SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION DOCKET
NO. A-684-23

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL ALLEN,

Defendant-Appellant.

CRIMINAL ACTION

On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Camden County

Camden County Indictment No. 21-04-00823-I

Sat Below:

Hon. Thomas J. Shusted, Jr., J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT MICHAEL ALLEN

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THE DEFENDANT IS CONFINED

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[1] This brief, along with all of the other briefs related to the suppression motion, are included in the appendix pursuant to R. 2:6-1(a)(2) as they were referenced and relied on below (including the exhibits annexed to these briefs). As to the initial suppression brief, the trial court stated: "I read the briefs three times" (1T105-16); see also 1T5-22 to 6-5. As to the reconsideration motion/briefs, the trial court stated: "I have read the briefs and reviewed this matter." (2T19-4 to 5).

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PRELIMINARY STATEMENT

It would be a terrible thing in this country if law enforcement were permitted to bypass the warrant requirements along with the constitutional protections against unreasonable searches and seizures; this is exactly what occurred here. The trial court erroneously accepted the State's position that an individual who enters and leaves a premises which is the subject of a soon-to-be-executed search warrant who has no involvement with any offense in the premises nor seen committing any offense while walking can be detained without a warrant and then subjected to a search and seizure.

Here, the judge issuing the warrant to search the premises at 1405 Park Boulevard, Camden, did not issue either a search warrant for any of the individuals on the premises, nor did he issue an arrest warrant for any individual. The trial court, in accepting the State's arguments, violated the constitutional requirements related to arrest and search warrants, as none was issued in this case to justify the detaining and arrest of defendant, with the subsequent seizure of the handgun in defendant's possession.

The Search Warrant Order in question provided:

1. **Things to Be Searched/Seized.**

(X) Premises described below,

( ) Vehicle(s) described below,

( ) Person(s) described below,

( ) Other items described below. (Ca41).

Only the "Premises" at 1405 Park Boulevard, Camden, NJ 08103 were to be searched.

The State primarily argued (erroneously) that the officers acted reasonably within the lawful scope of the search warrant that had been obtained with sufficient probable cause, the State also relied upon the investigative stop ("reasonable and particularized suspicion" Terry v. Ohio frisk standard) in the event the trial court did not find that the officers' actions fell within the scope of the search warrant. The trial court erroneously accepted the State's argument that the "reasonable and particularized suspicion" standard could be utilized to justify the stop as opposed to the more stringent "probable cause" standard as the stop was predicated upon the search warrant that had been issued.

Defendant submits that this case was not an "investigatory stop" case, and since there was neither an arrest warrant nor a search warrant issued as to defendant, the stop and subsequent pat-down was unconstitutional, mandating suppression of the gun.

PROCEDURAL HISTORY

On April 7, 2021, defendant-appellant Michael Allen was charged in Camden County Indictment No. 0823-04-21 with Murder - First Degree, contrary to N.J.S.A. 2C:11-3a(1)(2) (Count 1), and Possession of a Weapon for Unlawful Purpose - Second Degree), contrary to N.J.S.A. 2C:39-4 (Count 2), Unlawful Possession of Weapons - First Degree, contrary to N.J.S.A. 2C:39-5(1) (Count 3), and Resisting Arrest - Fourth Degree, contrary to N.J.S.A. 2C:29-2a(2) (Count 4). (Da1-5).[2]

Defendant entered a "not guilty" plea and on June 4, 2021 moved to suppress evidence (the firearm and other items seized from defendant's person) as the search was conducted without a search warrant and without probable cause. (Ca1-2).[3]

The State initially (in its opening suppression brief dated July 30, 2021 and filed July 31, 2021; Ca3-22) argued against an evidentiary hearing and the State requested that a hearing be conducted pursuant to Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 274, 57 L.Ed.2d 7 (1978) ("Defendant is not entitled to an evidentiary hearing regarding the evidence seized pursuant to the presumptively valid search warrant, as defendant has not shown that the information relied upon to issue the

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[2] "Da" denotes defendant's appendix.

[3] "Ca" denotes Confidential Appendix separately filed pursuant to R. 1:38-3(b)(1) and R. 3:5-6(c).

search warrant was untrustworthy or false;" Ca15). Following the filing of defendant's brief dated September 10, 2021 (filed on September 13, 2021; Ca86-104), at oral argument on August 16, 2022, the State reversed course and explained "it is the State's intent to proceed on a Franks argument and give argument as to that." (1T7-4 to 6). As defense counsel explained, "the threshold question is whether or not the search warrant authorized the search of any persons at the premises of 1405 Park Boulevard" (1T7-17 to 20).[4] Following oral argument, the Honorable Thomas J. Shusted, J.S.C., denied the motion to suppress based on a warrantless search. (1T90-6 to 106-6; Order at Da6).

On September 1, 2022, defendant moved for reconsideration. (Ca135-136). Following briefing by defendant (Ca137-139) and the State (Ca140-144) and oral argument on February 3, 2023 (again before Judge Shusted), the reconsideration motion was denied. (2T19-3 to 22-11; Order at Da7).

On July 10, 2023, defendant was indicted in an Amended Indictment and charged with Aggravated Manslaughter - First Degree, contrary to N.J.S.A. 2C:11-4a(1) (Count 1), Possession of a Weapon for Unlawful Purpose - Second Degree,

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[4] "1T" denotes suppression motion dated August 16, 2022.
"2T" denotes reconsideration motion dated February 3, 2023.
"3T" denotes plea transcript dated July 10, 2023.
"4T" denotes sentencing transcript dated September 22, 2023.

contrary to N.J.S.A. 2C:39-4a(1) (Count 2), Unlawful Possession of Weapons - First Degree, contrary to N.J.S.A. 2C:39-5b(1) (Count 3), and Resisting Arrest - Fourth Degree, contrary to N.J.S.A. 2C:29-2a(2) (Count 4). (Da6-10).

On that same day (July 10, 2023), defendant pleaded guilty to Count 1 as amended (Aggravated Manslaughter - First Degree) with a recommended 17 year NERA sentence. (3T3-14 to 14-22).

On September 22, 2023, defendant was sentenced to seventeen (17) years "in New Jersey State Prison subject to the No Early Release Act," with 5 years parole supervision after release. Fines and penalties totaling $205.00 were imposed ($100 VCCB, $75 SNSF, and $30 LEOPA). Jail credit of 1,089 days was received. Counts Two through Four of the Amended Indictment were dismissed. (4T13-6 to 25; Judgment of Conviction at Da13-15).

On October 12, 2023, an Amendment to the JOC was issued reflecting that defendant "is committed to the custody of the Executive Director of the Juvenile Justice Commission (JJC) for a term of 17 years, 85% NERA." (Da16-19).[5]

A timely Notice of Appeal was filed. (Da24).

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[5] This Amended JOC was filed at 3:13:53 PM on October 12, 2023; a second Amended JOC was filed at 3:34:46 PM (at Da20-23).

SUPRRESSION EVIDENTIARY HEARING STATEMENT OF FACTS

Camden County Sheriff's Officer Tyler Pickard testified that he is assigned to a "federal [narcotics] task force" that does "things such as search warrants, narcotics investigation . . . throughout the Camden County area, mainly based [in] Camden city." (1T11-4 to 12). Beginning in January 2022, Pickard was also on the Camden County Sheriff's Emergency Response Team (SERT): "we execute search warrants. We make the residences, whatever building may be searched, safe for the detectives to move in and conduct their investigation." (1T13-22 to 14-1).

On September 28, 2020, Pickard was "working as a task force officer with the suburban narcotics task force with the Camden County Prosecutor's Office" (1T16-20to25). At 1:45p.m.[6] he was "told to do surveillance on the home [1405 Park Boulevard, Camden] and pretty much anything we saw coming or going from the home." (1T17-15 to 18-3).[7] The investigation involved "a homicide warrant."

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[6] In Pickard's original report (Ca58), he erroneously wrote the time that they arrived at the scene; as he testified, "my initial time that I wrote that we got out there in the original report was 1445 hours. And as my testimony today says, we got out there at about 1335 hours, 1:45." (1T83-24 to 84-2). Pickard filed a Supplemental Report correcting the time. (1T84-3 to 11).

[7] Pickard identified S-4, S-5, S-6 and S-7 as photographs (admitted into evidence) depicting the target residence. (1T33-9 to 34-16).

(1T21-13 to 19). The premises was the location that defendant and others had gone to after a homicide had been committed in which defendant was purportedly the shooter. (1T68-12 to 25).

Pickard identified S-1 as "a picture of Jawan Coley," S-2 as a picture of Lionel Perry," and S-3 as "a picture of Michael Allen." (1T18-15 to 25) (admitted into evidence at 1T19-4 to 11). Pickard testified that "the third photo came through and it said that the suspected shooter in the homicide was the third photo." (1T20-14 to 18). Pickard testified that he recognized Allen as "[h]e was involved in a case with some of my partners previously. I myself had not dealt with him, but I was aware of who he was because of the magnitude of that case . . . Two of my partner had been fired at one a previous case involving Mr. Allen and a firearm." (1T20-19 to 10). Pickard testified that defendant had been holding a firearm. (1T21-11 to 12).

Pickard testified that "less than five minutes after we parked out there we were told that the warrant was approved." (1T22-3 to 5). His vehicle was parked across the street from the target residence "facing away from it." (1T23-2 to 15). Pickard was dressed in black jean, a tee shirt, a black, snap-back baseball cap with no police identifiers. (1T22-19 to 23-1). Pickard was in the vehicle with Camden County Prosecutor's Detective Matthew DiDomenico. (1T49-9 to 20). There were other officer conducting surveillance "two, three blocks" away. (1T22-15 to 18).

When shown the "Search Warrant Order," Pickard testified that it did not permit him to search any persons who are present at 1405 Park Boulevard. (1T52-6 to 10). He admitted that the warrant only permitted a search of only the "premises described below" (1T52-11 to 16). This is on page 1 of the "Search Warrant Order" at Ca41. Pickard acknowledged that page 2 of the Search Warrant Order (Ca42) also has "Premises described below" checked off under "2. Authority to Search, Serve One Copy of Warrant" references only the premises and no person to be searched. (1T52-17 to 53-1).

Pickard testified that the arrest of defendant was related to the search warrant "because we would not have been doing surveillance on that residence if the search wasn't issued for that residence." (1T53-2 to 9).

Pickard testified that he had been told prior to stopping defendant that "he was the suspected shooter in a homicide." (1T54-22 to 55-7). Pickard had no facts about the alleged shooting from his own personal knowledge. (1T56-11 to 15).

Pickard observed "two males matching the description of Jawan Coley and Michael Allen come across Park Boulevard towards the residence and enter the residence that were (sic) conducting surveillance on." (1T24-6 to 13). After 20 minutes, Pickard "saw them exit the residence." (1T24-18 to 20). The time they exited was approximately 2:40 p.m. (1T82-25 to 83-3).

Pickard identified defendant as one of the men who exited. (1T25-14 to 25). Pickard testified that "[w]e radioed to our supervisor to let him know what we were seeing . . . he said the team is not ready; they're getting ready to move, but they're not on the move yet. We need you to detain those two individuals." (1T26-6 to 12). Pickard testified that the two individuals crossed Park Boulevard and went "onto Langham . . . we watched them make a turn down a alleyway." (1T26-13 to 23). Pickard, wearing his tactical Kevlar vest (with "Police" across the front and back; 1T30-18 to 18), then jumped out of the vehicle and "kind of peeked down the alleyway . . ." and as the two "made a left on Kenwood" he "radioed to the other vehicles in the area that . . . they could proceed down Kenwood to try to stop the individuals." (1T27-3 to 28-11).

The officers "pulled up on the two individuals, exited their vehicles, identified themselves . . . [and] Mr. Coley was apprehend very shortly after the officers jumped out of the vehicles." (1T28-15 to 22). Pickard testified that defendant "had gotten away from the officers that initially tried to make the arrest and he started heading back down Kenwood . . . where I was on foot as like a failsafe . . . that's where we met each other, in the middle of the street right there." (1T28-25 to 29-6). Pickard "was able to tackle him by his legs." (1T29-13 to 16). The other officers then arrived and handcuffed him. (1T31-22 to 24). The time was "sometime after 3:00" in the

afternoon. (1T30-20 to 31-2). Pickard testified that he believed "it was sunny out, clear skies . . . I just know it wasn't raining. It wasn't dark." (1T31-4 to 8). Pickard arrested defendant "75 to 100 yards" from 1405 Park Boulevard. (1T57-23 to 58-2). In defendant's Certification (Paragraph 7), he attests that: "I had walked about ten blocks from the Park Blvd. address and was on Kenwood Ave. when I observed several adult males in plainclothes brandishing weapons approaching me hurriedly." (Ca115-116). As defendant "feared for" his life, he "attempt to sprint away but was physically tackled by one of these men and handcuffed." (Paragraph 8; Ca116).

Pickard asked defendant "if it was okay to search him" and if there was anything he needed to know before he patted him down and "[h]e let me know that he had a firearm in his pants at that time." (1T32-1 to 15). Defendant had a handgun "located in his long johns in his ankle area." (1T32-20 to 33-4). Pickard recovered the handgun. (1T37-20 to 38-3).

Pickard went to the scene with the expectation that at some point a search warrant would be executed. (1T42-15 to 19). Pickard identified S-4, S-5, S-6 and S-7 as photographs (admitted into evidence) depicting the target residence. (1T33-9 to 34-16). Pickard had the photographs prior to assisting in the execution of the warrant. (1T43-19 to 23).

Pickard did not have a search warrant to search defendant. (1T43-24 to 44-1).

Pickard was unaware if there was ever a search warrant to search defendant. (1T44-2 to 4). Pickard was unaware if there was ever an arrest warrant to arrest defendant. (1T44-5 to 7). Pickard had no arrest warrant for defendant. (1T60-5 to 9).

Pickard initially did not believe that he was supposed to arrest the subjects: "that's why I did not arrest them when I initially saw them." (1T44-13 to 16). Pickard had no additional information when he saw defendant exit the premises: "besides being told to detain him." (1T45-11 to 15). The only facts he was told was that there was "an individual leaving a house that was of interest for a homicide." (1T45-18 to 22). Pickard did not see defendant commit any crimes and observed nothing except defendant entering and exiting the house. (1T58-3 to 8). Pickard did not know if defendant had been identified as a shooter by any witnesses. (1T61-23 to 62-1). It was Pickard's understanding that the premises "was one of the addresses that the suspects went back to after the homicide had taken place." (1T59-10 to 15). Pickard did not observe defendant do anything suspicious as he "[j]ust went in and out of the house." (1T59-18 to 24).

Pickard did not have the search warrant with him at the time as "the search warrant as being approved at this time . . . The homicide unit would have had that." (1T48-1 to 9).

Pickard testified that if defendant did not run he still would have arrested him

and brought him into custody. (1T60-19 to 22). When asked why Pickard would detain defendant he answered: "Because he just exited the house that was the search warrant was going to be executed for." (1T62-9 to 12).

When asked if the reason he detained defendant was due to defendant being someone who he thought might possess a gun, testified: "he was detained because he left the house which was the target of a homicide and I proceeded with caution and treated the nature as such because he had been found to have a handgun on him multiple times before." (1T66-6 to 18).

Pickard testified: "The reason to detain him was because he left that residence" for which there was "a search warrant for homicide." (1T67-17 to 68-3).

Coley was also detained. (1T64-8 to 9). Pickard did not know if a search warrant had been executed for Coley's person: "I don't believe search warrants get executed for a person . . . a search warrant was not executed for his person." (1T64-21 to 65-3). Coley was detained "[t]wo to three blocks" from the house. (1T79-23 to 80-1).

The Warrant was signed "[w]ell before, about an hour before" Pickard detained defendant. (1T76-21 to 77-5). Pickard "felt comfortable detaining the suspects because . . . the warrant was signed at this time." (1T78-14 to 20).

LEGAL ARGUMENT

POINT ONE[8]

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS AND ERRED IN APPLYING A "REASONABLE SUSPICION" RATHER THAN "PROBABLE CAUSE" STANDARD; BECAUSE THE SEARCH WARRANT DID NOT PARTICULARLY LIST MR. ALLEN, OR ANY PERSON, THE STOPPING AND ARRESTING OF MR. ALLEN BY THE POLICE WAS IN VIOLATION OF AND CONTRARY TO THE FOURTH AMENDMENT (1T93-3 to 95-3).[9]

A. THE TRIAL COURT'S DECISION ON THE SUPPRESSION MOTION

The trial court (Judge Shusted) found Officer Pickard to be "a credible witness in this matter in regards to this, while he wasn't always entirely consistent, his inconsistencies were really due to perhaps memory and the age of the case as opposed to a lack of credibility on the matter." (1T91-22 to 92-1).

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[8] Defendant incorporates by reference the certification of Thomas R. Ashley, Esq., (annexed at Ca107) and defendant Michael Allen, each dated September 10, 2021 (Ca115-117).

[9] The significance of the seizure of the .9 millimeter semiautomatic handgun cannot be overstated as law enforcement purportedly linked this handgun to shell casings found at the scene of the Justin Ingram homicide which occurred on September 25, 2020. (GJT13-10 to 21; Ca130).

The trial court stated:

> I'm not giving any credibility to the officer's testimony based upon the fact that he had prior dealings with Mr. Allen. I agree with Mr. Ashley, that we're just looking on that date in question. And on that date in question he clearly has knowledge that he's supposed to surveil that area. He has S-1 through 3, so he knows the photographs. He has prior knowledge of Mr. Allen, but in regards to whether his warrantless search is effective, I'm looking at his conduct on that day . . .
>
> I'm looking exactly where you're pointing at: was that warrantless search and seizure stop of Mr. Allen valid. And I find that it was. And here's why I find that it was. He has knowledge, he's had a warrant at a premises and he sees the people go in. He sees the people come out. He's waiting for a warrant. He knows who he's looking for. He's familiar with this defendant. So as a result of that he makes a tactical decision in regards to -- because they are under investigation he certainly has a reasonable suspicion that this is the individual and so he takes and follows and sees what occurs.
>
> Certainly the other detectives who did not testify caused the stop of the initial Mr. . . . Coly from there. And from there the actions of Mr. Allen are to flee back in the arm where the officer is basically following him down the alleyway going forward, back toward the premises that's under surveillance for the search warrant that is executed. And certainly we have the search warrant executed and going forward from there, and the inventory happened. I'll get to that in a second.
>
> So that stop, that Terry frisk, that fleeing and certainly the admission and consent of the defendant that there is a weapon on him I find entirely valid. And I find that the witness is credible and going forward from there.
>
> So that clearly in my opinion takes care of that issue concerning the motion that you filed, which I interpreted

> as a request to suppress the evidence from the warrantless search. That motion is denied. (1T93-3 to 95-3) (emphasis added).

The trial court erroneously adopted the "reasonable suspicion" Terry standard instead of the correct higher "probable cause" standard applicable to search warrants.

B. THE RELEVANT STANDARD

As to the relevant standard of review: "When reviewing a trial court's decision to grant or deny a suppression motion, appellate courts '[ordinarily] defer to the factual findings of the trial court so long as those findings are supported by sufficient evidence in the record.'" State v. Smart, 253 N.J. 156, 164 (2023) (alteration in original) (quoting State v. Dunbar, 229 N.J. 521, 538 (2017)). The Appellate Division "will set aside a trial court's findings of fact only when such findings 'are clearly mistaken.'" Dunbar, 229 N.J. at 538 (quoting State v. Hubbard, 222 N.J. 249, 262 (2015)). As stated in Dunbar by the New Jersey Supreme Court: "We accord no deference, however, to a trial court's interpretation of law, which we review de novo." Dunbar, 229 N.J. at 538.

Here, the facts are not really in dispute and the trial court's incorrect interpretation of the law should be afforded no deference and reviewed de novo in this appeal, with the trial court reversed and the evidence seized ordered to be suppressed.

C. TO BE VALID A WARRANT MUST DESCRIBE WITH PARTICULARITY THE PLACE OR PERSON TO BE SEARCHED AND HERE ONLY THE PREMISES WAS NAMED

It is respectfully submitted that as the Camden County Search Warrant No. DR-CAM-3836-SW-20, issued September 28, 2020, does not list or mention the defendant (or any person) by name or description that it necessarily follows that the warrantless arresting and searching of defendant by the police on September 28, 2020, was invalid and in violation of the Fourth Amendment, requiring suppression of all evidence seized from defendant as fruit of the poisonous tree.

In language that is virtually identical, both the Fourth Amendment of the United States Constitution and Art. 1, par. 7 of the New Jersey Constitution require that any warrant issued must "particularly" describe the place/person to be searched and the articles to be seized. Imposing an obligation on police to particularly describe the area to be searched or the item or person to be seized serves the same purpose as the requirement of the warrant itself: to prevent a concentration of power in executive officials, to guarantee a neutral and detached assessment of probable cause prior to an intrusive search and seizure, and to limit the discretion of the executing officer.[10]

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[10] Despite the similarity between the text of Article I, Paragraph 7 of the New Jersey Constitution and the text of the Fourth Amendment, the New Jersey Supreme Court

Unless the search and seizure is limited to specified areas, items and persons, the resulting unfettered discretion would permit an interested executive branch to determine the bounds of the warrant, and hence the area to be searched and the persons and property to be seized.

The evil at which this requirement was directed was the so called general warrant commonly used by the British in pre- Revolutionary War times and, to some extent, is still existent in commonwealth nations such as Canada and

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which the State herein appears to be intent on resurrecting. See Stanford v. Texas, 379 U.S. 476, 481 (1965)("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists."); Marcus v. Search Warrant of Property, 367 U.S. 717, 729 (1960) ("The Bill of Rights was fashioned against the background of knowledge that unrestricted power of

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has found that the former "affords our citizens greater protection against unreasonable searches and seizures than does the Fourth Amendment." State v. Novembrino, 105 N.J. 95, 145 (1987) (unlike the Fourth Amendment, article I, paragraph 7 does not provide for good-faith exception to the exclusionary rule); see State v. Hunt, 91 N.J. 338 (1982) (New Jersey Constitution protects privacy interest in phone-toll billing records even though federal constitution does not); State v. Alston, 88 N.J. 211 (1981) (criteria for standing to challenge validity of searches and seizures are more liberal under article I, paragraph 7 than under Fourth Amendment).

search and seizure could also be an instrument for stifling liberty of expression."); State v. Riggins, 138 N.J. Super. 497, 503 (Law Div. 1975), (holding that the "evils of a general warrant c(an) not be more pronounced.").

The corollary to this doctrine is that the Primary Constitutional Right of the individual is to be protected from Governmental attack; that is the purpose of Government. As the Supreme Court has held:

> "Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded, may be regarded as lying at the very foundation of the social compact." Chicago v. Sturges, 222 U. S. 313, 322, 32 S. Ct. 92, 93 (1911).

As noted in Marron v. United States, 275 U.S. 192, 196 (1927), "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what [or who] is to be taken, nothing is left to the discretion of the officer executing the warrant." (Emphasis added).

There are three separate but interrelated issues involved in the particularity requirement: first, the warrant must particularly describe the place to be searched; second, it must particularly describe the thing(s) to be seized; and third, where

applicable, it must also particularly describe the person to be searched or seized. Byrnes, Current N.J. Arrest, Search & Seizure, (GANN: 2021-22 ed.), § 7.1.

A search warrant may be issued to search a person, a place, or a place and person or persons preconditioned upon the place and/or person to be searched particularly described. A description of a person named in a warrant should be as particular as the circumstances permit. Similar to the rules applicable to a warrant search of premises, an otherwise insufficient description of a person may be sufficiently enhanced by showing the prior knowledge of the officer who provided the affidavit and executed the warrant.

The case at bar bears similar facts to those in, finding Bailey v. United States, 568 U.S. 186, 133 S.Ct. 1031, 185 L. Ed. 2d 19 (2013), The Bailey Court determined that the rule announced in Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)—which permits officers executing a search warrant to detain the occupants of the premises while a search is conducted—does not apply beyond the immediate vicinity of the premises being searched. 568 U.S. at __, 133 S.Ct. at 1042. Accordingly, "[o]nce an individual has left the immediate vicinity of a premises to be searched, ... detentions must be justified by some ... rationale" other than the Summers rule. Id. at ——, 133 S.Ct. at 1043.

In Bailey, detectives conducting surveillance in an unmarked police car

outside an apartment (while the police prepared to execute a warrant to search for a handgun), observed two men (Chunon Bailey and Bryant Middleton) leave the gated area above the apartment, get in a car, and drive away. The detectives followed the car approximately one mile before stopping it. They found keys during a patdown search of Bailey, who initially said he resided in the apartment but later denied it when informed of the search. Both men were handcuffed and driven in a patrol car to the apartment, where the search team had already found a gun and illicit drugs. After arresting the men, police discovered that one of Bailey's keys unlocked the apartment's door. Id. at __ ; 133 S.Ct. at 1034.

The Bailey Court ruled that defendant's detainment was invalid under Summers because it was untethered from the three justifications of preventing flight, officer safety, and orderly completion of the search. Id. at 195-99. The Court also reasoned that "[w]here officers arrest an individual away from his home ... there is an additional level intrusiveness. A public detention, even if merely incident to a search, will resemble a full-fledged arrest." Id. at 200. Thus, the Bailey Court held that "[a] spatial constraint defined by the immediate vicinity of the premises to be searched is ... required for detentions incident to the execution of a search warrant" because "[l]imiting the rule in Summers to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that

the scope of the detention incident to a search is confined to its underlying justification." Id. at 201.

As the Bailey Court explained, "Bailey posed little risk to the officers at the scene after he left the promises, apparently without knowledge of the search. Had he returned, he could have been apprehended and detained under Summers. Ibid. Because the defendant in Bailey was detained over one mile away from the apartment that was the subject of the search warrant, the Court did not define the meaning of "immediate vicinity." Id. But the Court provided various factors for courts to consider in closer cases to determine whether an occupant was detained within the immediate vicinity of the premises to be searched. Id. Those factors include "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." Id.

Bailey therefore requires a justification other than the Summers rule in situations where officers detain a suspect away from the scene of the search. Applying the Bailey factors to the facts in the case at bar, Pickard testified that he arrested defendant "75 to 100 yards" from 1405 Park Boulevard (1T57-23 to 58-2), while defendant attested in his Certification (Paragraph 7) that: "I had walked about ten blocks from the Park Blvd. address and was on Kenwood Ave. when I observed

several adult males in plainclothes brandishing weapons approaching me hurriedly." (Ca115-116). Under either factual scenario, defendant Allen was outside the lawful limits of the premises, not within its site, and had no ease of reentry. The three Summers justifications of preventing flight, officer safety, and orderly completion of the search were also inapplicable.

As is relevant herein, it is critical to determine whether or not the warrant was issued for a place, or a place and a particularly identified person, or a place and "all persons present." See, e.g., State v. Watts, 223 N.J. 503, 519 (2015).

In State v. Moriarty, 133 N.J. Super. 563, 570 (App. Div.), certif. den. 68 N.J. 172 (1975), the court sustained a warrant authorizing the search of a person, who was unnamed but described as a "white male, wearing black horn rimmed glasses" seated in a particular vehicle. Despite the vague description of the individual contained in the warrant, the inclusion of the vehicle and the officers' knowledge of the identity of the person referred to in the warrant satisfied the particularity requirement. Id.; but see the Supreme Court's limitation of this holding in State v. Daniels, 46 N.J. 428, 438 (1966), that the personal knowledge of the officer executing the warrant cannot be held to cure a "vitally deficient description," is applicable where the "home which was intended to be searched was, in fact, searched is irrelevant. The improper description of the premises to be searched by

the officer rendered the search warrant defective." Id. at 559.

D. INCLUSION IN THE WARRANT TO SEIZE AND SEARCH "ALL PERSONS PRESENT" IS FACIALLY INVALID

As is relevant herein, the issuance of a search warrant specifying only a place does not authorize the search of persons found in or near that place during the execution of the warrant. Byrnes, Current N.J. Arrest, Search and Seizure, (GANN: 2021-22 ed.), § 7:4.

However, a search warrant for a place does authorize the police to detain and to pat-down (if there is a reasonable suspicion that they have a weapon on them), but not fully search, owners or occupants of premises during the search to secure the premises and to ensure the safety of the officers and the efficacy of the search. See Michigan v. Summers, 452 U.S. 692 (1981); Los Angeles County v. Rettele, 550 U.S. 609, 613-614 (2007).

In Summers, the search warrant specified only a place and justified the detention, on less than probable cause, of a person leaving the premises who later turned out to be the owner. In contrast, and as is most important in the case at bar, a search warrant for a place does not justify a detention once an occupant "has left the immediate vicinity of the premises to be searched." Bailey v. United States, 568 U.S. 186, 201 (2013; separate concurring opinion by Scalia, J.,

Ginsburg, J. and Kagan, J.), (holding that the "search all persons present provision" in the warrant "applies only to seizures of 'occupants' - that is, persons within 'the immediate vicinity of the premises to be searched.' ***Bailey was seized a mile away. Ergo, Summers cannot sanction Bailey's detention. It really is that simple.").

Here, Pickard testified that he arrested defendant "75 to 100 yards" from 1405 Park Boulevard. (1T57-23 to 58-2). In defendant's Certification (Paragraph 7), he attests that: "I had walked about ten blocks from the Park Blvd. address and was on Kenwood Ave. when I observed several adult males in plainclothes brandishing weapons approaching me hurriedly." (Ca115-116). As defendant "feared for" his life, he "attempt to sprint away but was physically tackled by one of these men and handcuffed." (Paragraph 8; Ca116). It is undisputed that defendant was quite a distance away from 1405 Park Blvd. when he was seized and arrested solely because he was observed exiting Park Blvd.

In any event, patrons of a commercial establishment may not be detained without an articulable suspicion that there is a nexus between the person and the criminal operation that is the subject of the search. Ybarra v. Illinois, 444 U.S. 85 (1979) (search warrant for tavern, and particularly named and described bartender who was believed to be engaged in narcotics transactions, did not

justify even a fleeting detention of patron).

Following the logic of Ybarra, a search warrant for a place also does not justify the warrantless detention of persons who happen to arrive at or be near the premises during a search without probable cause to conclude that they are associated with the criminal activities that are the object of the search. State v. Hall, 253 N.J. Super. 84, 93-97 (Law Div. 1990), aff'd o.b. 253 N.J. Super. 32 (App. Div. 1991).

Where there is no particularized description of individuals, a warrant may issue authorizing both the search of a place, and the search of all persons at a particular location, when there is probable cause to believe that anyone at such location is involved in criminal activity. State v. De Simone, 60 N.J. 319, 329 (1972).

In De Simone, a search warrant authorized the search of a particularly-described place, there an automobile, as well as the search of all persons found therein. The key to the validity of a search of unnamed persons found in such a vehicle is whether there is a sufficient nexus between the persons present and the criminal event. The Court noted that there was clearly probable cause to believe that the vehicle was being used as the instrumentality of illegal activity, and that the very nature of a motor vehicle gave rise to probable cause to believe

that anyone who occupied the car was involved in the illegal activity.

Under the rationale of De Simone, the New Jersey Supreme Court invalidated a search of a person found nearby, but not inside, a residence being searched in State v. Bivins, 226 N.J. 1, 13-17 (2016). The warrant in Bivins authorized the search of a private residence and "all persons present reasonably believed to be connected to said property and investigation." After the warrant's execution had begun, officers were notified of a person exiting the premises and walking away; the officers found the defendant in a gray Pontiac several houses away. The Court held that the "all-persons-present" search warrant for the premises did not authorize the search of the defendant when there were no facts demonstrating that he had been present at the scene at the time the warrant was being executed. Bailey v. United States, 568 U.S. 186, 185 L. Ed. 2d 19 (2013) (not permitting search of persons found blocks away from the premises that was the sole subject of the search warrant).

E. THE OMISSION IN THE WARRANT OF NAMING THE DEFENDANT MR. ALLEN, OR EVEN "ALL PERSONS PRESENT," IS A FATAL DEFECT AND CAN NOT BE CONSIDERED A MERE TECHNICAL IRREGULARITY

The State wrote in its suppression opposition brief below:

> In this case, there was an inadvertent typographical error where the language "all persons present reasonably

> believed to be connected with said property and investigation," was omitted from the warrant granting the search of 1405 Park Boulevard, but was a part of the application for the search warrant. (Sbr. Page 11; Ca13).

The State also "concedes that there was a clerical error." (Sbr. Page 15; Ca17).

The State vehemently urges this Court to validate the omission from the search warrant of any mention of defendant, or any individual found in or exiting the premises to be searched, as a minor, insignificant faux pas of the type which has occurred in numerous other search warrants afflicted with similar glitches, which ultimately have been disregarded by the courts and have upheld the search.

Other than the fact that there is no precedent on-point to sustain this outlandish proposition the precedent with respect to this issue deal with technical, non-material deviations. See State v. Bisaccia, 58 N.J. 586, 592 (1971) (sustaining validity of search where the warrant contained an incorrect street number and held that the "place searched was undeniably the place as to which probable cause had been made out, and the place searched was in fact the place the warrant was meant to describe. Nor did the error in the street number in the warrant taint the justice of the search.").

While defendant concedes that there is precedent to the effect that where supporting affidavits set forth the items/persons to be seized with the requisite

particularity, the "technical irregularities" in preparation or execution of the warrant will not result in invalidation of the search. See, e.g., State v. Brooks, 201 N.J. Super. 10, 14 (App. Div. 1985) (sustaining validity of search where warrant incorrectly described items to be seized, due to incorrect transcription, but which were correctly described in warrant application); State v. Bickham, 285 N.J. Super. 365 (App. Div. 1995), certif. den. 143 N.J. 516 (1996).[11]

The defect fatal to the State's contention is that we are not addressing a mere technical error of a transcription glitch or premature execution of an otherwise valid warrant. We are dealing with the total omission from the warrant of anything approaching a particularized description or naming of Mr. Allen, or of anyone! And certainly not one found blocks from the place to be searched. See State v. Marshall, 199 N.J. 602, 618 (2009)(holding that failure to comply with the particularity requirement in the application or search warrant are constitutional violations and can never be deemed as "technical insufficiencies or irregularities, R. 3:5-7(g), justifying overlooking the deficiencies in the

[11] In Bickham, the warrant authorized a search of the described apartment between 10:00 a.m. and 10:00 p.m., but the police executed the warrant at 9:21 a.m. The court determined that this technical violation did not infringe upon defendant's privacy rights.

warrant."

Here, exacerbating this irremediable defect is that the accompanying incident/arrest report issued by the arresting officer is totally devoid of any articulation as to the basis or legal grounds for having stopped and searched defendant in the first place, other that the fact that defendant was observed exiting 1405 Park Blvd., a good distance from where defendant was stopped and arrested. See State v. Helton, 146 N.J. Super. 98, 101 (App. Div. 1975), aff'd 72 N.J. 169 (1977), involving a federal search warrant for the search of a tavern in a narcotics investigation. The warrant did not mention persons found in the tavern. The court invalidated the search of the patrons on the premises during the execution of the search warrant, holding that there was no basis to believe that they were all engaged in criminal activity.

A search warrant authorizing searches of "all persons present at a place or location" have generally been invalidated absent a showing that the person's presence necessarily gave rise to probable cause to believe the person was involved in the criminal activity taking place there. See generally Ybarra v. Illinois, 444 U.S. 85 (1979).

In State v. Sims, 75 N.J. 337, 350-351 (1978), the search warrant authorized the search of a service station based on probable cause to believe that there was

illegal gambling on the premises. The warrant also allowed the police to search all persons found at the service station during the execution of the search warrant. The Court held that the warrant's authorization of the search of all unnamed persons found on the premises could only be valid if there was probable cause to believe that all persons who might be found at the service station were engaged in illegal gambling. It emphasized that presence alone did not establish probable cause; there must be additional factors establishing a sufficient nexus between all persons present at the service station and the illegal gambling. Here, the officer's affidavit, however, did not set forth any legitimate basis for reaching that conclusion, as is lacking in the instant case with defendant. Therefore, the Court in Sims found the search warrant invalid with respect to the search of all unnamed persons present.

Similarly, in State v. Riggins, 138 N.J. Super. 497, 503 (Law Div. 1975), a warrant was issued to search a tavern where illegal gambling was suspected. In invalidating the search, the court noted that the warrant there expressly "authorized the blanket search of everyone present regardless of any prior determination of an individual's participation in the criminal activity. The evils of a general warrant could not be more pronounced." Cf. State v. Dolly, 255 N.J. Super. 278 (App. Div. 1991), involving a search warrant of a place, including a combined residence and business and all vehicles present, that was invalidated as overly broad.

The Fourth Amendment mandates that an application[12] for issuance of a search warrant must contain sworn statements of fact establishing probable cause and describing with particularly the person to be seized and searched, so that a reviewing court may determine if the warrants' scope is properly limited. See, e.g. Marron v. United States, 275 U.S. 192, 196 (1927).

It merely states the obvious to note that in the instant case the warrant is deficient and defective in the above-listed several aspects and is another dimension of the Supreme Court's holding that the "point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[12] It is import to state that the warrant application requested a warrant for all people "connected with said property," which I constitutionally ambiguous in the extreme and leaves one to ponder how a person is "connected" to property; even had it been included in the warrant it is invalid as deviating from the requisite constitutional language that all persons at the scene may be searched if it is "reasonably believed they are involved with the investigation."

To deny defendant the suppression relief requested this Court would have to disregard and act contrary to the holding in State v. Valencia, 93 N.J. 126, 132-34 (1983), which rejected the State's argument that the particularity criterion governing issuance of a search warrant should not be strictly applied holding that "[c]ourts in this State consistently have maintained that strict adherence to the protective rules governing search warrants is an integral part of the constitutional armory safeguarding citizens from unreasonable searches and seizures*** (and that) "deviations from the rules governing search warrants in the aggregate constitute material noncompliance with the rules governing search warrants;" see also State v. Johnson, 168 N.J. 608, 623 (2001) (noting that "to permit a good-faith exception to apply in respect of one element of the warrant, i.e. the no-knock provision, but not in respect of other elements would lead ultimately to a patchwork of incongruous case law").

To summarize briefly, in the subject search warrant application Officer Jankowski requested a warrant issue for 1405 Park Blvd., Camden New Jersey ("Park Blvd.") and specifically requested that the warrant also provide for the seizure and search of "all persons present reasonably believed to be connected with said property and investigation for evidence including but not limited to: knives, sharp objects, firearms, ballistics evidence, weapons, ammunition, projectiles, fired

cartridge casings . . ." (Ca34) See Search Warrant Certification by Officer Jankowski, DR-CAM-3836-SW-20, September 28, 2020, at Ca 23(Emphasis added).[13] In the related search warrant order the Court specifically advised the State that the warrant was being issued only as to the Park Blvd. premises and that no search of any person was authorized. (Ca37). The issuing Court's decision in that regard could hardly be plainer or clearer; yet with this understanding the State accepted the order and made no protest to the Court.

On September 28, 2020 the police were surveilling the Park Blvd. location and observed Mr. Allen exit the Park Blvd. location and proceed on foot toward Kenwood Ave.; the police eventually gathered other officers and stopped Mr. Allen on Kenwood, which is some ten blocks from Park Blvd.

The arrest report dated October 07, 2020, ("Report") states that upon seeing the plainclothes police exit their unmarked vehicles defendant attempted to flee but was quickly arrested. (Ca58-59).

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[13] It appears to be constitutionally ambiguous as to how a person is "connected" or "unconnected" to property or to an investigation; moreover, the subject phrase is ungainly in that it appears the warrant is requested for one who is both connected to the property and also the investigation. Moreover, the omitted language sought authority to search, not to arrest as occurred with Mr. Allen.

In the grand jury presentment the State embellished the description of defendant's arrest by asserting that prior to arresting defendant he was commanded to "stop," which he ignored: "Did the defendant ignore commands for him to stop? A Yes, sir." (GJT13-4 to 6; Ca130).[14]

Defendant, in his statement, asserts that while he did attempt to flee the scene he did so because he saw several armed men in plain clothes approach him with weapons drawn and, fearing for his life, attempted to flee; he did not recognize the men approaching him with weapons drawn as police.

The Report is devoid of any discussion or explanation as to the basis for the police having stopped and arrested defendant on September 28, 2020.

The State asserts that within the application for the search warrant Detective Jankowski requested the search of "all persons present reasonably believed to be connected with said property and investigation for evidence including but not limited to... firearms... any items relating to the identity of persons who either live in, use or were present within the above-described premises at or around the time of the homicide described herein." (Ca34). The State then argued below that

[14] This claim is not contained in the Camden County Prosecutor's Office Report dated October 7, 2020, describing Allen's arrest.

"(a)lthough this language was inadvertently left out of the search warrant, it was a part of the application approved by the Judge in reviewing whether or not there was sufficient probable cause for the list of items sought. Here, Judge Ragonese found probable cause and Defendant has raised nothing to undermine that finding." Sbr. at 9; emphasis added. (Ca11).

At the outset, other than reading the Court's mind there is absolutely nothing which supports the State's proposition that the Court accepted and approved the entirety of the search warrant application; if anything, the fact that the order on the application exempts from search all persons would circumstantially demonstrate that the all persons search provision was rejected.[15] In sum, the State requests that although the "all persons present reasonably believed to be connected with said property and investigation for evidence" was not contained in the search warrant this Court should nevertheless convey the omitted phrase into the search warrant and thereby legitimize the illegal warrantless arrest and search of defendant.

F. NONE OF THE EXCEPTIONS TO A WARRANTLESS SEARCH EXISTS IN THIS CASE MANDATING SUPPRESSION

To reiterate the substantive legal principles, "'[a] warrantless search is

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[15] It is important to state that the warrant application requested a warrant for all people "connected with said property," which is constitutionally ambiguous in the extreme. See Point I, Subpoint B, infra.

presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement.' " State v. Gamble, 218 N.J. 412, 425 (2014) (quoting State v. Cooke, 163 N.J. 657, 664 (2000)). "[T]he State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure 'falls within one of the ... exceptions ....'" State v. Elders, 192 N.J. 224, 246 (2007) (quoting State v. Pineiro, 181 N.J. 13, 19-20 (2004)).

As no exceptions to the warrant requirement exist in this case, the evidence seized should be suppressed (the "investigatory stop" exception and its purported applicability is discussed in Point III, infra).

For the foregoing reasons, the trial court should be reversed and the evidence illegally seized suppressed.

POINT II

THE TRIAL COURT ERRED IN DENYING A HEARING PURSUANT TO FRANKS V. DELAWARE (2T95-13 to 96-11)

A. THE TRIAL COURT'S DECISION ON A FRANKS HEARING

The trial court stated:

> . . . under U.S. v. Franks (sic) you say I should need an evidentiary hearing as to what Judge Ragonese did. All right. I'm denying that because respectfully I think that's sort of a red herring that you're asking the trial court to chase and I'm not going to chase it. Because I think what Judge Ragonese did was valid. He didn't authorize or arrest or a search of a particular person, your client.
>
> But the, the purpose of that search warrant was to try to get evidence related to the homicide concerning 1244 Princess Avenue, 1405 Park Boulevard, and also the 2013 Gray Hyundai. And that's what he did.
>
> And you have to show me that . . . warrant was invalid for you to have some evidentiary hearing as to what Judge Ragonese did or didn't do. And that hasn't been shown. But even if you did show it, you . . . just had your investigative hearing, okay?
>
> So either way I want to I want to be clear when someone is trying to review this. Procedurally on a motion to suppress, one executed by a judge and one motion made by a defendant on a warrantless search what I'm finding and why I'm finding it. Do you understand that, sir? I know you don't . . . agree with it. But do you understand what I'm doing procedurally? (1T95-18 to 96-18) (emphasis added).

The trial court stated: ". . . this is one where really the State got lucky in my

opinion. But I don't think the State acted improperly in regards to what they did." (1T97-20 to 23).

B. REASONS FOR A FRANKS[16] EVIDENTIARY HEARING

In rejecting the request for a Franks hearing, the trial court erroneously ruled that defendant already had an evidentiary hearing: ". . . you just had your investigative hearing, okay?" (1T96-10 to 11). In fact, defendant did not have an evidentiary hearing involving the law enforcement officer who attested to and submitted the Certification in Support of Search Warrant Application--namely, Detective Jeremy Jankowski (Special State Investigator/Acting County Detective, Camden County Prosecutor's Office, Homicide Unit. (Jankowski Certification at Ca23-36).

To challenge the validity of a warrant, defendant "must prove, by a preponderance of the evidence, (1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions are

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[16] Under Franks, it is presumed that the affidavit supporting a search warrant is valid. Only intentional and knowingly false statements in a search-warrant affidavit, or statements made with reckless disregard for the truth, can undermine a finding of probable cause. Id. at 171, 98 S.Ct. 2674. "[N]egligence or innocent mistake[s] are insufficient" to challenge a warrant affidavit's validity. Id.

material, or necessary, to the finding of probable cause." See Franks v. Delaware, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 57 L.Ed.2d 667(1978) (1978). A statement is made with "reckless disregard" where "the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." Andrews v. Scuilli, 853 F.3d 690 at 698 (3d Cir. 2017) (citation omitted). "[O]missions are made with reckless disregard if an officer withholds a fact in his ken that '[a]ny reasonable person would have known that this was the kind of thing the judge would wish to know.'" Wilson v. Russo, 212 F.3d 781, 788 (3d Cir. 2000) (quoting United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir.1993)).

Here, without an evidentiary hearing it is impossible to know whether Jankowski knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant. For these reasons and the authorities cited the trial court erred in denying the motion for a Franks hearing.

POINT III

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR RECONSIDERATION AND SHOULD BE REVERSED AS IT BASED IT DECISION ON A PALPABLY INCORRECT OR IRRATIONAL BASIS; DEFENDANT WAS NOT INVOLVED IN ANY CONDUCT WHICH CONSTITUTED PROBABLE CAUSE OR REASONABLE SUSPICSION PRIOR TO THE SEARCH OF HIS PERSON ON SEPTEMBER 28, 2020 (2T19-3 to 22-11)

Defendant moved for reconsideration (Ca135) based on the New Jersey Supreme Court's July 5, 2022 decision in State v. Goldsmith, 251 N.J. 384 (2022), in which the Court, in a 4-2 decision, found that the police officers' conduct of blocking defendant's path on the walkway next to a vacant house constituted an investigatory stop, as would require reasonable suspicion, and the officers lacked reasonable suspicion for such stop (mandating suppression of a gun and drugs found on defendant).[17]

A. THE TRIAL COURT'S DENIAL OF THE MOTION FOR RECONSIDERATION

On February 23, 2023, the motion for reconsideration was argued and

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[17] While Goldsmith was decided 42 days prior to the August 16, 2022 suppression motion oral argument neither the State, defense nor trial court referenced the decision (which case was, of course, decided after the suppression briefings).

decided. The trial court stated:

> . . . the first question that the Court must ask itself based upon the argument and the briefs and what's been presented as -- did the Court base -- make a decision based upon incorrect or irrational basis. I find that I didn't do that . . .
>
> The second question that's looked at is did the Court not consider or fail to appreciate the significance of probative, competent evidence. Within that probative, competent evidence certainly I find that the decision of July 5th of 2022 predating my decision date could have some relevance. That was not brought up at the October hearing, but certainly was brought to me today in that particular matter. Likewise it is regarding a search in regards to the city of . . . Camden. And I felt that Mr. Ashley accurately reflected what was in that particular decision. (2T20-4 to 21-2).

The trial court distinguished the Goldsmith case which:

> . . . Did talk about pat-down for weapons. But the circumstances of the stop and investigatory method of the officers in this Court's opinion is respectfully completely different than what occurred in this particular matter.
>
> It appears that the Supreme Court of New Jersey felt that the stop was really sort of based on a hunch because they're in a high drug area and because they had investigations related to a certain walkway where they found Mr. Goldsmith in that matter. Not the case here.
>
> As Ms. Estrada said, my evaluation of the evidence back in October that certainly it was a real time incident regarding investigation of a murder. There was a search warrant in progress. The officer who observed the three individuals at this time, but certainly wasn't responsible for Mr. Allen. They were investigating a homicide in regards to having known addresses that they're getting

> warrant for, to find evidence of that as well as a motor vehicle. And certainly my findings in that matter still stand as previously stated on the record concerning the reasonable, articulable suspicion they also had their probable cause related to that. (2T21-6 to 22-4).

When asked by the trial court "[w]hat is that probable cause evidence so we have it on the record" (2T14-14 to 15) the State argued "multiple witnesses who indicated the description of the individual . . . video surveillance which tracks the three suspects from the location of the homicide through Camden and then exiting the vehicle. Those three individuals are seen heading towards two locations. And those locations are where the search warrants were to be executed that day." (2T14-16 to 24). Contrary to establishing either the "probable cause" or "reasonable suspicion" exceptions to the warrant requirement, the State (and trial court) instead established a loophole to the warrant requirement.

B. THE LAW AS TO RECONSIDERATION MOTIONS

R. 4:49-2 [Motion to Alter or Amend Judgment or Order] provides:

> Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto

> a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

Although there is not an explicit rule for motions for reconsideration in criminal matters, R. 4:49-2's philosophy has been applied to a prosecutor's motion for reconsideration of a trial court order admitting a defendant to a pretrial intervention program over prosecutorial objection. See State v. Fitzsimmons, 286 N.J. Super. 141 (App. Div. 1995), remanded 143 N.J. 482 (1996); cf. State v. Puryear, 441 N.J. Super. 280, 294-295 (App. Div. 2015), in which the philosophy of R. 4:49-2, as well as R. 4:42-2 and 1:7-4(b) (discussed below), was also applied in a criminal matter upholding the trial court's decision to grant reconsideration of its motion to suppress ruling. See also State v. Wilson, 442 N.J. Super. 224, 233 n. 3 (App. Div. 2015), rev'd on other grds., 227 N.J. 534 (2017).

Cummings v. Bahr, 295 N.J. Super. 374, 384-385 (App. Div. 1986), held that R. 4:49-2 is applicable only when the court's decision is based on plainly incorrect reasoning or when the court failed to consider evidence or there is good reason to consider new information. See also State v. Lawrence, 445 N.J. Super. 270, 274, 277 (App. Div. 2016), holding that an order denying reconsideration of dismissal of a municipal court appeal erroneously barred defendant access to the court and was an abuse of discretion. Cf. Flecker v. Statue Cruises, LLC, 444 N.J. Super. 31, 36, 40

(Law Div. 2013), denying a motion for reconsideration when the court's decision was not palpably incorrect or irrational. See also R. 1:7-4(b) (governing reconsideration of final orders or judgments), which states, in pertinent part:

> the court may grant a rehearing or may, on the papers submitted, amend or add to its findings and may amend the final order or judgment accordingly . . . The motion to amend the findings . . . shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or on which it has erred.

As explained in Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010), a motion for reconsideration is:

> not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion, but "should be utilized only for those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid. (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

In State v. Puryear, 441 N.J. Super. 280 (App. Div. 2015), the Appellate Division held that the trial court acted within its discretion in granting reconsideration. In Puryear, following a Miranda hearing, the trial court initially ruled all four statements of defendants admissible. The trial court granted partial reconsideration and found that each of the defendants' Miranda rights had been

violated in connection with one of the statements given by each defendant. Id. at 288. In affirming the reconsideration decision, the Puryear Court:

> Here, the trial court candidly found that it had failed to appreciate the significance of the explanation given by the detective to Brown during his second interview concerning his second Miranda warning: that second warning being used against him in a court of law. The trial court also found that it failed to appreciate the significance of the introductory statement made by the State Police detective to Puryear in his first interview advising Puryear that he could not hurt himself by answering the detective's questions. Given the facts of these interviews, we find no abuse of discretion and no error by the trial court in its decision to grant reconsideration.
> Indeed, it is entirely appropriate for a judge to reconsider a prior ruling given the right set of circumstances. Judges are not infallible. Judges who are willing to admit that they overlooked competent evidence, or failed to appreciate such evidence, should be commended because they are doing just what good judges do in the very limited circumstances where reconsideration is appropriate. Obviously, that is why there are rules for reconsideration. See R. 1:7-4(b); R. 4:42-2; R. 4:49-2. Id. at 294 (emphasis supplied).

As explained in Puryear, "it is entirely appropriate for a judge to reconsider a prior ruling given the right set of circumstances." This is one of those occasions.

C. THE GOLDSMITH CASE SUPPORTS SUPPRESSION

As explained by defense counsel below, Goldsmith "is really not new law, but reiterated law . . ." (2T9-4 to 5).

While the issue in Goldsmith was an investigative stop, as defense counsel explained below:" [t]his case was not an investigatory stop." (2T9-15).[18]

As stated in Goldsmith:

> Officer Goonan supported his suspicion of defendant by claiming that defendant was "coming out of a walkway between a vacant property which is known for the sales of [drugs] and weapons" after the two unidentified individuals walked away. Officer Goonan testified that he was suspicious of defendant based on his training and experience that drugs and guns are often stored in walkways, because of general "reports [he had] been having in the area," and because of his belief that criminal activity was taking place at the vacant house. [Footnote

[18] An investigative stop "is a procedure that involves a relatively brief detention by police during which a person's movement is restricted." State v. Goldsmith, 251 N.J. 384, 399 (2022). An investigative stop or detention "is permissible 'if it is based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity.' " State v. Shaw, 213 N.J. 398, 410 (2012) (quoting Pineiro, 181 N.J. at 20). "The standard for this form of brief stop or detention is less than the probable cause showing necessary to justify an arrest." Ibid. "However, an officer's hunch or subjective good faith—even if correct in the end—cannot justify an investigatory stop or detention." Id. at 411. "Determining whether reasonable and articulable suspicion exists for an investigatory stop is a highly fact-intensive inquiry that demands evaluation of '"the totality of circumstances surrounding the police-citizen encounter, balancing the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions."' " Goldsmith, 251 N.J. at 399 (quoting State v. Privott, 203 N.J. 16, 25-26 (2010)). The inquiry "takes into consideration numerous factors, including officer experience and knowledge." Id. at 400.

> omitted]. None of those non-specific, non-individualized factors, however, "meet the constitutional threshold of individualized reasonable suspicion" that this particular defendant was engaged in criminal activity. See State v. Nyema, 249 N.J. 509, 532, 267 A.3d 449 (2022). Aside from defendant's presence on that walkway, none of those factors are specific to defendant engaging in behavior indicative of criminal activity. The only information the officers possessed prior to the stop was information that could be used to justify the stop of virtually anyone, on any day, and at any time, based simply on their presence on that street.

There is actually greater "reasonable suspicion" in Goldsmith than in the case sub judice, as the defendant here did not (as did defendant Goldsmith) come out of a walkway between a vacant property known for the sales of drugs and weapons. Here, all defendant did was exit a house.

As further explained in Goldsmith and equally applicable here, an investigative detention "may not be based on arbitrary police practices, the officer's subjective good faith, or a mere hunch." State v. Coles, 218 N.J. 322, 343 (2014). Officer Goonan had a hunch that defendant was engaged in criminal activity. That hunch, however, did not amount to objectively reasonable and articulable suspicion for an investigatory stop.

Here, because the officer's' initial detention of defendant was unlawful, it is not necessary to reach the issue regarding whether officers had reasonable and

articulable suspicion to frisk defendant.

D. REASONS FOR RECONSIDERATION AND REVERSAL

Officer Pickard was resolute in his testimony that defendant was not involved in any suspicious conduct prior to stopping and subsequently searching him. Hence, it is clear that there was no probable cause to justify the warrantless search of defendant who was walking in the area of Kenwood Avenue in Camden, New Jersey.

The definition of probable cause was set forth in Brinegar v. United States, 338 U.S. 160, 175, 176 (1949). The Supreme Court held that police have probable cause when the facts and circumstances within the officers' knowledge and of which he had trustworthy information is sufficient in and of itself to warrant a man of reasonable caution in the belief that an offense has been or being committed.

In the instant case, clearly the officer candidly admitted that he did not see the defendant act in any suspicious manner. He stated that he was told that defendant was a "suspect" and alleged shooter in a murder case about which he had only minimal information. Obviously, the mere fact that defendant was a "suspect" in a murder is not the equivalent of probable cause or reasonable suspicion.

The officer admitted that he was not conversant with the details of the alleged murder and how it was determined that defendant was the alleged culprit in the murder.

Lastly, Terry v. Ohio, 392 U.S. (1968) is not applicable to the facts in this case. Terry v. Ohio initially arose in the context of a preventive stop and frisk. The United States Supreme Court subsequently extended the Terry doctrine to police investigation and detection of previously committed crimes in United States v. Hensley, 469 U.S. 221 (1985).

In Hensley the Supreme Court stated that:

> If police have a reasonable suspicion, grounded in specific and articulable facts that a person they encounter was involved in or is wanted in connection with a completed felony, then a Terry stop may be made to investigate that suspicion. Id. at 229. (Emphasis added).

In State v. Davis, 104 NJ. 490, 504 (1986) the New Jersey Supreme Court explained that:

> An investigatory stop is valid only if the officer has a particularized suspicion based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing.

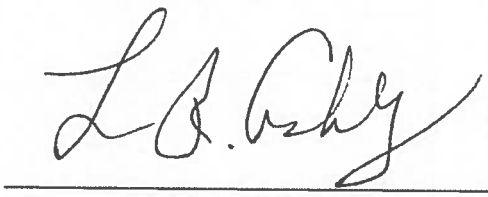
In the case at bar there was no arrest or search warrant for the defendant. The mere fact that the officer, who had no personal knowledge whatsoever with respect to the defendant's alleged previous conduct, was told by fellow officers that he was a "suspect" in a murder case is clearly not a "particularized suspicion based upon an objective observation." Hence, the search of defendant cannot be justified

by the Terry/Hensley doctrine.

CONCLUSION

For the foregoing reasons and authorities cited, defendant-appellant Michael Allen respectfully submits that the trial court's order denying suppression of evidence seized (the handgun) should be reversed and defendant's guilty plea vacated.

Respectfully submitted,



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Dated: February 28, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000684-23T4

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Appeal from a Judgment Of Conviction of the Superior
	:	Court of New Jersey, Law Division, Camden County.
v.	:	Indictment No. 21-04-00823
MICHAEL ALLEN,	:	Sat Below
Defendant-Appellant.	:	Hon. Thomas J. Shusted, Jr., J.S.C

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

On April 7, 2021, a Camden County Grand Jury returned Indictment No. 0823-04-21-I charging defendant, Michael Allen, with first-degree murder, in violation of N.J.S.A. 2C:11-3(a)(1)/(2) (Count One); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-49(a)(1) (Count Two); first-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b)(1) (Count Three); fourth-degree resisting arrest, in violation of N.J.S.A. 2C:29-2(a)(2) (Count Four). (Da1-Da5).

Defendant filed a motion to suppress evidence, which was heard before the Honorable Thomas J. Shusted, Jr., J.S.C., on August 16, 2022 and denied the same day. (1T1, et seq.; Da6).

On February 3, 2023, the trial court heard defendant's motion for reconsideration on the motion to suppress, which was denied the same day. (2T1, et seq.; Da7).

On July 10, 2023, a Camden County Grand Jury returned an Amended Indictment charging defendant with first-degree aggravated manslaughter, in

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[1] "1T" refers to the transcript from the August 16, 2022 motion to suppress hearing;
"2T" refers to the transcript from the February 3, 2023 reconsideration hearing;
"3T" refers to the transcript from the July 10, 2023 plea hearing;
"4T" refers to the transcript from the September 22, 2023 sentencing hearing;
"Db" refers to defendant's brief;
"Da" refers to the appendix to defendant's brief.

violation of N.J.S.A. 2C:11-4(a)(1) (Count One); second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-49(a)(1) (Count Two); first-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b)(1) (Count Three); fourth-degree resisting arrest, in violation of N.J.S.A. 2C:29-2(a)(2) (Count Four). (Da8-Da12).

On July 10, 2023, defendant pled guilty to first-degree aggravated manslaughter, Count One of the Indictment, in exchange for dismissal of the remaining charges. (3T1, et seq.).

On September 22, 2023, defendant was sentenced to a seventeen-year term with 85% parole ineligibility subject to the No Early Release Act ("NERA"), in accordance with the plea agreement. (4T13-6 to 11; Da20-Da23).

On November 2, 2023, defendant filed a Notice of Appeal to this Court. (Da24-Da27).

COUNTERSTATEMENT OF FACTS

On August 16, 2022, the Honorable Thomas J. Shusted, Jr., J.S.C., conducted a hearing on defendant's motion to suppress evidence. (1T1, et seq.).

Camden County Sheriff's Department Investigator Tyler Pickard testified that he was working on a narcotics task force in cooperation with the Camden County Prosecutor's Office when he was asked to assist in a homicide investigation. (1T16-20 to 17-2). Inv. Pickard advised that on September 28, 2020, he and a detective from the Prosecutor's Office were sent to surveil 1405 Park Boulevard, a residence connected to a homicide investigation, while the department waited for a search warrant for the residence to be imminently signed. (1T17-1 to 20). Inv. Pickard testified that were told to report "anything we saw coming or going from the home" and were given three photographs of the homicide suspects: Jawan Coley, Lionel Perry, and defendant, who was specifically identified as the shooter. (1T17-4 to 19-25).

Inv. Pickard advised that they started surveillance at approximately 1:45 p.m. and received notice that the search warrant was approved less than five minutes after they arrived. (1T21-19 to 22-5). Inv. Pickard testified that they continued to watch 1405 Park Boulevard while they waited for the search warrant team to arrive, and observed defendant and co-defendant Mr. Coley approach the residence on foot, enter, and leave approximately 20 minutes later. (1T24-9 to 19). When he reported

such to his supervisors, Inv. Pickard was told that the search warrant team was still preparing and that they needed to detain defendant and Mr. Coley. (1T26-6 to 12).

Inv. Pickard testified that the officers followed the two individuals for a few blocks via vehicle before he got out to follow the men from behind on foot, while the other officers circled around in the vehicle before exiting their vehicles, wearing marked police identifiers, to affect a stop on Kenwood Avenue. (1T26-14 to 28-21). Mr. Coley was apprehended "very shortly" after the officers exited the vehicle, but defendant fled on foot back down the alley towards Inv. Pickard, who stopped him by tackling him by his legs. (1T28-18 to 29-16). Inv. Pickard testified that the officers were all wearing tactical vests, identified themselves as police, and were giving commands to defendant to stop and comply. (1T29-19 to 24).

Inv. Pickard testified that defendant consented to a pat-down search and when the officer asked if he had "anything I need to know about," defendant advised that he had a firearm near the left ankle of his pants. (1T32-1 to 25). Officers recovered a black and green firearm from defendant's pants. (1T33-1 to 4).

The trial court first found that Inv. Pickard was "credible," finding that inconsistencies in his testimony "were really due to perhaps memory and the age of the case as opposed to a lack of credibility on the matter." (1T91-22 to 92-1). The court further found that the warrantless stop of defendant was valid:

> He has knowledge, he's had a warrant a premises and he sees the people go in. He sees the people come out. He's

> waiting for a warrant. He knows who he's looking for. He's familiar with this defendant. So as a result of that he make a tactical decision . . . because they are under investigation he certainly has a reasonable suspicion that this is the individual and so he takes and follows and sees what occurs.
>
> . . .
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> And from there the actions of Mr. Allen are to flee back in the arms where the officer is basically following him down the alleyway going forward, back toward the premises that's under surveillance for the search warrant that is executed. And certainly we have the search warrant executed and going forward from there, and the inventory happened. . .
>
> So that stop, that Terry frisk, that fleeing and certainly the admission and consent of the defendant that there is a weapon on him I find entirely valid.
>
> [1T93-24 to 94-23.]

Next, the court denied defendant's motion for a Franks[2] hearing because defendant failed to provide any evidence that the search warrant for 1405 Park Boulevard was invalid. (1T96-6 to 16). Defendant argued that his arrest was illegal because he was not the subject of an arrest warrant, he was not named in the search warrant, and even if he was named in the search warrant, it was still invalid because he was not arrested at the house, but 10 blocks away. (Ca86-101). The trial court rejected this argument and restated that "the purpose of that search warrant was to try

[2] Franks v. Delaware, 438 U.S. 154, 156 (1978).

to get evidence related to the homicide[,]" and not, as defense counsel alleged, "'cause he entered and then left the premises." (1T95-20 to 96-5, 101-4 to 25).

On September February 3, 2023, the trial court heard defendant's motion for reconsideration. (2T1, et seq.). In his motion for reconsideration of the trial court's denial of his motion to suppress evidence, defendant argued that Officer Pickard had "no personal knowledge . . . [of] defendant's alleged previous conduct" when he arrested him, and therefore did not have sufficient evidence to stop or arrest defendant. (Ca137-Ca139). Defendant also relied on a recent Supreme Court decision, State v. Goldsmith, 251 N.J. 384 (2022), to proffer that the trial court was "plainly incorrect" or "failed to consider evidence" when it found that the State established reasonable and articulable suspicion to stop defendant. (2T4-19 to 11-18).

The trial court found that Goldsmith, which involved a patrol officer conducting a Terry stop after a suspected narcotics transaction, was not applicable to the facts of this case, where officers were actively investigating a homicide and waiting for a search warrant for the residence that they saw defendant, the suspected shooter, walk into while surveilling: "the circumstances of the stop and investigatory method of the officers [in Goldsmith] in this Court's opinion is respectfully completely different than what occurred in this particular matter." (2T21-3 to 10). The court ultimately found that defendant failed to prove that the court originally

acted in a "palpable incorrect" or "irrational" basis, nor did the court fail to consider relevant evidence, and denied defendant's motion. (2T19-3 to 22-11; Da7).

On July 10, 2023, defendant pled guilty to first-degree aggravated manslaughter, Count One of the Indictment, in exchange for dismissal of the remaining charges. (3T1, et seq.).

On September 22, 2023, defendant was sentenced to a 17-year term for his guilty plea of first-degree aggravated manslaughter, subject to an 85% period of parole ineligibility under NERA. (4T1, et seq.). The trial court applied aggravating factors Three, the risk he will commit another crime; Six, defendant's criminal record and seriousness of the offenses; and Nine, need for deterrence; and also applied mitigating factor Fourteen, that defendant was less than 26 years old at the time of the offense. (4T11-24 to 12-13). After analyzed all aggravating and mitigating factors, including those not argued by the parties, see (4T11-18 to 23); N.J.S.A. 2C:44-1(a) and (b), the trial court found that the aggravating factors outweighed the mitigating factors and sentenced defendant in accordance with the plea agreement to a 17-year term with an 85% period of parole ineligibility, applicable fees and penalties, and a 5-year parole term following incarceration . (4T12-14 to 14-3).

This appeal follows.

LEGAL ARGUMENT

POINT I: THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THERE WAS REASONABLE SUSPICION TO STOP AND DETAIN DEFENDANT. (1T90-6 to 105-25). [Raised Below.]

The trial court properly denied defendant's motion to suppress evidence because it found that the State presented reasonable suspicion to stop defendant based on the totality of the circumstances. The State respectfully asks this Court to affirm.

Defendant argues that the trial court erred in denying his motion to suppress evidence because defendant was not identified on the search warrant for 1405 Park Boulevard and was not detained on the "immediate premises." (Db16-22). Defendant further argues that since the warrant was invalid and no other exception to the warrant requirement exists, the trial court further erred in analyzing the officers' reasonable suspicion for the stop when it should have made a probable cause calculation. (Db23-36).

These arguments are without merit. The State respectfully submits that the trial court properly rejected defendant's argument that the State was required to establish probable cause because defendant was not arrested on the search warrant, but because officers presented reasonable suspicion for an investigative detention when they observed defendant, a suspect in a homicide, enter the residence that they were currently surveilling, also connected to the homicide. Furthermore, the trial court's Terry application was proper because it found that the officers established

reasonable suspicion to stop defendant based on the totality of the circumstances. (1T93-21 to 94-7). The State respectfully asks this Court to affirm.

In reviewing a motion to suppress, this Court's review of a trial judge's findings is "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999). An appellate court "must uphold the factual findings underlying the trial court's decision so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Elders, 192 N.J. 224, 243 (2007) (citing Locurto, 157 N.J. at 474). Specifically, a reviewing court "should defer to trial courts' credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Locurto, 157 N.J. at 474; see also State v. Padilla, 321 N.J. Super. 96, 107 (App. Div.)("[d]ue deference must be given to the judge's assessment of credibility since he heard the case, saw and observed the witnesses, heard them testify, and had the best opportunity to assess their credibility"), certif. denied, 162 N.J. 198 (1999); State v. Johnson, 42 N.J. 146 (1964).

As the New Jersey Supreme Court has stated, while issues of law are reviewed de novo, this Court "should not disturb the trial court's findings merely because 'it might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close

case." Elders, 192 N.J. at 244 (quoting Johnson, 42 N.J. at 162); State v. Gandhi, 201 N.J. 161, 176 (2010).

The United States Constitution and the New Jersey Constitution each protects an individual's right from unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const., art. 1, ¶ 7. As always, the touchstone of the Fourth Amendment of the United States Constitution and the New Jersey Constitution, is reasonableness. State v. Zapata, 297 N.J. Super. 160, 171 (App. Div. 1997), certif. denied, 156 N.J. 405 (1998). Nonetheless, both the United States and New Jersey Supreme Courts have found that "'carrying out an immediate search without a warrant'" based on probable cause is "reasonable" under the Fourth Amendment. State v. Witt, 223 N.J. 409, 447 (2015) (quoting Chambers v. Maroney, 399 U.S. 42, 52 (1970)). Of course, any warrantless search is prima facie invalid, and the invalidity may be overcome only if the search falls within one of the specific exceptions created by the United States Supreme Court. State v. Patino, 83 N.J. 1, 7 (1980).

Moreover, a police officer may conduct an investigatory stop if, based on the totality of the circumstances, there is a reasonable and particularized suspicion to believe that an individual has just engaged in, or is about to engage in, criminal activity. State v. Maryland, 167 N.J. 471, 487 (2001); Terry v. Ohio, 392 U.S. 1, 22, (1968). Using the totality of the circumstances test, our Supreme Court emphasized the factors to be considered, including a police officer's "common and specialized

experience," and evidence concerning the area's reputation for crime. State v. Moore, 181 N.J. 40, 45-46 (2004).

Indeed, a "police officer charged with the duty of crime prevention and detection and protection of the public safety must deal with a rich diversity of street encounters with citizens." State v. Sheffield, 62 N.J. 441, 446, cert. denied, 414 U.S. 876 (1973). "In a given situation, even though a citizen's behavior does not reach the level of 'highly suspicious activities,' the officer's experience may indicate that some investigation is in order." Ibid. (internal citations omitted). Law enforcement officers "may rely on characteristics consistent with both innocence and guilt in formulating reasonable suspicion." State v. Stovall, 170 N.J. 346, 359-60 (2002). "[T]he fact that a suspect's behavior may be consistent with innocent behavior does not control the analysis ... '[S]imply because a defendant's actions might have some speculative innocent explanation does not mean that they cannot support articulable suspicions if a reasonable person would find the actions are consistent with guilt.'" State v. Mann, 203 N.J. 328, 339 (2010) (quoting State v. Arthur, 149 N.J. 1, 11-12 (1997)).

Importantly, reasonable suspicion "'does not deal with hard certainties, but with probabilities ... [and] common-sense conclusions about human behavior.'" State v. Valentine, 134 N.J. 536, 543 (1994) (quoting U.S. v. Cortez, 449 U.S. 411, 418 101 (1981)). "Although a mere hunch does not create reasonable suspicion, the level

of suspicion required is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." State v. Gamble, 218 N.J. 412, 428 (2014) (internal citations omitted).

Here, the trial court properly denied defendant's motion to suppress evidence because the State established reasonable suspicion to stop defendant based on the totality of the circumstances. The court also correctly analyzed this encounter as a Terry stop because officers were not intending to arrest defendant when they stopped him, but defendant's conduct and firearm found on his possession led to his arrest following the lawful stop.

At the hearing, the trial court found Inv. Pickard's testimony "credible," and found that the stop of defendant was valid based on the totality of the circumstances.

> [Inv. Pickard] has knowledge, he's had a warrant [for] a premises and he sees the people go in. He sees the people come out. He's waiting for a warrant. He knows who he's looking for. He's familiar with this defendant. So as a result of that he make a tactical decision . . . because they are under investigation he certainly has a reasonable suspicion that this is the individual and so he takes and follows and sees what occurs.
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> And from there the actions of Mr. Allen are to flee back in the arms where the officer is basically following him down the alleyway going forward, back toward the premises that's under surveillance for the search warrant that is executed. And certainly we have the search warrant executed and going forward from there, and the inventory happened . . .

> So that stop, that Terry frisk, that fleeing and certainly the admission and consent of the defendant that there is a weapon on him I find entirely valid.
>
> [1T93-24 to 94-23.]

Indeed, the trial court correctly determined reasonable suspicion based on the totality of the circumstances: first, Inv. Pickard and his partner were not at the residence for the purpose of arresting defendant, but surveilling a residence connected to a homicide, for which a search warrant was imminently being signed and on the way. Second, Inv. Pickard and his partner were given three photographs of individuals who they were told were the suspects in the homicide, including defendant, whom the officers were told was the shooter. Furthermore, Inv. Pickard saw defendant and co-defendant Cowley – two suspects in a homicide – enter the surveilled residence – also connected to the homicide. Also, Inv. Pickard testified that defendant was known to him from other cases where defendant had been in possession of a firearm, and knew that defendant was the current suspect in a shooting homicide.

Therefore, based on the information known to him at the time, which included the fact that defendant was believed to be the shooter in a homicide, he was seen entering a residence also connected with the homicide, and knew that defendant was known to carry a firearm, Inv. Pickard had reasonable suspicion to believe that defendant was engaging, or about to engage in, criminal activity.

Finally, the trial court did not err in making a reasonable suspicion analysis, rather than probable cause, because defendant was only arrested after he attempted to flee from the stop and because he was in possession of a firearm – he was not arrested based on the search warrant. Importantly, if Inv. Pickard intended to immediately arrest defendant and other suspects that day, he would have done so while he watched them enter and leave 1405 Park. However, the record is clear that while defendant and the two others were suspects, Inv. Pickard was waiting on the search warrant for 1405 Park to collect more information about the crime and the suspects. In fact, defendant was charged for the homicide only after 1405 Park was searched and officers recovered evidence incriminating defendant and the other suspects. Therefore, since defendant was stopped without a warrant, the trial court used the correct legal standard of reasonable suspicion. Furthermore, because Inv. Pickard had reasonable suspicion to stop defendant and defendant admitted to carrying a firearm in his pants, Inv. Pickard properly seized the firearm and arrested defendant following the seizure. As such, all evidence seized was legal, and the State respectfully asks this Court to affirm.

POINT II: THE TRIAL JUDGE PROPERLY FOUND THAT DEFENDANT DID NOT OVERCOME THE PRESUMPTION OF VALIDITY THAT ENTITLES HIM TO A FRANKS HEARING. (1T96-6 to 104-5). [Raised Below.]

The trial court correctly denied defendant's motion for a Franks hearing because defendant failed to prove that the search warrant was invalid.

On appeal, defendant alleges that the trial court should have held an evidentiary hearing to determine the validity of the officer who attested to and submitted the search warrant affidavit, and alleges that "it is impossible to know whether [the officer] knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that created a falsehood in applying for a warrant." (Db38-Db39). The State disagrees because defendant does not provide evidence, or even identify, what facts were allegedly falsified in the warrant, just that it is "impossible to know" without a hearing. The State asks this Court to affirm because defendant failed to prove need for a Franks hearing, or even what statements or facts are even in dispute.

To overcome the presumption of validity associated with a search warrant, there must be allegations that the affiants deliberately lied or recklessly disregarded the truth. Franks, 438 U.S. at 156; see also State v. Howery, 80 N.J. 563 (1979) ("New Jersey courts, in entertaining veracity challenges, need go no further than is required as a matter of Federal Constitutional law by Franks v. Delaware"). To mandate an evidentiary hearing, the challenger's attack must be more than conclusory

and must be supported by more than a mere desire to cross-examine. Franks, 438 U.S. at 171. A challenger must point out specifically the portion of the written affidavit that is claimed to be false, accompanied by a statement of supporting reasons. Ibid. "Affidavits of sworn or otherwise reliable statements of witnesses should be furnished or their absence satisfactorily explained . . . [t]he allegedly false statement, however, must be that of the officer and not of a non-government informant." Ibid.; see also State v. Guillman, 113 N.J. Super. 302, 305-06 (App. Div. 1971) (stating that information coming from law enforcement officers is entitled to greater credence than knowledge supplied by the typical informer).

Specifically, the defendant must meet the following factors to be entitled to a hearing: 1) the defendant must make a substantial showing that a false statement made knowingly and intentionally or with reckless disregard for the truth was included by the officer in the warrant affidavit, and 2) the defendant must demonstrate that the allegedly false statements are necessary to the finding of probable cause. Franks, 438 U.S. at 155; Howery, 80 N.J. at 563 (the Supreme Court of New Jersey adopted the standard enunciated in Franks v. Delaware); see also State v. Sheridan, 217 N.J. Super. 20 (App. Div. 1987); State v. Goldberg, 214 N.J. Super. 401 (App. Div. 1986); Siligato v. State, 268 N.J. Super. 21 (App. Div. 1993); State v. Bilancio, 318 N.J. Super. 408 (App. Div. 1999). A strict standard was adopted by the United States Supreme Court because:

> [t]he Supreme Court in Franks, which established the right to this type of hearing, was concerned that frivolous challenges could lead to unnecessary pretrial delays. Consequently, it adopted the substantial preliminary showing requirement and stressed the need for a 'sensible threshold' before a hearing would be required.
>
> [United States v. Figueroa, 750 F.2d 232, 237 (2d Cir. 1984) (citing Franks, 438 U.S. at 169).]

Furthermore, if a defendant can meet the standards detailed above, the defendant then must show that removal of the falsity would cripple the affidavit's statement of probable cause. Franks, 438 U.S. at 171-72. The Court held, "[i]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, then no hearing is required." Ibid.

Here, the trial court properly denied defendant's motion for a Franks hearing because defendant failed to point to any part of the affidavit, or any specific fact or group of facts, that he believes was intentionally fabricated or omitted such as to warrant a Franks hearing: "you have to show me that . . . the warrant was invalid for you to have some evidentiary hearing as to what Judge Ragonese did or didn't do. And that hasn't been shown." (1T9-6 to 9); see also Franks, 438 U.S. at 171, ("[a] challenger must point out specifically the portion of the written affidavit that is claimed to be false, accompanied by a statement of supporting reasons."

Similarly, here, defendant has still not pointed to the facts or portion of the warrant that was allegedly fabricated. Since defendant is unable to meet the first portion of the Franks test, defendant cannot meet the second point, that the allegedly falsified facts established probable cause. As such, defendant cannot prove that the affiant fabricated the warrant insofar that a Franks hearing was required, and the State asks that this Court affirm that decision.

POINT III: THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR RECONSIDERATION. (2T19-3 to 22-11). [Raised Below.]

The trial court correctly denied defendant's motion for reconsideration because defendant did not produce any evidence that the court's decision was based on a palpably incorrect or illegal basis. The State asks this Court to affirm.

On appeal, defendant argues that the trial court erred in denying defendant's motion to reconsider his motion to suppress evidence, alleging that the trial court's denial was based on a misapplication of the Supreme Court's findings in Goldsmith. (Db40-50). Despite defendant's reliance that the investigatory detention standard in Goldsmith should apply here, he also alleges that the trial court misapplied the legal standard by classifying the encounter as an investigatory stop requiring reasonable suspicion, when it should have determined whether the State established sufficient probable cause for his arrest. (Db40-50).

These arguments are without merit. First, the trial court properly denied defendant's motion for reconsideration because defendant failed to prove that the trial court's decision "represents a clear abuse of discretion based on plainly incorrect reasoning or failure to consider evidence or a good reason for the court to reconsider new information." N.J. Ct. R. 4:49-2; Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:49-2 (2022). Second, the trial court correctly determined that

Goldsmith was not applicable and that officers had reasonable suspicion to conduct an investigatory stop. The State asks this Court to affirm.

The Appellate Division reviews a trial judge's decision on whether to grant or deny a motion for rehearing or reconsideration under Rule 4:49-2[3] (motion to alter or amend a judgment order) for an abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Kornbleuth v. Westover, 241 N.J. 289, 301 (2020); Hoover v. Wetzler, 472 N.J. Super. 230, 235 (App. Div. 2022); Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). "The rule applies when the court's decision represents a clear abuse of discretion based on plainly incorrect reasoning or failure to consider evidence or a good reason for the court to reconsider new information." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 4:49-2 (2022).

Pursuant to R. 4:49-2, a motion for reconsideration must state with specificity the basis on which it is made, including a statement of the matters or controlling

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[3] Although motions for reconsideration are not expressly provided for by Part III of the Rules of Court governing practice in the criminal courts, the Appellate Division has nevertheless applied the standard contained in Rule 4:49-2 to such applications. See State v. Wilson, 442 N.J. Super. 224, 233 n.3 (App. Div. 2015), rev'd on other grounds, 227 N.J. 534 (2017); State v. Fitzsimons, 286 N.J. Super. 141, 147 (App. Div. 1995), certif. granted, and remanded, 143 N.J. 482 (1996). Under that Court Rule, motions for reconsideration are addressed to "the sound discretion of the Court, to be exercised in the interest of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)) (internal quotation marks omitted).

decisions which counsel believes the court has overlooked or as to which it has erred. The rule is applicable only when the court's decision is based on plainly incorrect reasoning or when the court failed to consider evidence or there is good reason for it to reconsider new information. Cummings, 295 N.J. Super. at 384-85 (App. Div. 1996).

It is well-settled that a motion for reconsideration is not warranted where the movant merely recapitulates the arguments or cases previously analyzed by the court. DelVicchio v. Hemberger, 388 N.J. Super. 179, 188-89 (App. Div. 2006). Additionally, a motion for reconsideration is not warranted where the apparent purpose of the motion is for the movant to express disagreement with the Court's initial decision. D'Atria, 242 N.J. Super. at 401-02 ("A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court.").

Here, the trial court properly denied defendant's motion for reconsideration because it correctly realized that defendant could not prove that its decision was based on a palpably incorrect or illegal basis, nor that the trial court failed to consider all relevant evidence. Rather, it is "apparent [that] the purpose of the motion is for the movant to express disagreement with the Court's initial decision," because defendant simply "recapitulates the arguments or cases" that were already considered and rejected[4] by the trial court. D'Atria, 242 N.J. Super. at 401-02.

[4] Compare (Db48-Db50) with (Ca137-Ca139).

The trial court first considered whether its decision was based on a "palpably incorrect or irrational" basis and found that defendant failed to point to "anything that [the court] did nor did [the court] hear any argument today that would persuade that I was palpably incorrect or irrational concerning that decision." (2T20-9 to 15). Indeed, the State submits that defendant failed at the hearing, and still fails, to produce any evidence indicating the court's finding was based on an incorrect or irrational basis.

The trial court next considered whether it failed to "consider or appreciate the significance of probative, competent evidence" regarding the applicability of Goldsmith to this case. The trial court properly acknowledged that Goldsmith – which was decided on June 5, 2022, 42 days before the suppression hearing – was available at the time of the suppression hearing and therefore not "new" law. (1T20-16 to 21). Regardless, the trial court found that Goldsmith did not have any bearing on the decision in this case because "the circumstances of the stop and investigatory method of the officers in this Court's opinion is respectfully completely different than what occurred in this particular matter." (2T21-3 to 10).

The State agrees and submits that Goldsmith has zero applicability in this case. In Goldsmith, Camden officers were on patrol and happened upon what they believed was a narcotics transaction between three people in front of an abandoned house, and approached and detained the individual who they believed was the seller without

observing the actual alleged exchange, contraband, or any other evidence of criminal activity other than that the neighborhood was known for narcotics activity. 251 N.J. at 389. The Supreme Court found that the State failed to establish reasonable suspicion to detain defendant because there was insufficient reasonable suspicion for an investigatory stop. Id. at 404-05.

This case is readily distinguished from Goldsmith because those officers did not observe the alleged transaction or see the defendant engage in any illegal activity, did they have reason to believe that the defendant was armed, nor did they have reason to believe that he was engaging in criminal behavior. However, here, the officers were surveilling a specific residence, as part of a specific homicide investigation, where defendant specifically was identified as the shooter. Unlike in Goldsmith, here, officers knew that the crime occurred, where they wanted to look for evidence, and who was involved. Thus, there was sufficient reasonable suspicion for the stop and defendant failed to prove that the court's basis was improper.

Therefore, the trial court properly denied defendant's motion for reconsideration because he failed to prove that the court erred in its decision.

CONCLUSION

For the foregoing reasons, the State respectfully urges this Court to affirm the decisions and convictions of the trial court.

Respectfully submitted,

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DATED: JULY 18, 2024

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