supra,* which observed that "the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable." 399 *U.S.* at 50–51, 90 *S.Ct.* at 1981, 26 *L.Ed.*2d at 428; *see Alston, supra,* 88 *N.J.* at 234, 440 *A.*2d 1311 (crediting *Chambers* for this Court's automobile-exception standard).
>
> [State v. Witt, 223 N.J. 409, 427–28, 126 A.3d 850, 860–61 (2015) (emphasis added)]

It is obvious that the Witt requirements, in addition to the requirements of the Carroll-Chambers line of cases revolve around the mobility of an automobile and the practicability of obtaining a warrant. The Alston Court wrote, **"[t]he 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." Alston at 231. (emphasis added) Accord, State v. Ercolano, 79 N.J. 25, 45–46, (1979) ("[R]eading Coolidge, Carroll and Chambers together, **the key** to the exception from the warrant requirement lies

in the mobility of the vehicle and the impracticality of previously obtaining a warrant under the circumstances then obtaining.") (emphasis added)

Hence, in State v. Rodriguez, 459 N.J. Super 13, 22 (App. Div. 2019, it was said that warrantless on-scene searches of motor vehicles are permitted where "(1) the police have probable cause to believe the vehicle contains evidence of a criminal offense; and (2) the circumstances giving rise to probable cause are unforeseeable and spontaneous." Additionally, our courts require that the search must be conducted at the scene. Witt 223 N.J. at 450.

B. POLICE DID NOT HAVE PROBABLE CAUSE IN ADVANCE OF ENCOUNTERING DEFENDANT AND THE CIRCUMSTANCES WHICH GAVE RISE TO PROBABLE CAUSE AROSE SPONTANEOUSLY AND UNFORESEEABLY, FURTHER, THERE WAS AN ADDITIONAL INDEPENDENT EXIGENCY IN THIS CASE

The spontaneous and unforeseeable test of Witt is directed against the evil of police "sitting" on probable cause and conducting a warrantless search later. Witt demands that when the probable cause over the vehicle is not connected to or threatened by the vehicle's inherent mobility, police must secure a warrant to find and search the car. In other words, police may **"not sit on probable cause and later conduct a warrantless search,** for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant." Witt, at 432. (emphasis added) Thus,

Witt teaches that the unforeseeable and spontaneous requirement "ensure[s] that police officers **who possess probable cause well in advance of an automobile search [seek] a warrant.**" Id. at 431. (emphasis added)

In Smart, supra, 473 N.J. Super 87, the Appellate Division found that the police "could not have secured a warrant before the car was stopped," and that "a warrant would not have issued at any point during the surveillance [of Defendant's car]." The Court wrote that this was "not a case where police 'sat' on probable cause and could have obtained a warrant before stopping the car," Id. at 97. The Court also recognized that probable cause did not arise until "the dog positively alerted for the presence of narcotics in the car." Ibid.

These findings – which are unassailable – should have gone far to disposing of this case. Nevertheless, the Appellate Division, wrote,

> Although we agree police could not have secured a warrant before the car was stopped and, in that sense, did not "sit" on probable cause, we disagree with the State's contention that probable cause under these circumstances was unforeseeable and spontaneous within the meaning of Witt. Notwithstanding the officers' reasonable suspicion that defendant was engaged in illegal activity involving drugs, leading to this investigatory stop, probable cause did not arise until the canine alerted for the presence of narcotics. We therefore conclude those circumstances were not unforeseeable under Witt and, as such, the automobile exception to the warrant requirement did not apply to this warrantless search.
>
> [Smart, 473 N.J. Super. at 91]

While offering the conclusion that the circumstances did not fulfill the Witt test, the Court offered no further guidance about its disposition of this case. Examining Witt's discussion of cases throughout the opinion, and in particular at 428-430 and 432-433 there is ample guidance offered concerning the contours of the spontaneous and unforeseeable test, which indicates the Smart Court erred in its conclusion.

In the following cases, either the courts found the circumstances giving rise to probable cause arose in a spontaneous and unforeseeable way, or the Court in Witt indicated under the Alston test they would have been found to have done so. The common thread of these cases is that police did not have probable cause prior to encountering the defendants and they could not have secured a warrant.

In Chambers v. Maroney, 399 U.S. 42 (1970) a service station attendant was robbed at gun point and officers located and stopped a car described to them in less than an hour. The number of occupants and the clothing they were wearing matched the description given to them. Id. at 44, 46-48, 50-51. The Court concluded there was ample cause to stop the car and probable cause to arrest the occupants and stated, "obviously there was probable cause to search the car for guns and stolen money." Id. at 47-48. This was a quickly

developing situation the circumstances of which could not have been known to police beforehand.

Witt itself involved a stop of the defendant's vehicle because the high beams were on inappropriately. The defendant appeared intoxicated and failed sobriety tests. In searching the car for intoxicants, police found a gun. The trial court found the officer had a right to stop defendant's car based on an "unexpected" occurrence and had probable cause to search for an open container of alcohol. However, under the Pena-Flores[4] standard then prevailing, the Court found police did not have "sufficient exigent circumstances" to conduct a warrantless search. 223 N.J. 409 at 415-416. Although the Court upheld the suppression of evidence under the Pena-Flores standard the Court acknowledged that "a different outcome might have been reached under the Alston standard." Witt at 450.

In State v. Alston, 88 N.J. 211 (1981), officers stopped a speeding car and while the driver was retrieving credentials, they observed shotgun shells in the open glove compartment. They noticed a bag protruding from the passenger seat that appeared to contain a gun and upon opening it, they discovered a shotgun. The rest of the vehicle was searched and two more guns

[4] 198 N.J. 6 (2009)

were retrieved. Again, none of the developing circumstances could have been foreseen by police.

In State v. Martin 87 N.J. 561, 563-564 (1981) this Court upheld a search of a parked and unoccupied car that fit the description of a car used in an armed robbery. When officers looked through the windows they saw evidence related to the crime. The car was towed to headquarters where it was searched without a warrant. This Court, citing to Chambers, held the circumstances unforeseeable and spontaneous. Interestingly, although not necessary to justify the search under the automobile exception, this Court recognized that present in that case was an "independent exigency," that is, the suspects in the armed robbery were still at large warranting the immediate search of the automobile. Witt at 428-429.

Significantly, as observed in Cardwell v. Lewis, 417 U.S. 583, 589–90, 94 S. Ct. 2464, 2469, 41 L. Ed. 2d 325 (1974) the concern in the Carroll-Chambers line of decisions has been the exigent circumstances that exist in connection with movable vehicles. "(T)he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. This is **strikingly true where the automobile's owner is alerted to police intentions and, as a consequence, the motivation to**

remove evidence from official grasp is heightened." Cardwell at 417 U.S. 589-590, 94 S.Ct. at 2469, 41 L.Ed. 325 quoting Chambers 399 U.S., at 50—51, 90 S.Ct., at 1981. (emphasis added)

Although this Court in Witt dispensed with a separate exigent circumstances requirement, here, it is also true that once officers asked Defendant for consent to search, and certainly when officers called for the canine, Defendant, knowing he had just been involved in a drug transaction and that he was in possession of drugs and multiple weapons, had a heightened motivation to remove the evidence from their grasp. This reflects an additional "independent exigency" as in the Martin case above. This independent exigency becomes even more pronounced because police were aware of Defendant's criminal record which included multiple felony offenses including weapons offenses, as well as the fact that drug distribution cases present the distinct possibility of violence. The Smart Court did not account for this additional exigency, which was error.

In State v. Colvin, 123 N.J. 428, 429 (1991) this Court upheld the warrantless search of a drug suspect's parked car. In that case, the defendant had been arrested for his role in a drug transaction, and shortly afterwards an informant advised police that there were drugs hidden in the defendant's car, and that his confederates were alerted to his arrest and would attempt to

remove the drugs. Police conducted a warrantless search and recovered cocaine.

The police in Colvin did not sit on probable cause, and the exigencies present included the fact that the defendant's confederates would return to the car, the car contained contraband, police would need a special detail to guard the car, and any element of surprise had been lost. Colvin, 123 N.J. 434-435, Witt at 429-430.[5]

As in Martin and per the observation made by the Cardwell case, the defendant's confederates in Colvin had been alerted to police intentions and therefore had a heightened motivation to remove the evidence under that additional exigency. Again, here, the armed and dangerous defendant in this case was fully aware of police intentions and had every reason to keep the drugs and weapons in his car from police – indeed he armed himself for just such a possibility.

State v. Cook, 163 N.J. 657, 663 (2000) was a police surveillance case. A police officer observed the defendant participate in drug transactions and on one occasion place suspected drugs in a Ford Escort. The defendant and an accomplice drove off but were stopped by other officers serving as a perimeter

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[5] Interestingly, Witt points out that Colvin did not rely on the Chambers line of cases, but rather relied on Coolidge v. New Hampshire, 403 U.S.443, 462 (1971), which involved an unconstitutional search without a warrant of a parked car and which will be discussed below.

team. The defendant was arrested on an unrelated warrant and the accomplice detained, and officers took the keys to the car and conducted an on-scene search of the car which yielded drugs. This Court upheld the warrantless search of the defendant's automobile on exigency grounds. Yet, as Witt points out, "a warrantless search would have been permissible under the Alston standard because the probable cause arose from unforeseeable and spontaneous circumstances." Witt, 223 N.J. 433.

In contrast to the cases discussed above, the developing circumstances giving rise to probable cause in the following cases and examples were said to have not arisen in a spontaneous and unforeseeable way. The common thread in these cases is that police had probable cause prior to encountering the defendants, and could have secured a warrant.

Witt sets forth an example of circumstances giving rise to probable cause that would not be considered to be spontaneous and unforeseeable. Indeed, in the Court's example, the officer would have had probable cause in advance of encountering the defendant.

> *Alston* 's requirement of "unforeseeability and spontaneity," *id.* at 233, 440 *A.*2d 1311, does not place an undue burden on law enforcement. For example, if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so. In this way, we eliminate the concern expressed in *Cooke, supra*—the fear that "a car parked in the home

> driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs." 163 *N.J.* at 667–68, 751 *A.*2d 92. In the case of the parked car, if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies.

[State v. Witt, 223 N.J. at 447–48]

In State v. Ercolano, 79 N.J. 25 (1979) this Court suppressed evidence seized from a parked car because police had probable cause in advance and therefore the Court concluded that police could have secured a warrant long before the search of the car. In concluding the circumstances were not unforeseeable this Court wrote,

> Second, the obtaining of a search warrant for this vehicle (assuming probable cause) was readily practicable. . . .; **Indeed, the police knew for more than a week** that defendant had been visiting Verlingo using the same automobile, and they certainly had probable cause to believe that he was implicated in the conspiracy. Thus, if there was also probable cause to believe that objects connected with the conspiracy were contained in that car, the police had that information all during the same extended period. Paraphrasing Chambers, supra, **"the circumstances" giving rise to probable cause to search this car were Not unforeseeable.** 399 U.S. at 50-51, 90 S.Ct. 1975.
>
> [State v. Ercolano, 79 N.J. at 46–47, (emphasis added)]

This Court in Alston revisited Ercolano, and made clear that police had probable cause to search the defendant's vehicle well before they encountered it. The Alston Court wrote, "our decision there expressly states, paraphrasing Chambers, that 'the **circumstances giving rise to probable cause to search this car were not unforeseeable**.' 79 N.J. at 47, 397 A.2d 1062." [State v. Alston, supra, 88 N.J. at 234–35, 440 A.2d at 1322–23.]

In Coolidge v. New Hampshire supra, 403 U.S. 443, following the arrest of the defendant, hours later police removed his car from his driveway and impounded it where a warrantless search ensued. In rejecting the vehicle warrant exception, the Court noted "by no stretch of the legal imagination" can this be made into a case where it is not practicable to secure a warrant. The Court emphasized that the Carroll –Chambers line of cases involved motor vehicles stopped on a highway and thus the exigent circumstances due to the mobility of the vehicles made it impractical to secure a warrant in those cases. Id. at 460.

Obviously the most important factor in these cases is whether police had probable cause prior to encountering the defendant and could have secured a warrant. If police possess probable cause in advance of encountering a defendant and it is practicable to obtain a warrant, then probable cause cannot be said to have arisen in a spontaneous and unforeseeable way.

Here, the circumstances arose in an unforeseeable and spontaneous way. No circumstance in this case was foreseeable or could have been predicted by police. Indeed, they came upon Defendant by chance – as the courts below acknowledged – and each and every circumstance that followed arose spontaneously and unforeseeably – including the canine's alert. Additionally, there was an independent exigency present in Defendant's awareness of police intentions such that he had reason to remove the evidence.

Indeed, the motion judge acknowledged that officers did not have probable cause in advance of encountering Defendant, that instead they were conducting general narcotics surveillance in an area known for narcotics activity. (1T3-15 to 3-23). The Judge stated the police "did not set out that day with a specific suspect in mind. . . ." The Appellate Division agreed. "In the present matter it is undisputed that police lacked probable cause to search the GMC prior to encountering defendant at the condominium complex. Nor did probable cause arise during the one-hour and seventeen-minute surveillance. Because police only had a reasonable suspicion, not probable cause to believe the GMC contained criminal contraband, a warrant would not have issued at any point during the surveillance. Accordingly, this is not a case where police "sat" on probable cause and could have obtained a warrant before stopping the car." Smart, 473 N.J. Super. at 96-97.

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

> However, we are not convinced the canine's alert for the presence of narcotics – which gave rise to probable cause in this case – falls within the ambit of circumstances the Witt Court contemplated as "unforeseeable and spontaneous" under the automobile exception. When the officers' sensory perceptions failed to confirm their suspicions of drug activity following the stop of the GMC, police summoned the K-9 unit for the sole purpose of developing probable cause. That investigative tool, although validly employed under Dunbar and Nelson, nonetheless fails under Witt, **because the use of the K-9 unit** under the circumstances presented here **did not result in the spontaneous and unforeseeable development of probable cause; it was simply another step in the search for drugs that caused the stop in the first place.** Thus when probable cause sufficient to support a search of the vehicle developed, police at that juncture were required to seek a warrant. We conclude their failure to do so rendered the ensuing search fatally defective.
>
> [473 N.J. Super. at 101] (emphasis supplied)

Once the Appellate Division found the Terry seizure of the automobile to be reasonable, and concluded that the canine was appropriately called to the

scene, it was error for the Court to conclude that the circumstances giving rise to probable cause were not unforeseeable and spontaneous.

> The Fourth Amendment speaks of 'unreasonable searches and seizures.' **If the 'seizure' is reasonable, it would be remarkable to find that 'search' of that which has been seized is unreasonable. It would be ritualistic at best to require an application for a warrant to search for the unknown something which a search of the seized car may or may not reveal.** Nothing in the phrasing or history of the Fourth Amendment requires that needless restriction upon law enforcement. And, we add, the true issue is not the meaning of the Fourth, but whether the untarnished truth should be suppressed if the Fourth was not satisfied, and this at the expense of the first right of the individual to be protected from criminal attack. We can see no gain here which could compensate for the hurt which suppression of the truth must inflict upon the liberty of the individual. State v. Gerardo, 53 N.J. 261, 250 A.2d 130 (1969).
>
> [State v. Carter, 54 N.J. 436, 449–50, 255 A.2d 746, 753–54 (1969) (emphasis added)

C. THE SMART COURT ERRED IN ITS DETERMINATION THAT THE CANINE SNIFF "CHANGED THE EQUATION" BECAUSE THIS WAS AN INVESTIGATIVE DETENTION FOR DRUGS AND NOT A ROUTINE TRAFFIC STOP

Stopping a car on a roadway in an investigative detention as well as a traffic stop case requires a reasonable and articulable suspicion that the motorist or automobile is subject to seizure for violation of the law. Probable cause is not required. United States v. Brignoni-Ponce, 422 U.S. 873, 878, 880,

95 S.Ct. 2574, 2578, 2579, 45 L.Ed.2d 607 (1975). Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Stopping a car for a traffic infraction is qualitatively different than stopping a car because of a well-grounded suspicion that criminal activity – sometimes dangerous criminal activity - is afoot. Unlike in traffic stop cases, in deciding whether an investigative detention is temporally reasonable courts must "consider the law enforcement purposes to be served by the stop" as well as the time reasonably needed to effectuate those purposes, "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly," and whether police were "acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." United States v. Sharpe, 470 U.S. 675, 686, (1985)

Hence, in investigative stops, the law more fully accommodates public and police interests and the investigative tools necessary to detect crime under the circumstances. In traffic cases, since no criminal activity is suspected, there is no independent justification for a dog sniff to be used *as an investigative tool* to uncover a crime. The car has been "seized" briefly to permit a summons to be issued and the dog sniff, while permissible, is tied to the brief seizure of the car. Hence the traffic cases are temporally limited as

well as limited by the type of additional investigation that can be done. In the context of traffic infractions, law enforcement and public interests are relatively minimal.

In investigative detention cases, the dog is permitted to be used as an *investigative tool* because there is a reasonable basis to believe that criminal activity is afoot. In these cases, police are not temporally limited to the extent they are limited in traffic stops, and they are not limited in their investigative methods so long as those methods are reasonable. It is obvious that the dog sniff here, found to be constitutionally sound by the Appellate Division, was the most efficient and expeditious way for police to confirm or dispel their suspicions. See State v. Coles, 218 N.J. 322, 344 (2014).

The U.S. Supreme Court has stated, with regard to investigatory detentions, "we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." United States v. Sharpe, supra, 470 U.S. at 685. Additionally, that Court has stated, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officers' suspicion in a short period of time." Florida v. Royer 460 U.S. 491, 502 (1983). The ability of authorities "**to graduate their responses to the demands of any particular situation**" must be considered as well.

United States v. Sharpe, 470 U.S. 675, 682–86, 105 S. Ct. 1568, 1573–75, 84 L. Ed. 2d 605 (1985)

The accommodation in the law in the context of investigatory detentions for graduated police responses and no hard-and-fast time limit on investigatory stops is an acknowledgement of the fluid nature of these detentions and presupposes circumstances that develop into probable cause that are often unforeseen and spontaneously arising. Such is the case with the dog sniff here.

In Smart, the Appellate Division concluded that because the result of the canine's alert "changed the equation" in this case, police were required to obtain a warrant merely because it was "another step" in the search for drugs. No case law prohibits another step to be taken during an investigative detention. Rather, the law accommodates and expects that police will take investigatory steps to confirm or deny their suspicions. Additionally, the canine sniff is not a search and the positive alert alone could not have changed the equation if everything else was constitutional.

> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a

> "search" within the meaning of the Fourth Amendment.
>
> [United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644–45, 77 L. Ed. 2d 110 (1983)]

Hence it was improper and unduly technical for the Smart Court to conclude there was a constitutional violation as a result of police failure to seek a warrant solely because of the canine's positive alert during this roadside investigative detention where all the circumstances of the case giving rise to probable cause were unforeseen and spontaneous.

D. THE APPELLATE DIVISION ERRED IN REASONING THAT "PROBABLE CAUSE" HAD TO ARISE IN AN UNFORESEEN AND A SPONTANEOUS MANNER RATHER THAN THE "CIRCUMSTANCES" GIVING RISE TO PROBABLE CAUSE

The Appellate Division apparently believed that the *legal conclusion* that probable cause existed had to arise immediately via police sensory perceptions rather than the circumstances of the case having to have arisen in a spontaneous and unforeseen manner. Indeed, the Court reasoned that "had police observed drugs in plain view upon effecting the investigatory stop in this case, the automobile exception readopted by the Court in Witt likely would have been satisfied." Smart, 473 N.J. Super at 98. Similarly the Court observed that here, "...the officers' suspicions were not confirmed by their observations after the stop was conducted." Id. at 100. Yet, Witt makes clear

that the "circumstances" of the case had to have arisen spontaneously and unforeseeably – that is, police could not have foreseen or predicted the circumstances as they developed throughout the encounter. See Witt at 447-448. Further, application of the automobile exception is not dependent on plain view observations. As stated in California v. Carney,

> [W]e held in *Cardwell v. Lewis, supra,* 417 U.S., at 590, 94 S.Ct., at 2469, that, because the passenger compartment of a standard automobile is relatively open to plain view, there are lesser expectations of privacy. **But even when enclosed "repository" areas have been involved, we have concluded that the lesser expectations of privacy warrant application of the exception.** We have applied the exception in the context of a locked car trunk, *Cady v. Dombrowski, supra,* a sealed package in a car trunk, *Ross, supra,* a closed compartment under the dashboard, *Chambers *392 v. Maroney, supra,* the interior of a vehicle's upholstery, *Carroll, supra,* or sealed packages inside a covered pickup truck, *United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985).
> These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways. *Cady v. Dombrowski, supra,* 413 U.S., at 440-441, 93 S.Ct., at 2527-2528.
>
> [California v. Carney, 471 U.S. 386, 391–92, 105 S. Ct. 2066, 2069, 85 L. Ed. 2d 406 (1985) (emphasis added)]

Thus, it is the inherent movability of the automobile which is the issue and items may be seized whether in plain view or not. The Appellate Division's conclusion otherwise was error.

E. THE SMART DECISION RUNS CONTRARY TO THE POLICIES EXPRESSED IN WITT

The Smart Court found every action of the police in this case to be reasonable except for the failure to secure a warrant at the conclusion of the police investigation. This goes against the policy expressed in Witt of preventing dangerous roadside delays and does not give any added benefit to the citizenry. The Court's rule serves to undercut the automobile exception to the warrant requirement – and in this particular case, the danger present was not only from the roadside encounter, but from the armed and dangerous defendant who had a motive to flee and who armed himself perhaps for that purpose. This additional danger to police and the public would be extended unnecessarily during the time police sought a warrant if they were required to do so.

As stated by this Court in Alston, "[T]here is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." Alston supra at 234-235, quoting Chambers, supra, 399 U.S. at 52. See also Witt, supra, 423-424. (The most "compelling" rationale for Fourth Amendment purposes is that "an

immediate search of a vehicle may represent a lesser intrusion than impounding the vehicle and detaining its occupants while the police secure a warrant.")

In our view, the dog sniff was the most reasonable and expeditious way for police to confirm or dispel their suspicions. Requiring police to obtain a warrant after the dog alert promotes form over substance and undercuts the rule and policy expressed in Witt in its attempt to constrain the time-consuming and dangerous roadside encounters when police are required to get a warrant roadside.

> The current approach to roadside searches premised on probable cause—"get a warrant"—places significant burdens on law enforcement. On the other side of the ledger, we do not perceive any real benefit to our citizenry by the warrant requirement in such cases—no discernible advancement of their liberty or privacy interests.

[State v. Witt, 223 N.J. at 446–47, 126 A.3d 850, 872]

CONCLUSION

The Smart decision has the potential to negatively impact the settled law of this Court and undercut – and extinguish entirely in certain cases - the automobile exception to the warrant requirement by requiring that a warrant be obtained following a roadside completion of a police investigation where the circumstances giving rise to probable cause arose unforeseeably and

spontaneously – and in a situation that was fraught with danger. Hence this Court should reverse the decision of the Appellate Division in this case.

Respectfully submitted,

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

Submitted: October 11, 2022

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY

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

COUNT ONE

POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE-THIRD DEGREE

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

COUNT TWO

POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE-THIRD DEGREE

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

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

COUNT THREE

POSSESSION WITH INTENT TO DISTRIBUTE A CDS- THIRD DEGREE

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

COUNT FOUR

UNLAWFUL POSSESSION OF A FIREARM-SECOND DEGREE

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

COUNT FIVE

POSSESSION OF A WEAPON FOR AN UNLAWFUL PURPOSE-SECOND DEGREE

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

COUNT SIX

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

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

COUNT SEVEN

CERTAIN PERSON NOT TO POSSESS FIREARM-SECOND DEGREE

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

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

BRADLEY D. BILLHIMER
OCEAN COUNTY PROSECUTOR

DATED: 10-21-2021

BY: _____
JULIE E. PETERSON
ASSISTANT PROSECUTOR

ENDORSED: _____
Foreperson

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GJ Docket # : 21002215

Superior Court of New Jersey
Law Division, Ocean County

THE STATE

VS.

KYLE A. SMART

INDICTMENT NO.
21-10-1417

INDICTMENT FOR

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

BRADLEY D. BILLHIMER
Ocean County Prosecutor

A TRUE BILL

Foreperson

ELIGIBLE DEFENDANT UNDER BAIL REFORM

Bail **DETAINED**

Condition Of Bail

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PREPARED BY THE COURT

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

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

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

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

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

Honorable Rochelle Gizinski, J.S.C.

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-000416-21T2
MOTION NO. M-003853-21
BEFORE PART E
JUDGE(S): ALLISON E. ACCURSO
LISA ROSE

STATE OF NEW JERSEY
V.
KYLE A. SMART

MOTION FILED: 03/17/2022 BY: STATE OF NEW JERSEY

ANSWER(S) FILED: 03/28/2022 BY: KYLE A. SMART

SUBMITTED TO COURT: April 04, 2022

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 5th day of April, 2022, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION FOR LEAVE TO APPEAL **GRANTED AND OTHER**

SUPPLEMENTAL: The motion for leave to appeal is granted. The State shall advise whether it wishes to rely on its motion brief as its merits brief by April 8, 2022. If not, the following briefing schedule shall apply: Appellant's merits brief is due by April 22, 2022; respondent's brief shall be served and filed by May 6, 2022; and a reply, if any, is due by May 10, 2022. All briefing dates in this appeal are peremptory. The appeal is to be calendared before Part E on May 23, 2022.

FOR THE COURT:

Allison E. Accurso

ALLISON E. ACCURSO, J.A.D.

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

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ORDER ON MOTION

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

STATE OF NEW JERSEY
V
KYLE A. SMART

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

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

SUBMITTED TO COURT: July 11, 2022

ORDER

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

MOTION BY APPELLANT

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

FOR THE COURT:

LISA ROSE, J.A.D.

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

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BRADLEY D. BILLHIMER
Ocean County Prosecutor

JOSEPH F. MITCHELL
Chief of Detectives

MICHAEL T. NOLAN, JR.
First Assistant Prosecutor

ROBERT J. ARMSTRONG
Deputy First Assistant Prosecutor

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

January 21, 2022

Via E-Courts

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

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

Dear Judge Gizinski:

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

Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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BRADLEY D. BILLHIMER
Ocean County Prosecutor

ANTHONY U. CARRINGTON
Chief of Detectives

MICHAEL T. NOLAN, JR.
First Assistant Prosecutor

ROBERT J. ARMSTRONG
Deputy First Assistant Prosecutor

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February 1, 2022

Via E-Courts

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

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

Dear Judge Gizinski:

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

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

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

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

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

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

FILED, Clerk of the Supreme Court, 14 Oct 2022, **087315**, **AMENDED**

FILED, Clerk of the Supreme Court, 13 Sep 2022, **087315**

SUPREME COURT OF NEW JERSEY
M-16 September Term 2022
087315

State of New Jersey,

Plaintiff-Movant,

v. ORDER

Kyle A. Smart,

Defendant-Respondent.

It is ORDERED that the motion for leave to appeal is granted; and it is further

ORDERED that further proceedings on appeal shall be conducted in accordance with the following expedited, peremptory schedule:

- The State shall serve and file a supplemental appellant's brief on or before October 4, 2022, and defendant shall serve and file a supplemental respondent's brief on or before October 25, 2022.
- Should any entity wish to appear as amicus curiae, such entity shall serve and file its motion for leave to appear, and its proposed amicus curiae brief, on or before October 31, 2022. The parties may serve and file answers to any motions for leave to appear, together with

responses to the proposed amicus curiae brief on the merits, on or before November 4, 2022.

- No further submissions shall be accepted without leave of Court.
- The parties, and any amicus curiae entities who are granted leave to participate, shall appear for oral argument at a date and time to be scheduled by the Clerk of the Court.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 7th day of September, 2022.

Heather J. Baker

CLERK OF THE SUPREME COURT

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SUPREME COURT OF NEW JERSEY
M-17 September Term 2022
087315

State of New Jersey,

Plaintiff-Movant,

v. ORDER

Kyle A. Smart,

Defendant-Respondent.

It is ORDERED that the motion for stay is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 7th day of September, 2022.

Heather J Baker
CLERK OF THE SUPREME COURT

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