SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1114-23T1

	: CRIMINAL ACTION
STATE OF NEW JERSEY,	:
	: On Appeal from a Judgment of
	: Conviction of the Superior
Plaintiff-Respondent,	: Court, Law Division,
	: Ocean County
	:
v.	: Indictment No. 19-08-1327
	:
	:
VINCENT RICHARDS,	: Sat Below:
	: Hon. Michael T. Collins, J.S.C.
Defendant-Appellant.	: Hon. Kimarie Rahill, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

PAGE NOS.

PROCEDURAL HISTORY 1

STATEMENT OF FACTS 3

LEGAL ARGUMENT 14

POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THERE WAS NO REASONABLE SUSPICION FOR THE STOP, AND POLICE DID NOT HAVE PROBABLE CAUSE TO SEARCH DEFENDANT'S CAR. ALTERNATIVELY, THE CAR SEARCH WAS ILLEGAL BECAUSE ANY PROBABLE CAUSE DID NOT ARISE FROM UNFORESEEABLE AND SPONTANEOUS CIRCUMSTANCES. (Da 6-17) 14

A. There Was No Reasonable Suspicion To Stop Defendant. 16

B. The Police Did Not Have Probable Cause To Search Defendant's Car. 22

C. Alternatively, Any Probable Cause Did Not Arise From Unforeseeable And Spontaneous Circumstances. 25

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE AND SHOULD BE REMANDED FOR RESENTENCING. (3T 10-3 to 14-5; Da 25-28) 31

CONCLUSION 35

INDEX TO APPENDIX

Ocean County Indictment 19-08-1327-I ..... Da 1-5

Order Denying Suppression .....Da 6

Suppression Opinion.....Da 7-17

Plea Forms .....Da 18-24

Judgment of Conviction.....Da 25-28

Notice of Appeal.....Da 29-32

Joseph Goldstein, 'Testilying' by Police: A Stubborn Problem, New York Times (March 18, 2018).....Da 33-51

Notice of Suppression Motion.....Da 52-53

TABLE OF JUDGMENTS, RULINGS, AND ORDERS BEING APPEALED

Suppression Denial .....Da 6-17

Sentence ..... 3T 10-3 to 14-5; Da 25-28

TABLE OF AUTHORITIES

PAGE NOS

Cases

Illinois v. Wardlow, 528 U.S. 119 (2000) 17

In re Perrone's Estate, 5 N.J. 514 (1950) 23

State v. Arthur, 149 N.J. 1 (1997) 19

State v. Carey, 168 N.J. 413 (2001) 32

State v. Case, 220 N.J. 49 (2014) 33

State v. Cohen, 254 N.J. 308 (2023) 15

State v. Coles, 218 N.J. 322 (2014) 18

State v. Dalziel, 182 N.J. 494 (2005) 32

State v. Fuentes, 217 N.J. 57 (2012) 32, 34

State v. Gandhi, 201 N.J. 161 (2010) 16

State v. Goldsmith, 251 N.J. 384 (2022) 14, 17

State v. Jaffe, 220 N.J. 114 (2014) 34

State v. Johnson, 42 N.J. 146 (1964) 22

State v. Kuhn, 213 N.J. Super. 275 (App. Div. 1986) 21

State v. McFarlane, 224 N.J. 458 (2016) 34

State v. Natale, 184 N.J. 458 (2005) 32

State v. Nyema, 249 N.J. 509 (2022) 14

State v. O'Donnell, 117 N.J. 210 (1989) 32

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS

Cases

State v. Pineiro, 181 N.J. 13 (2004) 18, 19

State v. Rivera, 276 N.J. Super. 346 (App. Div. 1994) 21

State v. Rodriguez, 459 N.J. Super. 13 (App. Div. 2019) 15

State v. Shaw, 213 N.J. 398 (2012) 17

State v. Sims, 65 N.J. 359 (1974) 22

State v. Smart, 253 N.J. 156 (2023) ..... passim

State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955) 22, 25

State v. Warren, 115 N.J. 433 (1989) 31

State v. Witt, 223 N.J. 409 (2015) 15, 25

Wong Sun v. United States, 371 U.S. 471 (1963) 16

Ybarra v. Illinois, 444 U.S. 85 (1979) 22

Statutes

N.J.S.A. 2C:35-5(a)(1) 1

N.J.S.A. 2C:35-5(b)(2) 1

N.J.S.A. 2C:35-5(b)(3) 1

N.J.S.A. 2C:35-10(a)(1) 1

N.J.S.A. 2C:44-1 31

N.J.S.A. 2C:44-1(a)(6) 31

N.J.S.A. 2C:44-1(a)(9) 31

TABLE OF AUTHORITES (CONT'D

PAGE NOS

Statutes (Cont'd)

N.J.S.A. 2C:44-1(b)(9) 31

N.J.S.A. 2C:44-1(b)(8) 31

Rules

R. 3:21-4(h) 33

Constitutional Provisions

N.J. Const. art. I, par. 7 ..... 14, 16

U.S. Const. amend. IV 14, 16

Other Authorities

Christopher Slobogin, Testilying: Police Perjury and What to Do About It, 67 U. Colo. L. Rev. 1037 (1996) 24

Joseph Goldstein, 'Testilying' by Police: A Stubborn Problem, New York Times (March 18, 2018) 24

Russell Covey, Police Misconduct as a Cause of Wrongful Convictions, 90 Wash. U. L. Rev. 1133 (2013) 24

PROCEDURAL HISTORY

Ocean County Indictment No. 19-08-1327 charged Vincent Richards with five counts of third-degree possession of CDS (cocaine, oxycodone, heroin, fentanyl, and 4-ANPP), contrary to N.J.S.A. 2C:35-10(a)(1) (Counts 1 and 3-6); second-degree possession of cocaine with intent to distribute, contrary to N.J.S.A. 2C:35-5(a)(1) and 5(b)(2) (Count 2); and third-degree distribution of heroin, contrary to N.J.S.A. 2C:35-5(a)(1) and 5(b)(3) (Count 7). (Da 1-4)[1]

The defense filed a motion to suppress, and on October 29, 2021, the Honorable Michael T. Collins, J.S.C., heard testimony on the motion. (1T) On February 7, 2022, Judge Collins denied the motion to suppress in a written decision. (Da 6-17)

On July 17, 2023, before the Honorable Kimarie Rahill, J.S.C., Richards pleaded guilty to Count 2, second-degree possession of cocaine with intent to distribute. (2T 8-10 to 9-9) In exchange for his guilty plea, the State recommended a maximum sentence of ten years in prison and dismissal of all other charges. (2T 4-1 to 12; Da 18-24) On November 3, 2023, Judge Rahill

[1] Da – Defendant's Appendix
1T – October 29, 2021 – Suppression
2T – July 17, 2023 – Plea
3T – November 3, 2023 – Sentence

sentenced Richards to seven years in prison and imposed all appropriate fines and fees. (3T 10-3 to 14-5; Da 25-28)

Richards filed a notice of appeal on December 13, 2023. (Da 29-32) This appeal follows.

STATEMENT OF FACTS

The suppression hearing revealed two conflicting accounts of the investigatory stop and car search that led to the discovery of the drugs in this case. The State called Toms River Police Department Patrolman Louis Taranto and Detective Duncan MacRae, while Richards testified for the defense.

Patrolman Taranto testified that he was working with the Toms River Special Enforcement Team (SET) in April 2019. (1T 5-11, 5-20 to 24) He explained that the SET is "primarily a plain clothes narcotics unit." (1T 6-2) Taranto testified that the SET is not equipped with body-cameras or motor vehicle recorders. (1T 15-7 to 9)

On April 24, 2019, around 6:30 p.m., Patrolman Taranto was on duty, "conducting plain clothes surveillance" in the parking lot of the Shop Rite located at 2 Route 37 West. (1T 7-4 to 11, 7-18 to 21) Taranto explained that the SET was surveilling this area because "the parking lot of the Shop Rite is an area where a high number of narcotics-related transactions occur" — a fact he is "personally aware [of] through [his] past experiences and departmental intelligence." (1T 12-4 to 8) He testified that he had done extensive prior surveillance at the Shop Rite parking lot, had made prior arrests for drug "[d]istribution and possession" at this particular location, and that between himself and his unit, had made "dozens" of arrests "during the course of [his]

four years in the Special Enforcement Team." (1T 12-9 to 16, 12-23 to 13-7) Multiple other SET officers were also on duty that evening, communicating with each other over their radios. (1T 16-6 to 11)

Patrolman Taranto testified that when he arrived at the Shop Rite, he saw a Jeep Grand Cherokee parked with a sedan, with a man, later identified as Richards, speaking with a woman inside the sedan. (1T 16-15 to 20) Taranto did not recognize Richards and had never seen him before when conducting surveillance. (1T 17-13 to 18) Taranto testified that there was also a Dodge Ram parked near the other two vehicles. (1T 18-7 to 9) He testified that after a few minutes of talking to the woman in the sedan, the woman drove off, and Richards walked over to the Dodge Ram and began talking to its driver. (1T 18-12 to 16) Taranto testified that when Richards went from one vehicle to another, "it raised [his] suspicions" because he was "aware through [his] training and experience that distributors of narcotics will sometimes meet with multiple users in a parking lot in order to distribute." (1T 18-20 to 19-1)

Taranto testified that at some point during Richards's conversation with the driver of the Ram, he "briefly lean[ed] inside" the open passenger-side window. (1T 19-1 to 9) Richards and the driver had "another short conversation," and then Richards walked away, got back into his Jeep, drove to

the front of the Shop Rite, parked, and then he and a female passenger walked inside the grocery store. (1T 19-13 to 15, 19-19 to 23)

Taranto testified that the Ram drove to a different area of the parking lot that "was devoid of any other vehicles" and parked. (1T 19-16 to 19) Taranto continued to watch the Ram and decided to drive by the parked vehicle to "see what the driver was doing." (1T 20-1 to 4) Taranto testified that the driver "looked like he had been looking down at his lap," (1T 20-5) which Taranto's "training and experience" led him to believe that the driver was "examin[ing] the narcotics that they just purchased." (1T 20-6 to 9) On cross-examination, Taranto admitted that the man in the Ram could have been looking down at his phone or his wallet, and that all he knew was that the man was looking down. (1T 38-3 to 22)

Taranto circled the parking lot and drove past the Ram a second time, this time noticing the driver "looked like he had leaned down and then up quickly in a motion that [Taranto] believed to be indicative of him snorting something." (1T 20-15 to 20) On cross-examination, Taranto admitted that he did not see the driver snort anything, could not see if there was any powder or other substances around the man's nose, and the only thing he actually observed was that the man bent down and then came back up. (1T 39-9 to 19)

Taranto testified that he made eye contact with the driver, at which point the driver left the parking lot, driving onto Route 37 and eventually onto the Garden State Parkway northbound. (1T 20-20 to 24) Taranto testified that "[a]t that time, given [his] . . . training and experience and the totality of everything [he] observed, [he] believed that a narcotics-related transaction between the defendant and the driver of the Dodge Ram had just occurred." (1T 21-2 to 5)

Taranto testified that he advised the other SET members of his observations and said that he would follow the Ram with the intention of having it stopped by a marked police unit. (1T 21-6 to 10) Taranto requested that other SET members respond to the Shop Rite parking lot to try "to locate the defendant's vehicle and make contact with him when he exited the Shop Rite." (1T 21-10 to 14) In response to the court's questions, Taranto testified that, to the best of his recollection, he told the other SET members that "I believed I saw a narcotics transaction." (1T 62-17 to 20) He agreed with the court that it was after seeing the Ram's driver "bending over and what you believe was snorting drugs" that "solidified" his belief that there had been a drug transaction. (1T 69-2 to 11)

Taranto followed the Ram onto the Parkway, passing the vehicle when it pulled over at a toll plaza but maintaining surveillance in his rearview mirror. (1T 21-25 to 22-8) Another Toms River patrolman in a marked police car

responded and stopped the Ram. (1T 22-8 to 13) Taranto circled around, arriving back at the stopped Ram where he learned from the patrolman that the driver "had admitted to purchasing five wax folds of heroin from the defendant in the Shop Rite parking lot." (1T 22-17 to 23-1) The driver claimed that he had "snorted" the heroin in the parking lot and then "disposed of the wax folds at some point while he was driving." (1T 23-1 to 4)

On cross-examination, Taranto agreed that he had been watching the Ram as it was driving and never saw the driver throw anything out of the vehicle. (1T 40-1 to 19) In addition, Taranto testified that no one arrested the driver for operating a vehicle while under the influence of drugs, and that the man "did not appear to be under the influence or impaired." (1T 43-17 to 19, 44-16 to 22)

Taranto testified that before he could notify the other SET members about the stop of the Ram's driver and the driver's statements, he heard on the radio that other SET members had already arrested Richards. (1T 45-24 to 46-6) Thus, the other SET members had "know[n] nothing" about the driver's statements "about ingesting heroin." (1T 47-17 to 19)

SET Detective Duncan MacRae testified that on April 24, he was patrolling the Kohl's parking lot on Route 37, across from the Shop Rite, which was also a "high-narcotics area[ ]." (1T 72-12 to 17, 74-23 to 75-6) MacRae heard Taranto "relay[ ] that he believe[d] he witnessed a narcotics transaction, a

suspicious activity in the Shop Rite lot," so MacRae drove to that parking lot. (1T 76-1 to 5) MacRae testified that Taranto had given "a detailed description of the vehicle," so he was able to find the vehicle in the parking lot. (1T 76-6 to 10) MacRae and another SET detective "set up a station surveillance on the vehicle," where they waited for "several minutes but less than an hour." (1T 76-12 to 13, 82-13 to 16)

MacRae testified that he saw Richards returning to his vehicle with a woman, and that they were pushing a shopping cart with groceries. (1T 80-4 to 16) MacRae testified that he and the other detective approached Richards, identified themselves as police, "explained to him the narcotics-related investigation we were conducting and then I advised him of his Miranda rights." (1T 76-15 to 25) On cross-examination, MacRae clarified that he "patted [Richards] down at that point and then . . . told him that we're conducting a narcotics-related investigation and [that he was] going to advise you of your Miranda rights." (1T 85-8 to 11) MacRae testified that Richards "responded that he understood his rights," though agreed on cross-examination that did not "formalize" Richards's response. (1T 77-3 to 4, 85-21 to 22)

MacRae testified that he then "got a little bit more specific," telling Richards what MacRae's "partner had relayed . . . about what he had observed," and Richards "expressed a willingness to cooperate with the investigation. (1T

77-12 to 17) According to MacRae, Richards "stated that he had an amount of cocaine in the back seat of the car." (1T 77-18 to 20) When asked for more details, MacRae responded, "[h]e said it was in the back seat. That's all I recall." (1T 77-23 to 24)

MacRae testified that "based on his statement and what my partner, Patrolman Taranto, had observed," MacRae believed he had probable cause to search Richards's car. (1T 78-1 to 5) He therefore went to the back seat of the vehicle and found a black backpack that contained "an amount of cocaine, a small amount of heroin, a pill container that had Oxycodone inside, a couple of digital scales and there was also a bag in there that contained rice." (1T 78-8 to 16) MacRae further testified that "[a]s soon as [he] opened the back car door, [he] could actually smell the chemical odor of, that's indicative of cocaine." (1T 78-19 to 21)

Richards provided a different account of his encounter with the police that day. He testified that on April 24, he approached the Shop Rite and saw a car that he recognized. (1T 105-4 to 14) The car belonged to a woman he recognized from work; he did not know the woman's name as they were "[n]ot really good friends but we just knew each other on a hi and bye basis." (1T 115-1 to 3, 115-13 to 14, 116-5 to 6) Richards testified that he had just bought a brand-new Jeep and wanted "to brag a little bit" to the woman. (1T 105-14 to 16) He pulled up

to the woman's sedan, rolled down his window, and talked for a little bit before the woman drove away. (1T 105-16 to 25)

As Richards and the woman were talking, Stephen Lacicero pulled up in his pickup truck. (1T 106-18 to 20) Richards testified that Lacicero must have seen him because "he pulled over where our cars were." (1T 106-24 to 107-1) When Richards was done talking with the woman, he walked over and began speaking to Lacicero. (1T 107-3 to 4) Richards testified that he had known Lacicero "for maybe a year," and became friends with him by "[b]uying used cars from" him. (1T 117-23 to 24, 118-1 to 5) Richards acknowledged that he "can understand why it's going to be looking like a drug deal" but maintained that it was not, and he was simply talking to two people he knew. (1T 107-4 to 6)

Richards testified that he and Lacicero talked about the new Jeep for about five to seven minutes, and that during this time, Richards did lean into Lacicero's truck. (1T 107-12 to 18) Richards maintained that he did not sell or give any drugs to Lacicero nor did he see any drugs in Lacicero's vehicle. (1T 108-8 to 23) After a few minutes, Richards's wife began shouting at him, saying "let's go, we got to go shopping," so Richards said goodbye to Lacicero, drove to the grocery store entrance, and went inside with his wife to go food shopping. (1T

108-5 to 7, 109-4 to 8) Richards and his wife were inside the store for "[a]bout an hour, hour and ten minutes." (1T 109-22 to 23)

Richards explained that after he and his wife had walked out of the store, he was standing next to his Jeep talking to another man about the gym and getting a personal trainer. (1T 110-2 to 6) He saw some police officers approaching. (1T 110-15 to 16) Richards testified that Detective MacRae walked up with "some cuffs in his hand and he told [the] guy that I was talking to, if you don't want to go [to] jail, I suggest you get out of here now. So the guy took off." (1T 110-17 to 22) Richards testified that MacRae told him, "they got my buddy Mr. Lacicero down the highway and he said he caught him with five bags of heroin and he said he bought them from you." (1T 111-1 to 4) Richards told MacRae that he did not sell or give Lacicero any drugs. (1T 111-4 to 5)

Richards testified that MacRae then told him that other officers had "been surveilling the parking lot" and saw Richards "serve him some drugs." (1T 111-5 to 12) As Richards was trying to explain to the officers that they were mistaken, MacRae told Richards to put his hands on the car so that he could be patted down. (1T 111-12 to 16) Richards testified that after he was patted down, MacRae "threw the cuffs right on me. He didn't Mirandize or anything, he threw the cuffs right on me." (1T 111-23 to 25)

Richards testified that after he was handcuffed, the police told him they were going to search his Jeep, and further told him that "if there's anything in [the] vehicle, [they were] going to arrest [Richards] and the female companion [he was] with." (1T 112-21 to 24) Richards therefore told the police that there was nothing in his vehicle, but that "if you find anything in the vehicle, it's mine." (1T 112-24 to 113-3) Richards maintained that he never told the police that there were drugs in the car. (1T 113-19 to 24) The police then searched the car, found drugs, and only then did they read Richards his Miranda rights. (1T 113-3 to 5, 114-7 to 12)

Following briefing, the trial court denied the defense motion to suppress. (Da 6-17) The court found the police testimony credible and Richards's testimony incredible. (Da 11) The court concluded that police had reasonable suspicion to support the initial investigatory stop of Richards because the parking lot was known to be a "high-crime area, specifically for narcotics transactions," and because of Taranto's observations of Richards and Lacicero. (Da 13-15) The court further ruled that the search of Richards's car was permissible under the automobile exception because there was probable cause the car contained contraband given Taranto's observations and Richards's admission. (Da 15-16) In addition, the court concluded that probable cause to search the car arose spontaneously because (1) the SET members were not

specifically looking for Richards when they began surveillance; (2) MacRae only had reasonable suspicion when he first stopped Richards; and (3) Richards's admission about possessing drugs "was not an anticipated or foreseeable response to MacRae's investigative inquiry." (Da 16-17)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THERE WAS NO REASONABLE SUSPICION FOR THE STOP, AND POLICE DID NOT HAVE PROBABLE CAUSE TO SEARCH DEFENDANT'S CAR. ALTERNATIVELY, THE CAR SEARCH WAS ILLEGAL BECAUSE ANY PROBABLE CAUSE DID NOT ARISE FROM UNFORESEEABLE AND SPONTANEOUS CIRCUMSTANCES. (Da 6-17)

Both the United States and New Jersey Constitutions protect individuals against unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, par. 7. "Under both constitutions, 'searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid.'" State v. Smart, 253 N.J. 156, 165 (2023) (quoting State v. Goldsmith, 251 N.J. 384, 398 (2022)). To overcome that presumption of unreasonableness, the State must prove that "the search falls within one of the well-recognized exceptions to the warrant requirement." Ibid.

The exceptions at issue in this appeal are an investigatory detention, which police may conduct when there is reasonable and articulable suspicion of criminal activity, State v. Nyema, 249 N.J. 509, 528 (2022), and the automobile exception. Under New Jersey's automobile exception, a vehicle may be searched without a warrant only when: (1) "the police have probable cause to believe that

the vehicle contains contraband or evidence of an offense," and (2) "the circumstances giving rise to probable cause are unforeseeable and spontaneous." State v. Witt, 223 N.J. 409, 447 (2015); see also State v. Rodriguez, 459 N.J. Super. 13, 22 (App. Div. 2019). Our Supreme Court has recently reaffirmed the importance of this second requirement — that the State must prove that the probable cause developed under "unforeseeable and spontaneous" circumstances. Smart, 253 N.J. at 480; State v. Cohen, 254 N.J. 308, 319-20 (2023).

In this case, the motion court erred in denying the motion to suppress because neither of these exceptions was satisfied. First, police did not have reasonable suspicion that Richards had been involved in a narcotics transaction because Patrolman Taranto had seen no such thing. Second, there was not probable cause that Richards's car contained contraband because Detective MacRae's testimony that Richards spontaneously admitted to possessing cocaine was wholly incredible. Third, and alternatively, any probable cause that the vehicle contained contraband developed from the Special Enforcement Team's surveillance and observations of Richards engaging in what they believed to be a narcotics transaction. Under these foreseeable and far from spontaneous circumstances, the warrantless search of Richards's vehicle violated his right to be free from unreasonable searches. The evidence found in

the car should be suppressed. U.S. Const. Amend. IV; N.J. Const. art. I, par. 7; Wong Sun v. United States, 371 U.S. 471 (1963).

A. There Was No Reasonable Suspicion To Stop Defendant.

First, Detective MacRae's initial detention of Richards was illegal because it was not supported by reasonable suspicion that Richards had engaged in criminal activity. The motion court concluded that police had reasonable suspicion because the parking lot was known to be a "high-crime area, specifically for narcotics transactions," and because of Taranto's observations of Richards and Lacicero. (Da 13-15) The court's legal conclusion that there was reasonable suspicion is owed no deference on appeal. See State v. Gandhi, 201 N.J. 161, 176 (2010) ("It is a well-established principle of appellate review that a reviewing court is neither bound by, nor required to defer to, the legal conclusions of a trial . . . court."). And the court's conclusion is mistaken because none of the facts cited, either alone or together, amount to the necessary reasonable suspicion to justify this warrantless detention.

The motion court's reliance on the SET members' testimony that the Shop Rite parking lot was a "high-crime area" was insufficient to support reasonable, articulable suspicion that Richards was involved in criminal activity. As our Supreme Court has recently reaffirmed, "just because crime is prevalent in a particular area 'does not mean that residents in those areas have lesser

constitutional protection from random stops.'" Goldsmith, 251 N.J. at 403 (quoting State v. Shaw, 213 N.J. 398, 420 (2012)). See also Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."). Although citizens want law enforcement to "execute their duties and protect their communities," those citizens equally "do not want the necessary policing of their neighborhoods to occur at the expense of their own constitutional rights of privacy and freedom." Goldsmith, 251 N.J. at 403-04. Thus, even crediting the SET members' testimony that this parking lot was an area where there were frequent narcotics transactions, that fact certainly did not give them license to stop every citizen who was going grocery shopping in Toms River.

Patrolman Taranto's observations of Richards in the Shop Rite parking lot equally could not add to any reasonable suspicion that he was engaged in criminal activity. The objective facts that Taranto relayed about Richards were that there were three cars parked near each other; that Richards spoke to a woman in a sedan; that Richards then walked over to speak to a man in a truck; that while speaking with the man, Richards leaned on the truck and one of his arms crossed the threshold of the truck window; and Richards then drove to the store entrance, parked, and entered the store with his wife. (1T 16-15 to 20, 18-

7 to 16, 19-1 to 23) Although Taranto testified that he found this behavior suspicious because of his "training and experience" as a plainclothes narcotics officer, (1T 18-20 to 19-1) this was nothing more than a hunch. See State v. Coles, 218 N.J. 322, 343 (2014) (holding that an investigative detention may not be based on "the officer's subjective good faith, or a mere hunch").

Notably absent from Taranto's observations are any specific facts to support a belief that Richards had done anything criminal. He did not recognize Richards or have any prior knowledge that Richards was involved in any criminal activity. (1T 17-13 to 18) He made no mention of seeing Richards exchange anything with either the woman in the sedan or the man in the truck. He did not see Richards retrieving any objects from his Jeep or his pockets, nor did he see Richards holding any objects. He did not see any money change hands, nor did he even see any money at all. Talking to two different people in two different cars in a parking lot before driving closer to the store is, at most, odd. It is not criminal nor is it indicative of any criminal activity.

Patrolman Taranto's observations fall far short of other cases where courts have upheld a finding of reasonable suspicion that someone was engaged in a narcotics transaction. For example, in State v. Pineiro, 181 N.J. 13 (2004), an officer saw two men he recognized — one was a suspected drug dealer, while the other was a known "drug user" he had previously arrested — standing on the

corner that was known as a high-drug-crime area. Id. at 18. The officer saw the defendant give the known drug user a pack of cigarettes, and the officer knew that cigarette packs were often used to transport drugs. Ibid. The officer further noticed that neither man was smoking. Ibid. The men noticed the officer, looked "shock[ed] and surprise[d]," and fled. Ibid. The Supreme Court held that these specific observations amounted to reasonable suspicion because the officer knew both men were involved with drugs, saw the exchange of a cigarette pack that neither man was actively using, and watched both men flee upon noticing the police presence. Id. at 25.

Here, unlike in Pineiro, Taranto did not know or suspect Richards to be a drug dealer based on his prior police investigations. (1T 17-13 to 18) He did not see Richards exchange any drugs, or even any potentially innocent objects like a cigarette pack, with either the woman in the sedan or the man in the truck. And Richards did not flee from the scene. Thus, unlike in Pineiro, Taranto's observations of Richards did not provide reasonable suspicion that he had engaged in a drug transaction.

Even in cases where police do not see a hand-to-hand transaction, they still must see something to support a reasonable suspicion that a drug transaction occurred. For example, in State v. Arthur, 149 N.J. 1 (1997), officers had reasonable suspicion that the defendant had engaged in a drug transaction

because they saw a woman enter the defendant's car, speak with the defendant, and then exit the car carrying a brown paper bag and "looking around suspiciously." Id. at 4. The woman did not have the bag when she entered the car, and the officer knew that brown bags were often used to transport drugs. Id. at 5, 10. The Court held that the officer's observations of the woman carrying a paper bag, known to commonly transport drugs, that she did not have when she entered the car, her "furtive movements," and the "high levels of narcotics activity" in the area were sufficient to support reasonable suspicion of the defendant. Id. at 10, 12.

In contrast, here, Patrolman Taranto did not see any containers that could have possibly contained drugs. He did not see Richards hand anything to the woman in the sedan or to the man in the truck. He did not see the woman in the sedan or the man in the truck holding any objects that they did not have before they interacted with Richards. All Taranto actually saw was that Richards spoke to two people in their cars. That is not reasonable suspicion that Richards engaged in a drug transaction with either person.

Taranto's subsequent observations of Lacicero in his truck after his conversation with Richards similarly do not provide reasonable suspicion that Richards did anything criminal for two reasons. First, Taranto did not see Lacicero do anything criminal or suspicious. Taranto testified that he saw

Lacicero drive his truck to a secluded area of the parking lot, look down at his lap, and then bend down and back up, before driving away. (1T 19-16 to 19, 20-5, 20-15 to 24) As Taranto conceded on cross-examination, he did not see what Lacicero was looking at in his lap. While Taranto suspected Lacicero was looking at drugs, Lacicero equally could have been looking at his phone or his wallet. (1T 38-3 to 22) All Taranto observed was that Lacicero was looking down — a wholly ordinary thing to do. Similarly, although Taranto believed Lacicero had "snorted" something, what Taranto actually saw was that Lacicero bent down and then sat back up. He did not see Lacicero use any drugs nor did he see any drugs. (1T 39-9 to 19) These benign observations do not provide reasonable, articulable suspicion that Lacicero was using drugs in his truck.

Second, even if Taranto did have reasonable suspicion that Lacicero was using drugs in his truck, those observations could not support reasonable suspicion that Richards had done anything criminal. "There must be particularized suspicion" for every individual that the police detain. State v. Kuhn, 213 N.J. Super. 275, 282 (App. Div. 1986) (emphasis added). The seizure of a person must be supported by suspicion "particularized with respect to that person," and "[t]his requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another. . . ." State v. Rivera, 276 N.J. Super. 346, 352 (App. Div. 1994)

(quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979)). Patrolman Taranto did not see Richards do anything suspicious. He did not see Richards give Lacicero any drugs. He did not see Richards give Lacicero any containers that could contain drugs. He did not see Lacicero give Richards any money. At most, Taranto saw Richards talking to someone who later used drugs. That cannot provide reasonable, particularized suspicion to detain Richards. The motion court erred in ruling otherwise, and this Court should reverse.

B. The Police Did Not Have Probable Cause To Search Defendant's Car.

Second, the trial court erred in concluding that there was probable cause to search Richards's vehicle because the trial court erred in crediting Detective MacRae's testimony over Richards's testimony. An appellate court must weigh a trial court's "views of credibility of witnesses, their demeanor, and his general 'feel of the case'" heavily. State v. Sims, 65 N.J. 359, 373 (1974). However, a trial court's findings may be overturned when they are "so clearly mistaken 'that the interests of justice demand intervention and correction.'" Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

If an officer's testimony contains "incredible and improbable elements," it should not be credited. See State v. Taylor, 38 N.J. Super. 6, 23-24 (App. Div. 1955). The Taylor Court emphasized that "'[t]estimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself.

It must be such as the common experience and observation of mankind can approve as probable in the circumstances.'" Id. at 24 (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)).

Detective MacRae's testimony about what happened was not credible, and the trial court erred in crediting MacRae over Richards. It is simply implausible that Richards, having been Mirandized by two narcotics detectives as he walked back to his car, would "express[ ] a willingness to cooperate" and simply volunteer "that he had an amount of cocaine in the back seat of the car." (1T 77-12 to 20) The plausibility of this testimony is further undercut by the complete lack of any corroboration. None of the SET members wore body-cameras or had video recorders on their unmarked police cars. (1T 15-7 to 9) MacRae did not formalize Richards's acknowledgment and waiver of his Miranda rights in any way. (1T 77-3 to 4, 85-21 to 22) And MacRae could not remember any details about what Richards said when he allegedly admitted to possessing drugs in the car. (1T 77-23 to 24)

The motion court should not have believed this implausible series of events — that Richards, confronted by two narcotics detectives in the parking lot of a grocery store, knowing he had the right to remain silent, and knowing that there were drugs in the car, would spontaneously volunteer that he was committing a crime. Unfortunately, instances of police misconduct, including

lying, are well-documented. See, e.g., Christopher Slobogin, Testilying: Police Perjury and What to Do About It, 67 U. Colo. L. Rev. 1037, 1041 (1996) (citing a survey in which "defense attorneys, prosecutors, and judges estimated that police perjury at Fourth Amendment suppression hearings occurs in twenty to fifty percent of the cases"); Russell Covey, Police Misconduct as a Cause of Wrongful Convictions, 90 Wash. U. L. Rev. 1133 (2013) (reviewing two mass exonerations based on police officer misconduct). Given the documented history of the problem of "testilying," particularly in cases involving contraband, courts should start viewing officers' assertions with a certain degree of skepticism. See Joseph Goldstein, 'Testilying' by Police: A Stubborn Problem, New York Times (March 18, 2018) ("In many instances, the motive for lying was readily apparent: to skirt constitutional restrictions against unreasonable searches and stops.").[2]

Here, rather than crediting MacRae's implausible version of events, it is instead much more plausible that Richards was telling the truth: that the detectives approached, ordered Richards to put his hands on the car to be frisked, and then told him they were going to search the car. (1T 110-17 to 22, 111-12 to 16, 112-21 to 24) In response to the detectives threatening to arrest both

[2] (Da 33-51) Also available at [www.] nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html

Richards and his wife if they found anything during their search, Richards, knowing that there were drugs in the car, told the officers that anything they happened to find belonged to him, not his wife. (1T 112-24 to 113-3) Richards's recitation of events is "credible in itself" and comports with "common experience." Taylor, 38 N.J. Super. at 24. The court erred in failing to credit his testimony.

Without Richards's alleged statement that there were drugs in the car that belonged to him, the police did not have probable cause that his car contained any contraband. Without probable cause, police were not permitted to conduct a search of the car, let alone a warrantless search. Witt, 223 N.J. at 447. This Court should therefore hold that the warrantless search was illegal.

C. Alternatively, Any Probable Cause Did Not Arise From Unforeseeable And Spontaneous Circumstances.

In the alternative, if MacRae did have probable cause that Richards's car contained contraband, the warrantless car search remained illegal because it did not comport with New Jersey's automobile exception. In particular, any probable cause that existed did not arise from unforeseeable and spontaneous circumstances, as required by New Jersey law. This Court should therefore reverse the denial of the motion to suppress.

Our Supreme Court has recently reaffirmed that New Jersey's automobile exception requires that the circumstances giving rise to probable cause be

"unforeseeable and spontaneous." Smart, 253 N.J. at 163-64. Applying this rule, the Supreme Court in Smart held that the warrantless search of the defendant's car could not be justified by the automobile exception. In Smart, a police officer received a tip from a confidential informant about an individual allegedly selling drugs out of his car. Id. at 160. The tip included the individual's nickname, a physical description, and a picture of his car. Ibid. One month later, the officer saw a vehicle matching the car in the picture in an area known for drug dealing. Id. at 160-61. Upon further investigation, the officer identified the owner of the car as the defendant and saw the defendant and two other individuals enter the car and drive away; the officer followed the car to a residence. Id. at 161. Simultaneously, another officer, who had previously received a tip from a concerned citizen about drug activity at the residence involving a similar car, also followed the defendant to the residence. Ibid. At the residence, the officers saw the defendant engage in activity that they believed was consistent with a drug transaction. Ibid.

One hour after first seeing the defendant, the officers stopped his car. Ibid. The officers patted down and questioned the defendant and, after the driver denied consent to search the car, conducted a canine sniff of the car. Id. at 162. The canine alerted to the presence of narcotics inside the car, the police performed a warrantless search, and seized drugs and other evidence from the

car. Ibid.

The Smart Court affirmed the trial court order suppressing the evidence seized from the car because the circumstances leading to probable cause to search were not unforeseeable and spontaneous. Id. at 159-60. The Court found that circumstances were not unforeseeable, as the officers "reasonably anticipated and expected they would find drugs" in the car before the canine alert. Id. at 172. Nor were the circumstances spontaneous, as they "did not develop, for example, suddenly or rapidly." Id. at 173. Rather, the stop "was deliberate, orchestrated, and wholly connected with the reason for the subsequent seizure of the evidence." Id. at 172. The Court noted that the proper inquiry into whether the circumstances are unforeseeable and spontaneous assesses all the circumstances leading to probable cause, not just the last one. Although the officers "did not have probable cause to search the [car] well in advance of the warrantless search," the "fact that the canine sniff is what culminated in probable cause does not eviscerate the steps that led to the sniff." Id. at 173-74.

Here, as in Smart, the warrantless car search was illegal because the circumstances leading to probable cause were neither unforeseeable nor spontaneous. Patrolman Taranto, a member of the Special Enforcement Team made up of plainclothes narcotics officers, was surveilling a parking lot that was

specifically known for a high number of narcotics transactions. (1T 6-2, 12-4 to 8, 12-9 to 16, 12-23 to 13-7) During his surveillance, he saw what he believed to be "a narcotics transaction" by Richards. (1T 62-17 to 20) He then saw the person he believed was the drug purchaser "bending over and . . . snorting drugs," which "solidified" Taranto's belief that there had been a drug transaction by Richards. (1T 69-2 to 11) Because of his observations and belief that he had just seen Richards sell drugs, he contacted other SET members, told them he had witnessed this narcotics transaction, asked them to stop Richards when he came out of the grocery store, and gave a detailed description of Richard's Jeep so the other officers could locate it. (1T 21-10 to 14, 62-17 to 20, 76-1 to 10)

Detective MacRae, having heard Taranto's report of the drug transaction by Richards, found Richards's car and set up surveillance, where he waited for "several minutes but less than an hour." (1T 76-6 to 13, 82-13 to 16) When Richards returned to his car, MacRae told him that he was conducting a "narcotics-related investigation" and advised Richards of his Miranda rights. (1T 76-15 to 25) At that point, according to MacRae, Richards admitted that there was cocaine in the car. (1T 77-18 to 20)

Here, as in Smart, the investigatory stop of Richards and the subsequent search of his car were "wholly connected" to the police's prior surveillance and investigation, intended to capture people distributing drugs in this high-crime,

high-narcotics parking lot. 253 N.J. at 172. The probable cause that developed — that there were drugs in Richards's car — was not unforeseeable. The SET members believed that Richards had just engaged in a narcotics transaction using his car. Thus, as in Smart, the officers were detaining Richards next to his car because they "reasonably anticipated and expected they would find drugs" in the car. Ibid. Nor were the circumstances leading to probable cause spontaneous — they did not develop "suddenly or rapidly," id. at 173, instead developing over the course of a surveillance operation by multiple officers. Detective MacRae's stop of Richards "was deliberate, orchestrated, and wholly connected" to the later seizure of drugs from Richards's car. Id. at 172. As in Smart, the mere fact that MacRae only had reasonable suspicion that Richards was selling drugs out of his car before Richards's alleged admission "does not eviscerate the steps that led" to that probable cause. Id. at 173-74.

In short, the SET members in this case saw what they believed to be a drug transaction from Richards's car and then stopped Richards next to his car because of their suspicions. The subsequent ripening of that reasonable suspicion into probable cause that the car contained contraband was not a surprise; it was the exact thing the SET members were expecting to happen. Thus, because the probable cause did not arise from unforeseeable and spontaneous circumstances, New Jersey's automobile exception was not

satisfied. The warrantless search of Richards's car was illegal, and all evidence found should be suppressed.

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE AND SHOULD BE REMANDED FOR RESENTENCING. (3T 10-3 to 14-5; Da 25-28)

Richards pleaded guilty to one count of second-degree possession of cocaine with intent to distribute and was sentenced to a seven-year term of imprisonment. (2T 8-10 to 9-9; 3T 10-3 to 14-5; Da 25-28) In imposing this sentence, the court found aggravating factors 6, defendant's prior criminal history, and 9, the need to deter, while also finding mitigating factors 8, conduct unlikely to recur, and 9, defendant's character and attitude indicate he is unlikely to reoffend. N.J.S.A. 2C:44-1(a)(6), (9); 2C:44-1(b)(8), (9) . (3T 12-11 to 13-1, 13-8 to 13) In weighing these factors, the court found that the mitigating factors outweighed the aggravating factors, particularly in light of Richards's conduct in the four years between the offense and the sentencing date. (3T 13-14 to 18) Although the court imposed a lower sentence than the maximum sentence recommended by the State, as the court had full authorization to do, State v. Warren, 115 N.J. 433, 442 (1989), the seven-year sentence remains excessive. This Court should remand for resentencing.

When imposing a sentence, a court must consider the applicability of the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1 to determine the length of a defendant's prison term within the available range. This step requires

a court to "identify the aggravating and mitigating factors and balance them to arrive at a fair sentence." State v. Natale, 184 N.J. 458, 488 (2005). In order to ensure proper balancing of the relevant factors, at the time of sentencing, a court must "state the reasons for imposing such sentence, including . . . the factual basis supporting a finding of particular aggravating and mitigating factors affecting sentence." State v. Fuentes, 217 N.J. 57, 73 (2012). A clear explanation of the balancing process is "particularly important," and that explanation "should thoroughly address the factors at issue." Ibid. (internal citations omitted).

A remand for resentencing is required when the trial court considers an improper aggravating factor, State v. Carey, 168 N.J. 413, 424 (2001), fails to find mitigating factors supported by the evidence, State v. Dalziel, 182 N.J. 494, 504 (2005), or if the trial court's reasoning in finding aggravating and mitigating factors is not based on factual findings "supported by substantial evidence in the record." State v. O'Donnell, 117 N.J. 210, 216 (1989).

Here, a remand for resentencing is required because the court failed to provide any explanation whatsoever for its finding of aggravating factor 9, the need to deter. Moreover, it was error for the court to find aggravating factor 9 at all because, given the court's findings regarding the mitigating factors, there was

simply no need to deter in this case. This inappropriate finding of this aggravating factor renders this sentence excessive.

The law is clear that it is improper for a court to fail to explain the factual bases for aggravating factors. State v. Case, 220 N.J. 49, 65 (2014) ("trial judges must explain how they arrived at a particular sentence") (emphasis added); R. 3:21-4(h) ("At the time sentence is imposed the judge shall state reasons for imposing such sentence including. . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence") (emphasis added). Here, the entirety of the court's explanation for finding aggravating factor 9 was: "As well as aggravating factor 9, the need for deterring you and others from violating the law." (3T 13-12 to 13) This complete lack of explanation falls far short of what our law requires, and a remand for resentencing, at which the court fully explains its findings, is needed.

In addition, the court substantively erred in finding any need for deterrence given that the court found that Richards was unlikely to reoffend. The court relied on Richards's conduct in the four years from the offense date and his history of stable employment to find that Richards's conduct was the result of circumstances unlikely to recur and that Richard's character and attitude demonstrate that he is unlikely to reoffend. (3T 12-11 to 13-1) With no or very low risk of reoffense, there is no need to impose a higher prison sentence in

order to deter a defendant. Thus, in light of the court's findings, the court erred if it believed there was any need for specific deterrence in this case.

Insofar as the court here considered general deterrence as an aggravating factor, "general deterrence has relatively insignificant penal value." Fuentes, 217 N.J. at 79. Moreover, general deterrence alone, without being tethered to any need for specific deterrence, should not constitute an aggravating factor because it is present in every single case. Yet finding an aggravating factor in every case is a clear violation of our sentencing law. State v. McFarlane, 224 N.J. 458, 465 (2016) ("[E]ach '[d]efendant is entitled to [an] individualized consideration during sentencing.'") (quoting State v. Jaffe, 220 N.J. 114, 122 (2014)) (alterations in McFarlane). Thus, the court here erred in finding aggravating factor 9.

The court's total failure to explain the basis of its finding of an aggravating factor, and its improper finding of that inapplicable aggravating factor renders this sentence excessive. Had the court engaged in an appropriate and legally supported balancing of the applicable aggravating and mitigating factors, the court would have recognized that the five-year sentence requested by defense counsel was the only fair sentence. Thus, this Court should remand for resentencing.

CONCLUSION

For the reasons set forth in this brief, the stop of the defendant and search of the defendant's vehicle were illegal, and this Court should reverse the denial of the motion to suppress. Defendant should be given the opportunity to withdraw his guilty plea, if he chooses to do so. Alternatively, defendant's sentence should be vacated and remanded for resentencing.

Respectfully submitted,

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Dated: March 21, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-1114-23T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction in the Superior Court of New Jersey, Law Division, Ocean County.
v.	:	Sat Below:
VINCENT RICHARDS.	:	Hon. Michael T. Collins, J.S.C. Hon. Kimarie Rahill, J.S.C.
Defendant-Appellant.	:	

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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July 9, 2024

TABLE OF CONTENTS

PAGE

COUNTERSTATEMENT OF PROCEDURAL HISTORY 1

COUNTERSTATEMENT OF FACTS 2

LEGAL ARGUMENT 3

POINT I

THE JUDGE CORRECTLY RULED THAT THE SEARCH OF DEFENDANT'S VEHICLE WAS PROPER UNDER THE AUTOMOBILE EXCEPTION. 3

A. Facts Elicited At the Motion to Suppress Hearing on October 29, 2021. 3

B. Standard of Review. 9

C. Detective MacRae Had a Reasonable and Articulable Suspicion To Believe Defendant Had Engaged in Criminal Activity. 11

D. Probable Cause to Search Defendant's Vehicle Arose During Detective MacRae's Interaction with Defendant in the ShopRite Parking Lot. 18

E. Detective MacRae Developed Probable Cause to Search Defendant's Vehicle Spontaneously and Unforeseeably. 23

POINT II

DEFENDANT'S SEVEN-YEAR SENTENCE, WHICH IS THREE YEARS LESS THAN HE BARGAINED FOR WHEN PLEADING GUILTY TO A SECOND-DEGREE CRIME AND THREE YEARS LESS THAN THE MANDATORY MINIMUM EXTENDED TERM FOR WHICH HE WAS ELIGIBLE, SHOULD BE AFFIRMED. 42

CONCLUSION 48

TABLE OF APPENDIX

Plea forms dated July 17, 2023.....Pa1

Judgement of Conviction for Stephen Lacicero.....Pa8

Unpublished opinion in State v. Gainey.....Pa11

Unpublished opinion in State v. Summa.....Pa17

TABLE OF CITATIONS

Pa – State's appendix
Db – Defendant's brief
Da – Defendant's appendix
PSR – Defendant's Pre-sentence report
1T – suppression motion transcript dated October 29, 2021
2T – plea hearing transcript dated July 17, 2023
3T – sentencing transcript dated November 3, 2023

TABLE OF AUTHORITIES

PAGE

CASES

Carroll v. United States, 267 U.S. 132 (1925) ..... passim

Chambers v. Maroney, 399 U.S. 42 (1970) 30-33

Husty v. United States, 282 U.S. 694 (1931) 29, 30

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

State in the Interest of J.G., 151 N.J. 565 (1997) 19, 20

State v. Alston, 88 N.J. 211 (1981) ..... passim

State v. Barrow, 408 N.J. Super. 509 (App. Div.),
certif. denied, 200 N.J. 547 (2009) 9, 12

State v. Blackmon, 202 N.J. 283 (2010) 43

State v. C.H., 264 N.J. Super. 112 (App. Div.),
certif. denied, 134 N.J. 479 (1993) 44

State v. Cancel, 256 N.J. Super. 430 (App. Div. 1992) 46

State v. Carroll, 456 N.J. Super. 520 (App. Div. 2018) 19

State v. Case, 220 N.J. 49 (2014) 43

State v. Citarella, 154 N.J. 272 (1998) 14

State v. Cooke, 163 N.J. 657 (2000) 33, 40

State v. Davis, 104 N.J. 490 (1986) 11-14

State v. Denmon, 347 N.J. Super. 457 (App. Div.),
certif. denied, 174 N.J. 41 (2002) 44

State v. Elders, 192 N.J. 224 (2007) 10, 19

State v. Ercolano, 79 N.J. 25 (1979) 31, 34

State v. Frankel, 179 N.J. 586 (2004) 18, 19

State v. Fuentes, 217 N.J. 57 (2014) 43, 44

State v. Gainey, A-3644-21 (App. Div. Nov. 2, 2023),
certif. denied, 256 N.J. 199 (2024) 37-39

State v. Gonzales, 227 N.J. 77 (2016) 10, 35-37

State v. Gray, 59 N.J. 563 (1971) 13, 14

State v. Hubbard, 222 N.J. 249 (2015) 10

State v. Johnson, 171 N.J. 192 (2002) 19, 20

State v. Johnson, 42 N.J. 146 (1964) 10

State v. Kearney, 183 N.J. Super. 13 (App. Div. 1981),
certif. denied, 89 N.J. 449 (1982) 13

State v. Keyes, 184 N.J. 541 (2005) 19

State v. Lagares, 127 N.J. 20 (1992) 2, 47

State v. LaPorte, 62 N.J. 312 (1973) 30

State v. Letts, 254 N.J. Super. 390 (Law Div. 1992)..... 11, 12

State v. Locurto, 157 N.J. 463 (1999) 9, 10

State v. Martin, 87 N.J. 561 (1981) 31-34

State v. Moore, 181 N.J. 40 (2004) 19, 20

State v. Nishina, 175 N.J. 502 (2003)..... 12, 24, 33

State v. Nyema, 249 N.J. 509 (2022)..... 12

State v. O'Donnell, 117 N.J. 210 (1989) 44

State v. Olenowski, 253 N.J. 133 (2023) 10

State v. Patino, 83 N.J. 1 (1980) 19

State v. Pena-Flores, 198 N.J. 6 (2009) 33, 40

State v. Pierce, 188 N.J. 155 (2006) 43

State v. Pineiro, 181 N.J. 13 (2004) 12, 13

State v. Rodriguez, 172 N.J. 117 (2002)..... 13

State v. Roth, 95 N.J. 334 (1984) 43

State v. Sheffield, 62 N.J. 441 (1973) 13

State v. Smart, 253 N.J. 156 (2023) ..... passim

State v. Stovall, 170 N.J. 346 (2002)..... 13

State v. Summa, A-0369-22 (App. Div. April 9),
certif. denied, __ N.J. __ (2024) 39, 40

State v. Terry, 232 N.J. 218 (2018) 18, 19

State v. Thomas, 110 N.J. 673 (1988) 12

State v. Valentine, 134 N.J. 536 (1994)..... 12, 13

State v. Witt, 223 N.J. 409 (2015) ..... passim

State v. Zutic, 155 N.J. 103 (1998) 20

Terry v. Ohio, 392 U.S. 1 (1968) 11, 20

United States v. Ross, 456 U.S. 798 (1982) 41

United States v. Sokolow, 490 U.S. 1 (1989) 12

STATUTES

N.J.S.A. 2C:33-2.1b 7

N.J.S.A. 2C:35-10a(1) 1, 7

N.J.S.A. 2C:35-5a(1) 1

N.J.S.A. 2C:35-5b(2) 1

N.J.S.A. 2C:35-5b(3) 1

N.J.S.A. 2C:43-6(f) 2, 47

N.J.S.A. 2C:44-1a(9) 45

N.J.S.A. 2C:44-1b(8) 45

N.J.S.A. 2C:44-1b(9) 45

COUNTERSTATEMENT OF PROCEDURAL HISTORY

An Ocean County grand jury returned Indictment 19-08-1327-I charging defendant, Vincent Richards, with third-degree Possession of a Controlled Dangerous Substance in violation of N.J.S.A. 2C:35-10a(1) (counts one, three, four, five, and six); second-degree Possession with Intent to Distribute a Controlled Dangerous Substance in violation of N.J.S.A. 2C:35-5a(1)/2C:35-5b(2) (count two); and third-degree Possession with Intent to Distribute a Controlled Dangerous Substance in violation of N.J.S.A. 2C:35-5a(1)/2C:35-5b(3) (count seven). (Da1-5).

Defendant filed a motion to suppress the evidence seized during the search of his vehicle, which the Honorable Michael T. Collins, J.S.C., heard on October 29, 2021. (1T). Judge Collins denied defendant's motion in a written opinion and Order dated February 7, 2022. (Da6; Da11).

Thereafter, on July 17, 2023, defendant appeared before the Honorable Kimarie Rahill, J.S.C., and pleaded guilty to count two of the indictment, second-degree Possession of a Controlled Dangerous Substance with Intent to Distribute. (2T; Da18-25). In exchange for his guilty plea, the State agreed to recommend ten years of imprisonment with no period of parole ineligibility and to request a dismissal of the remaining counts of the indictment at sentencing. (2T4-6 to 10).

On November 3, 2023, prior to sentencing, the State noted that because defendant was mandatory extended-term eligible, the ten-year prison term was the minimum allowed for a second-degree crime.[1] (3T9-1 to 3). Judge Rahill nonetheless downward departed from the plea agreement, sentencing defendant to seven years in prison with no period of parole ineligibility and imposing the appropriate fines, fees, and penalties. (Da25; 3T13-19 to 24). She also dismissed the remaining counts of the indictment and the disorderly-persons offense that was attached to his original complaint. (Da25).

Defendant filed a notice of appeal seeking a reversal of the denial of his motions to suppress, or in the alternative, a resentencing. (Da29-32).

COUNTERSTATEMENT OF FACTS

At defendant's plea hearing on July 17, 2023, defendant admitted the 113 grams of cocaine found in the backseat of his car on April 24, 2019, belonged to him. (2T8-18 to 25; 3T9-14 to 15). He also conceded that he intended to distribute that cocaine. (2T8-25 to 9-3).

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[1] Defendant's prior convictions for Possession with Intent to Distribute CDS and his current conviction for same make him mandatory extended-term eligible under N.J.S.A. 2C:43-6f and State v. Lagares, 127 N.J. 20 (1992). The plea agreement—which was completed by defense counsel—has the box checked that states the State agreed not to seek an extended term of confinement, (Pa4), but the second part of that question is not filled out and there is no indication of this agreement anywhere in the record of this. Moreover, the State noted during sentencing that defendant "is mandatory extended term because of his 2014 felony." (3T9-1 to 3).

LEGAL ARGUMENT

POINT I

THE JUDGE CORRECTLY RULED THAT THE SEARCH OF DEFENDANT'S VEHICLE WAS PROPER UNDER THE AUTOMOBILE EXCEPTION.

The testimony provided during the motion to suppress hearing firmly established officers had the requisite reasonable suspicion to approach defendant and that the reasonable suspicion then hardened into probable cause once defendant admitted to possessing cocaine in his car. The judge correctly found that the facts giving rise to probable cause were spontaneous and unforeseeable. The officers' subsequent search of defendant's vehicle and seizure of evidence was therefore proper under the automobile exception and Judge Collins denial of defendant's motion to suppress should be affirmed.

A. Facts Elicited At the Motion to Suppress Hearing on October 29, 2021.

Officer Louis Taranto testified that he was on duty on April 24, 2019, as part of the Special Enforcement Team (SET) with the Toms River Police Department, which is a plain-clothes unit that uses surveillance to monitor controlled-dangerous-substance (CDS) activity. (1T5-10 to 6-7). Taranto had been an officer for ten years and had been assigned to the Special Enforcement Team for two and a half years. (1T5-18 to 24; 1T29-2 to 4). During his career, he was involved in hundreds of narcotics-related investigations. (1T6-8 to 14).

That day, around 6:30 p.m., he was conducting general surveillance in an unmarked vehicle in the parking lot of the ShopRite in Toms River, not looking for anyone in particular. (1T7-4 to 13; 1T14-2 to 11; 1T15-3 to 4). Having conducted approximately one hundred surveillance operations from that location in the past, he was aware that the parking lot was frequently used to conduct narcotics-related transactions. (1T12-4 to 8; 1T13-3 to 7).

While parked in the lot, he noticed a newer-model Jeep Grand Cherokee parked next to a sedan with a male, later identified as defendant, standing outside of it speaking to the female driver through the passenger-side window. (1T16-15 to 20; 1T31-16 to 20; 1T32-17 to 18). Taranto had never seen defendant before and did not know him, nor is there any testimony that he recognized his vehicle. (1T17-13 to 18; 1T36-12 to 14). The conversation between defendant and the woman lasted no more than a few minutes. (1T34-22 to 24). Defendant then walked over to another vehicle, a Dodge Ram, that was parked on the opposite side of defendant's vehicle while the woman in the sedan drove away. (1T16-15 to 17; 1T18-7 to 16). All three vehicles had been separately parked next to each other, but away from the store at the far end of the parking lot. (1T60-9 to 61-18).

Defendant's actions in going from talking to a person in one vehicle to talking to a person in another vehicle raised Taranto's suspicions. (1T18-20 to

22). Through his training and experience, he was aware that CDS distributors will sometimes meet up with multiple users in parking lots in order to sell. (1T18-23 to 19-4). Parking lots also have a large volume of vehicular and pedestrian traffic that can help mask any illicit activity. (1T13-14 to 18).

Defendant began speaking to the driver of the Dodge Ram, later identified as Steven Lacicero, through the passenger-side window. (1T18-12 to 14; 1T19-8 to 9). Defendant leaned onto the frame and then leaned through the window with at least one arm for a few seconds. (1T19-8 to 9; 1T59-10 to 21). After a short conversation, defendant walked away and got back into his own vehicle and drove to the front of the store and entered the store with his wife. (1T19-13 to 23).

Lacicero then drove to a different area of the parking lot that was free of other vehicles and parked. (1T19-16 to 19; 1T30-2 to 3). Taranto drove toward it and noticed Lacicero was looking down toward his lap. (1T20-1 to 6). Taranto testified that through his experience, he is aware that users will often examine the CDS they have just purchased and believed that was what Lacicero was doing. (1T20-6 to 9). Lacicero looked up and made eye contact with Taranto as he drove by, and when Taranto circled the lot back to Lacicero's vehicle again, he noticed Lacicero was leaning down and then quickly picking his head up, which Taranto testified to him to be "indicative of [Lacicero] snorting

something." (1T20-10 to 20; 1T39-10 to 12; 1T70-1 to 2). After Taranto made eye contact with Lacicero a second time, Lacicero drove out of the parking lot. (1T20-20 to 24).

Believing he had observed a CDS-transaction between defendant and Lacicero based on his training and experience, Taranto alerted other Toms River SET members and officers on duty of his observations and requested the team stop Lacicero's vehicle and approach defendant upon his leaving the ShopRite. (1T21-6 to 14). Taranto then followed Lacicero onto the Parkway. (1T21-25 to 22-1). Likely suspecting he was being followed, Lacicero pulled over to the side of the road and let Taranto pass him before he merged back into traffic. (1T22-2 to 8). Taranto was able to maintain eye contact with Lacicero's vehicle in his rearview mirror and saw other members of the Special Enforcement Team and Toms River police respond to stop Lacicero's Dodge Ram at 6:53 p.m. (1T22-9 to 13; 1T51-3 to 12). Taranto had to drive to one of the Parkway turnaround areas before he could return to the scene of the stop. (1T22-17 to 20).

Taranto testified that another officer, Officer Seaman, had already removed Lacicero from the car and had read him his rights by the time Taranto arrived. (1T22-20 to 23). Seaman informed Taranto that Lacicero had admitted to buying five folds of heroin from defendant in the ShopRite parking lot,

snorting the heroin, and then disposing of the folds while driving. (1T22-23 to 23-5; 1T42-12 to 14). Taranto never saw Lacicero throw anything out of his window, but surmised Lacicero could have thrown the folds at some point while Lacicero was driving behind his vehicle on the Parkway since his main focus was on looking forward. (1T40-6 to 19; 1T55-6 to 13).

Lacicero did not appear to be under the influence while speaking to officers and was not arrested for driving under the influence, but he was arrested and charged with Possession of a Controlled Dangerous Substance in violation of N.J.S.A. 2C:35-10a(1) and Wandering/Prowling to Obtain a Controlled Dangerous Substance in violation of N.J.S.A. 2C:33-2.1b. (1T44-16 to 19; 1T44-17 to 19; Pa8).[2] Soon after Lacicero was arrested, Taranto heard on the radio that other SET officers had arrested defendant. (1T45-24 to 46-6). He had not informed those officers about Lacicero's statements during his motor vehicle stop. (1T47-12 to 19).

Detective Duncan MacRae also testified at the motion to suppress hearing and indicated he was one of the SET officers on duty with Taranto that day. (1T74-8 to 15). While conducting his own SET surveillance in a parking lot across the street, he heard Taranto relay his observations about a potential drug

[2] Lacicero pled guilty and was sentenced for Wandering/Prowling to Obtain a Controlled Dangerous Substance on July 17, 2019. Part of his plea agreement required he provide truthful testimony at trial against defendant. (Pa8).

transaction in the ShopRite parking lot. (1T76-2 to 5). He and another officer, Detective Chencharik, drove to the ShopRite and set up stationary surveillance on the vehicle Taranto had described. (1T76-1 to 13).

Detective MacRae testified that at 7:05 p.m., while in the ShopRite parking lot, he saw defendant and his wife returning to his vehicle with a cart of groceries. (1T52-14; 1T76-15 to 17; 1T80-7 to 16). He and Chencharik approached defendant with their badges around their necks, identified themselves as police officers, informed him of the narcotics-related investigation they were conducting, and patted him down. (1T76-23 to 25; 1T85-8 to 11). Out of an abundance of caution, MacRae said, he informed defendant of his rights, which defendant indicated he understood. (1T76-23 to 77-7; 1T93-25 to 94-7). MacRae told defendant what Taranto had observed and asked defendant if there was anything illegal in his vehicle. Defendant admitted there was a "small amount" of cocaine in the back seat of the car and that anything found in the car was his. (1T77-12 to 20; 1T87-6 to 16; 1T91-20 to 92-1).

At that point, MacRae told defendant he was going to search the car. (1T90-11 to 12). As MacRae opened the backdoor of defendant's Jeep, he immediately smelled the "chemical odor . . . that's indicative of cocaine" emanating from inside. (1T78-19 to 21). Officers searched the backseat and

located a black backpack that contained cocaine, heroin, oxycodone, scales, and a bag with rice. (1T78-13 to 16). Up until that point, MacRae had not handcuffed defendant. (1T90-21 to 25).

Defendant also testified during the motion to suppress hearing, but provided a different version of events than Officer Taranto or Detective MacRae that Judge Collins found not credible. (Da9-11). He admitted to being in the ShopRite parking lot and talking to the drivers of two separate vehicles, but denied selling them CDS. (1T107-14 to 18; 1T108-19 to 20). He also denied admitting to Detective MacRae that there was cocaine in his car, but did admit he told the officers, "Anything you find belongs to me." (1T122-23 to 24). "I said you're not going to find anything, but if you do, it belongs to me because it's my Jeep." (1T122-25 to 123-2).

B. Standard of Review

Judge Collins's ruling denying defendant's motion to suppress the evidence found in his car was correct and his factually sound and legally supported findings should be upheld on appeal. Appellate review of a trial judge's findings is deferential and "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999). Courts must give "great deference" to the trial judge's factual findings. State v. Barrow, 408 N.J. Super. 509, 516 (App. Div.), certif. denied, 200 N.J. 547 (2009). After all, the trial judge's factual and credibility

findings 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. Thus, courts "are obliged to uphold the motion judge's factual findings" that are supported by the record and should only review the trial court's legal conclusions de novo. State v. Gonzales, 227 N.J. 77, 101 (2016); State v. Hubbard, 222 N.J. 249, 263 (2015).

An appellate court also must not "engage in an independent assessment of the evidence as if it were the court of first instance." Locurto, 157 N.J. at 471. Once the reviewing court is satisfied the judge's findings were based on sufficient credible evidence in the record, "its task is complete and it should not disturb the result[.]" Ibid. This is true even if the case is "a close one" or the appellate court may have reached a different conclusion were it independently deciding the case. Ibid. As our Supreme Court has frequently reaffirmed, "A trial court's findings should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction." State v. Elders, 192 N.J. 224, 244 (2007) (citations and punctuation omitted). Only if the appellate court is "thoroughly satisfied" that the trial court erred and made a decision that was "so plainly unwarranted" may it step in and "make its own findings and conclusions." State v. Johnson, 42 N.J. 146, 162 (1964), modified on other grounds, State v. Olenowski, 253 N.J. 133 (2023).

Here, after carefully weighing the conflicting testimony before him, Judge Collins denied defendant's motion to suppress. He determined Officer Taranto was credible, "forthright in his answers," and "readily conceded" unfavorable information or when he could not recall a detail. (Da9). He also found Detective MacRae's testimony credible for many of the same reasons. (Da9). On the other hand, Judge Collins ruled, "[t]he Court cannot reach the same conclusions regarding Defendant's credibility[.]" (Da10). He found defendant was not credible and his testimony was inconsistent and illogical. (Da10; Da11).

Judge Collin's determinations thus rested squarely on his ability to observe the testifying witnesses and judge their credibility. His careful analysis, which was based on sufficient credible evidence in the record, is entitled to substantial deference and should be upheld on appeal.

C. Detective MacRae Had a Reasonable and Articulable Suspicion To Believe Defendant Had Engaged in Criminal Activity.

Judge Collins correctly ruled that Officer Taranto's observations of defendant in the ShopRite parking lot justified Detective MacRae's investigatory stop of defendant a short time later. Police tasked with protecting the public are authorized to approach and temporarily detain someone for questioning if they suspect the person stopped has been or is about to engage in criminal activity. State v. Davis, 104 N.J. 490, 508 (1986); Terry v. Ohio, 392 U.S. 1 (1968). "There can be no question that a police officer has the duty to

investigate suspicious behavior." State v. Letts, 254 N.J. Super. 390, 396 (Law Div. 1992). "Common sense and good judgment . . . require that police officers be allowed to engage in some investigative street encounters without probable cause." Davis, 104 N.J. at 505. Officers may thus stop someone if they have a particularized and reasonable suspicion to do so. Id. at 504.

The United States Supreme Court and our courts have held this reasonable-suspicion standard means there must be "some minimal level of objective justification" for conducting the investigatory stop. United States v. Sokolow, 490 U.S. 1, 7 (1989); State v. Nishina, 175 N.J. 502, 511 (2003). "Reasonable suspicion is less than proof by a preponderance of evidence and less demanding than that for probable cause," and simply requires more than a hunch or "unparticularized suspicion[.]" Barrow, 408 N.J. Super. at 517 (citations and punctuation omitted). In short, officers must be able to articulate exactly what behavior led them to believe the defendant was engaged or about to engage in criminal conduct. State v. Thomas, 110 N.J. 673, 678 (1988).

Courts examining the legality of an officer's stop must look at "the whole picture." State v. Nyema, 249 N.J. 509, 531 (2022). The reasonable-suspicion test is incredibly fact sensitive and not "readily, or even usefully, reduced to a neat set of legal rules." State v. Nishina, 175 N.J. 502, 511 (2003); State v. Pineiro, 181 N.J. 13, 22 (2004). See State v. Valentine, 134 N.J. 536, 546 (1994)

("No mathematical formula exists for deciding whether the totality of the circumstances provide an officer" with reasonable suspicion.). Instead, common sense should guide the court's analysis. State v. Stovall, 170 N.J. 346, 370 (2002).

If the officer's observations reasonably warranted the limited intrusion upon the individual's freedom based on the facts present and the rational inferences that can be drawn from the totality of the circumstances, the investigatory stop will be deemed valid. Davis, 104 N.J. at 504; State v. Rodriguez, 172 N.J. 117, 126–27 (2002). Recognition of the officer's experience and knowledge is thus a crucial component of the court's review. Pineiro, 181 N.J. at 22. "In determining whether an officer acted reasonably in the circumstances[,] due weight must be given to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." State v. Kearney, 183 N.J. Super. 13, 18 (App. Div. 1981), certif. denied, 89 N.J. 449 (1982) (punctuation omitted). Even though an individual's behavior may not seem suspicious to an ordinary citizen, "the officer's experience may indicate that some investigation is in order." State v. Sheffield, 62 N.J. 441, 446 (1973).

> [P]olice officers are trained in the prevention and detection of crime. Events which would go unnoticed by a layman ofttimes serve as an indication to the trained eye that something amiss might

> be taking place or is about to take place. The police would be derelict in their duties if they did not investigate such events.
>
> [Davis, 104 N.J. at 504 (quoting State v. Gray, 59 N.J. 563, 567–68 (1971).]

And "[t]he fact that purely innocent connotations can be ascribed to a person's actions does not mean that an officer cannot base a finding of reasonable suspicion on those actions as long as a reasonable person would find the actions are consistent with guilt." State v. Citarella, 154 N.J. 272, 279–80 (1998) (punctuation omitted).

Here, as outlined in Subpoint A, above, Officer Taranto had a well-grounded and particularized suspicion that defendant had engaged in drug activity. In an area known for a large volume of CDS transactions, Taranto, a specialized and experienced officer, observed defendant engage to two quick conversations with people in two different cars, which were parked next to his vehicle in an isolated area of the parking lot. He then observed the driver of one of the vehicles drive to a different area of the parking lot, park, look down into his lap, and then—after making eye contact with Taranto—make movements indicative of snorting by leaning over into his lap and quickly picking up his head. Taranto relayed these observations to MacRae and his belief a CDS-transaction had occurred.

A reasonable officer with Taranto's training and experience would view the facts and the rational inferences that can be drawn from them and objectively suspect defendant was distributing CDS. Judge Collins thus appropriately found that the police "had a reasonable and articulable suspicion of criminal activity to conduct an investigatory stop of defendant[.] (Da13). He based this finding on eight distinct factors:

> (1) The Shop Rite parking lot is known to law enforcement as a high-crime area, specifically for narcotics transactions. Taranto testified to being involved in hundreds of surveillance details there and dozens of CDS arrests at that location.
>
> (2) Taranto observed Defendant standing next to a sedan and speaking with an unidentified female who remained in her vehicle. Taranto characterized the conversation as brief and the woman left the parking lot immediately thereafter.
>
> (3) Immediately after the unidentified female left the parking lot, Taranto observed Defendant meet with a second individual, Lacicero. As with the unidentified female, Defendant approached Lacicero, who did not exit his car.
>
> (4) Taranto candidly admitted he did not observe any hand-to-hand transactions between Defendant and Lacicero. However, he observed Defendant briefly lean into the Dodge Ram, obstructing his hands from view.
>
> (5) Based on the two short interactions in a parking lot known for narcotics distribution, and Taranto's training and experience with respect to CDS transactions, Taranto suspected Defendant was engaged in CDS-related activity.
>
> (6) Following the second interaction, Lacicero drove away and parked in the southern area of the parking lot devoid of other vehicles. Based on Taranto's observations of Lacicero, he believed

> Lacicero was inspecting narcotics he had just purchased and then snorting them in the parking lot.
>
> (7) Taranto testified that he suspected narcotics activity after the two short interactions between Defendant and the two other individuals in the parking lot, but that Lacicero apparently snorting drugs "hardened my belief that there was a transaction occurring." (Tr. 69:6-7).
>
> (8) Taranto informed SET over police radio that he believed a narcotics transaction occurred. MacRae, acting on Taranto's information, then stopped Defendant as he exited the Shop Rite for investigatory purposes.
>
> [Da14-15.]

As part of his ruling, Judge Collins also discredited defendant's testimony that tried to explain away what Taranto had observed. (Da11). Defendant testified that while on his way to go grocery shopping with his wife, he drove across the parking lot so he could speak to a woman so that he could show off his new Jeep to her. (1T105-16 to 18). But he admitted he did not know her name and was not friends with her. (1T105-13 to 25; 1T114-20 to 115-9). He also testified that while at his workplace, this woman would notice his Jeep and would comment, "[T]hat's a nice Jeep, that's a nice Jeep." (1T115-22 to 24). Likely realizing his error, defendant tried to backtrack and explained he had a <u>different</u> Jeep before, but now he had an SRT which he wanted to show her. (1T115-25 to 116-1). And despite specifically seeking her out to show off his new Jeep, he only spoke to her through her passenger-side window, and the

woman never got out of her vehicle to look at his Jeep. (1T32-17 to 18; 1T118-11 to 18).

Defendant's explanation for his interaction with Lacicero was likewise incredible. Once again willing to delay his grocery shopping and leave his wife sitting inside his vehicle, defendant left the unnamed woman and walked over to Lacicero, who happened to drive up next to defendant right then. (1T106-18 to 20). Defendant said Lacicero parked next to his Jeep and asked if it was his and they "started talking about [his] Jeep a little bit" through Lacicero's passenger-side window. (1T35-25 to 36-2; 1T107-12 to 16). Lacicero, defendant claimed, is "absolutely" a car guy. (1T119-1 to 3). Yet, defendant admitted Lacicero remained in his vehicle: "[H]e didn't get out, he just looked." (1T119-13 to 19). And defendant did not gesture to the SRT or use his hands to describe it at all, as Taranto testified there were "no hand movements" during the conversation beyond defendant leaning on Lacicero's doorframe. (1T35-16 to 24; 1T120-12 to 13).

As Judge Collins therefore held, "Defendant's explanation of the 'transactions' in the parking lot compromised his credibility." (Da11).

> With respect to the encounter with the unidentified female in the sedan, Defendant identified her as "a friend". (sic) He claimed he knew her because she often comes into his place of employment to speak with a co-worker. And the reason that he approached her in the parking lot was to show off his new vehicle. Despite the foregoing, Defendant testified he did not know "his friend's" name.

> Also noteworthy, "his friend" never exited her vehicle to check out the new Jeep Grand Cherokee Defendant was eager to show off.
>
> Defendant made a similar claim with respect to his encounter with Lacicero. He identified Lacicero as someone he knew to be a "car guy." Again, and despite Defendant's alleged enthusiasm to show off his new Jeep to a "car guy," Lacicero did not exit his vehicle to check out the Defendant's new Jeep.
>
> [Da10-11.]

Accordingly, the judge found, defendant's version of events was not believable.

As Judge Collins correctly determined, Taranto's observations, coupled with the inferences he could draw from them based on his training and experience, formed the reasonable suspicion that allowed MacRae to stop defendant after he left ShopRite a short time later. These findings were well-supported, based on the record, and should be afforded proper deference on appeal.

D. Probable Cause to Search Defendant's Vehicle Arose During Detective MacRae's Interaction with Defendant in the ShopRite Parking Lot.

Detective MacRae was permitted to search defendant's vehicle without a warrant once defendant revealed there was cocaine in his car. "The Fourth Amendment does not require that every search be made pursuant to a warrant." State v. Terry, 232 N.J. 218, 231 (2018) (citations and punctuation omitted). Warrantless searches are permissible if the State can prove by a preponderance

of the evidence that the search was "justified by one of the 'few specifically established and well-delineated exceptions' to the warrant requirement." State v. Witt, 223 N.J. 409, 422 (2015) (quoting State v. Frankel, 179 N.J. 586, 597-98 (2004)); State v. Elders, 192 N.J. 224, 254 (2007).

Another exception to the search warrant requirement, the automobile exception, allows police officers to search a motor vehicle without a warrant if they have probable cause to believe the vehicle contains contraband or evidence of an offense. Witt, 223 N.J. at 422. Our Supreme Court has justified this exception based on the inherent mobility of vehicles, the lesser expectation of privacy in vehicles, and the recognition that a prompt search based on probable cause may be less intrusive than seizing a vehicle and detaining the driver while the police prepare and a judicial officer reviews a search warrant application. Terry, 232 N.J. at 233 (2018) (citing Witt, 223 N.J. at 422-24).

But what constitutes probable cause is a "flexible, nontechnical concept" whose foundation is a "well-grounded suspicion that a crime is being committed" or a "reasonable ground for belief of guilt." Keyes, 184 N.J. 541, 553 (2005); State v. Patino, 83 N.J. 1, 10 (1980); State v. Moore, 181 N.J. 40, 46 (2004). This is a "low threshold," which our Supreme Court has unanimously decided "is not a stringent standard[.]" State v. Carroll, 456 N.J. Super. 520, 544 (App. Div. 2018); State in the Interest of J.G., 151 N.J. 565, 591 (1997). It

"requires nothing more than a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Johnson, 171 N.J. 192, 214 (2002) (citations omitted, alteration in original).

And as with the reasonable-suspicion test, courts determining whether probable cause existed to justify an officer's search should consider the totality of the circumstances, including the officer's experience and evidence of the high-crime reputation of an area. Moore, 181 N.J. at 46. See State v. Gamble, 218 N.J. 412, 431 (2014) (noting that location of stop in high-crime area may factor into totality of circumstances). "Although several factors considered in isolation may not be enough, cumulatively these pieces of information may 'become sufficient to demonstrate probable cause.'" Moore, 181 N.J. at 46 (quoting State v. Zutic, 155 N.J. 103, 113 (1998)). See Johnson, 171 N.J. at 215, 217 (recognizing that in determining the reasonableness of officers' actions, courts must give consideration to specific reasonable inferences which officers are "entitled to draw from facts in light of their experience.") (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

Here, as outlined above, Officer Taranto reasonably suspected defendant was engaging in CDS activity. But it was defendant's subsequent unexpected admissions to MacRae after he approached defendant in the ShopRite parking

lot that elevated Taranto's reasonable suspicion into probable cause. MacRae had his badge around his neck when he approached defendant and informed him of Taranto's observations and the CDS-related investigation they were conducting. (1T76-18 to 23). He then patted defendant down and informed him of his Miranda rights. (1T85-8 to 11). Defendant "responded that he understood his rights" and was willing to cooperate. (1T76-23 to 77-20; 1T85-16 to 17). MacRae testified he then, "asked him if he had anything in the car which he shouldn't be in possession of. . . . He told me there was a small amount of cocaine in the back." (1T89-8 to 12). And both MacRae and defendant testified that defendant told the officers anything found in the car was his. (1T91-25 to 92-1).

These admissions, in conjunction with Taranto's observations, immediately escalated the suspicion to the probable cause required to search defendant's vehicle. As Judge Collins held, "MacRae developed probable cause during the investigatory stop." (Da16). "In addition to Taranto's information that Defendant was involved in a narcotics transaction, MacRae testified that Defendant admitted to having cocaine in the vehicle. The admitted presence of CDS in Defendant's vehicle provided more than the well-grounded suspicion needed to satisfy a finding of probable cause." (Da16).

This decision rested on Judge Collin's ability to hear and view the witnesses before him. Detective MacRae, he determined, was credible. "[H]e was forthright in his answers; he conceded the point when he could not recall specific information; and he was not evasive in his responses." (Da9). He further noted MacRae's candor in denying that Taranto relayed to him that Lacicero admitted to buying heroin from defendant in the ShopRite parking lot—a fact which undoubtedly would have increased the likelihood that the court would have found he had probable cause to search defendant's vehicle. (Da10).

Judge Collins determined that unlike MacRae's, defendant's version of events was not credible. "The Court cannot reach the same conclusions regarding Defendant's credibility[.]" (Da10). In addition to providing conflicting testimony about the events leading up to the search of his vehicle, he noted, defendant

> claims he never informed officers that his vehicle contained narcotics, whereas MacRae testified Defendant said there was a small amount of cocaine in the back. Defendant did admit on direct examination-consistent with MacRae's recollection-that whatever was found in the car belonged to him. It strikes the Court as anomalous that Defendant would claim ownership of CDS while apparently denying that he informed MacRae of its location before the search of his vehicle.
>
> [Da10.]

Thus, crediting Taranto's and MacRae's version of events over defendant's, Judge Collins determined the officers' search of defendant's vehicle was

constitutionally permissible. (Da17). This fact-specific and witness-driven conclusion was appropriate and should not be disturbed on appeal.

E. Detective MacRae Developed Probable Cause to Search Defendant's Vehicle Spontaneously and Unforeseeably.

Neither Officer Taranto nor Detective MacRae could have known that defendant, who they did not know or recognize or have any prior information about, would unexpectedly admit that he possessed CDS in his vehicle, which the police also had no prior knowledge of, after he was confronted with officers' observations of his suspected criminal activity. Thus, the probable cause to search defendant's vehicle arose spontaneously and unforeseeably, justifying the warrantless search.

As outlined above, the automobile exception requires that law enforcement officers acquire probable cause to believe contraband or evidence of a crime will be found in a vehicle before searching it. But unlike federal law and most other states, where exigency is satisfied by the vehicle's inherent mobility, our Supreme Court created an exigency standard that requires probable cause that has arisen unforeseeably and spontaneously. Witt, 223 N.J. at 421, 425-26.

Defendant tries to argue that because Officer Taranto was surveilling the ShopRite parking lot for narcotics activity when he observed what he suspected to be CDS transactions, that the probable cause that arose from defendant's

admission about CDS was "wholly connected" to the original investigation and was, therefore, neither unforeseeable nor spontaneous. (Db28-29). In effect, defendant attempts to stretch the recent holding of Smart, 253 N.J. at 163, to stand for the principle that if officers in a high-crime area develop a reasonable suspicion that a particular contraband will be found in a vehicle, and probable cause arises to harden this suspicion at any time, they must stop and obtain a warrant because it is no longer unforeseeable and spontaneous they might find that specific contraband. (Db29).

But Smart does not stand for such an extreme and illogical bright-line principle. The Court self-limited the application of its holding to other cases by emphasizing its fact-specific nature. Smart, 253 N.J. at 173. Specifically, it emphasized that "the question of whether the circumstances giving rise to probable cause were unforeseeable and spontaneous is a fact-sensitive inquiry that should be analyzed case by case[.]" Ibid. This is in line with the Court's prior precedent in this area. See Nishina, 175 N.J. at 516–17 ("As with so much of our search-and-seizure jurisprudence, the application of the doctrine of exigent circumstances demands a fact-sensitive, objective analysis."). After all, what constitutes exigency is "incapable of precise definition because, by its nature, the term takes on form and shape depending on the facts of any given case." Id. at 516. The Smart Court thus explicitly rejected a sweeping,

formulaic, and mechanical application of the holding of its case to all automobile-exception cases.

And almost none of the facts that led to the decision in Smart are present in this case. In Smart, a confidential informant informed officers that an individual known as "Killer" trafficked drugs out of a particular vehicle, gave officers a picture of the vehicle, and provided them with "Killer's" detailed descriptors. Id. at 160. One month later, an officer observed a GMC Yukon that he believed matched the photograph in an area known for frequent CDS transactions. Ibid. The officer then searched a law-enforcement database and found Smart, who he believed was the person the informant was referencing, and learned he had the moniker "Killer" and had several felony convictions for CDS. Id. at 161. Several officers then discretely surveilled Smart for over an hour and then deliberately conducted a stop of the GMC for investigative purposes. Id. at 161-62. One of the officers ordered Smart out of the GMC and patted him down, but found nothing incriminating. Id. at 162. Smart was questioned and refused consent to search. Ibid. Still suspecting the GMC contained drugs, but without any additional information to establish probable cause, officers called for a canine to perform a sniff of the GMC. Ibid. The dog arrived 23 minutes after the stop and positively alerted on the vehicle; the officers then searched it, locating CDS, weapons, paraphernalia, and

ammunition. Ibid.

The motion judge in Smart suppressed the evidence found in the GMC, finding that the probable cause did not develop unforeseeably or spontaneously, and this Court agreed. Ibid. The New Jersey Supreme Court subsequently affirmed, finding the "combined circumstances" of that case "can hardly be characterized as unforeseeable." Id. at 172. It noted the officers had months-old information about Smart's vehicle, his description, and the residence where he stopped, and multiple officers were involved in the interaction and they followed the defendant around for a long time. Ibid. Then, the police called the canine unit out to conduct a sniff "to establish probable cause to search the vehicle for drugs." Ibid. This sniff was entirely controlled by the officers and "was just another step in a multi-step effort to gain access to the vehicle to search for the suspected drugs." Id. at 173.

In contrast, here, the probable cause arose unforeseeably and spontaneously. First, unlike in Smart, officers were not provided any information about defendant or his vehicle in the months, days, or even hours prior to the April 24, 2019, incident. (1T14-5 to 8). Officer Taranto confirmed he was in the ShopRite parking lot to see what he could find and was not looking for anyone in particular that day and that neither he nor MacRae knew defendant. (1T14-2 to 4; 1T17-13 to 18; 1T28-20 to 23; 1T29-24 to 25; 1T79-7 to 8).

Second, it was only about thirty minutes from the time Taranto noticed defendant in the parking lot to the time MacRae approached him and the majority of that time was spent waiting for defendant to exit the store, not following him around. (1T7-4 to 13; 1T52-14; 1T82-13 to 16). This is far less time than the months' worth of investigative leads, in addition to the 100 minutes from when the surveillance began in Smart.

Third, and most importantly, the officers here had no control over the development of the probable cause. Unlike in Smart, where officers were the driving force behind the obtaining of the probable cause by culminating their months' worth of information by calling the canine out to the scene and directing it to conduct a sniff, here, Detective MacRae did not control how the probable cause developed in the pending investigation, nor could he have foreseen that it would arise as it did. Defendant blurted out that there was cocaine in the backseat after he was asked if there was anything illegal in the car. (1T89-8 to 12). This is entirely different from the carefully orchestrated steps the officers took over the course of two months in identifying a vehicle to surveil in Smart before the probable cause was culminated in the dog sniff.

Here, as Judge Collins correctly found, the probable cause developed unforeseeably and spontaneously. (Da16-17). The judge noted that Taranto was not specifically looking for defendant when he began his surveillance, that

MacRae did not yet have probable cause at the time he stopped defendant for investigatory purposes, and that it was not anticipated or foreseeable that defendant would admit to possessing CDS in response to MacRae's investigative inquiry. (Da16-17). Thus, Judge Collins ruled, "[P]olice developed probable cause spontaneously once Defendant admitted to possessing cocaine within the vehicle." (Da17). This finding was well-grounded and should be affirmed.

Defendant's overly expansive interpretation of the foreseeability requirement would ignore the United States and New Jersey Supreme Court's clear and long-standing precedent that the automobile exception does not require that officers stumble upon the probable cause by accident or that officers be oblivious — or worse, intentionally ignorant — of the potential evidence they may find in a vehicle in order to search a vehicle. The United States Supreme Court created the automobile exception in 1925 in Carroll v. United States, 267 U.S. 132, 160, 162 (1925). In that case, the police developed "convincing evidence" that the defendants were illegally transporting prohibited liquor. Id. at 160. One night, they saw the defendants in Carroll's vehicle, but were unable to pull it over. Ibid. Two months later, officers "suddenly met the same men" on the road again, and this time, were able to effectuate a motor vehicle stop. Ibid. The officers searched Carroll's car on the side of the highway and located the illegal liquor inside. Ibid. The Supreme Court found the officers'

subsequent search of defendant's car was permissible.

> We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.
>
> Id. at 153.

And because "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched," the Supreme Court found the officers had probable cause to search the vehicle without a warrant. Id. at 162.

Using the foundation laid by Carroll, the Supreme Court continued for decades to uphold the legal principle that automobile searches are permissible when grounded in probable cause. See Husty v. United States, 282 U.S. 694, 700, (1931) (upholding warrantless search of defendant's vehicle where officer knew defendant to be a "bootlegger," having arrested him for it in years past, and, on day of defendant's arrest, had "received information over the telephone that Husty had two loads of liquor in automobiles of a particular make and

description, parked in particular places on named streets.") In Chambers v. Maroney, 399 U.S. 42, 50–51 (1970), the Court acknowledged Carroll's reasoning that a search warrant is "unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." Id. at 51. The Court expounded on Carroll's holding and progeny, finding that because the circumstances that furnish probable cause to search a vehicle for particular contraband are most often unforeseeable and "the opportunity to search is fleeting since a car is readily movable[,]" warrantless searches of vehicles are permissible. Id. at 52 (emphasis added).

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> Ibid.

New Jersey courts subsequently used these Supreme Court cases as the foundation for its own automobile-exception law. See State v. LaPorte, 62 N.J. 312, 316 (1973) (holding police properly seized and searched defendant's vehicle because it was reportedly involved in prior robbery and they had probable cause to believe it contained evidence of said crime). In the seminal pair of decisions on the automobile exception, State v. Alston, 88 N.J. 211, 230–

31 (1981), and State v. Martin, 87 N.J. 561, 563 (1981), the New Jersey Supreme Court reaffirmed the legal principle that unforeseeability and spontaneity requirement did not demand that police officers seek a warrant simply because they had used their training and experience to anticipate the evidence that would be found in the vehicle.

In Alston, during the course of a motor-vehicle stop, police saw the occupants' furtive and unusual movements in the vehicle and noticed shotgun shells in the glove compartment. Id. at 232. When officers reached into the glove compartment to retrieve the shells, they saw a sawed-off shotgun under the front passenger seat. Id. at 232. Based on this, they suspected there were additional weapons in the vehicle. Ibid. A panel of this Court, relying on State v. Ercolano, insisted the officers could have obtained a warrant since there were no longer exceptional circumstances justifying the warrantless search of the vehicle. Ibid. (citing Ercolano, 79 N.J. 25, 46-47 (1979)).

Our Supreme Court disagreed and rejected the "level of exigent circumstances" the panel found necessary to justify the automobile exception. Id. at 233. It also noted the "broad dictum concerning the level of exigency required by the automobile exception" in Ercolano

> in no way marks a departure from the established analysis of the exception as recognized in Carroll and Chambers. Because of its inherent mobility, a motor vehicle that has been stopped on a highway may be searched without a warrant when probable cause

> exists to believe that the vehicle contains articles that the police are entitled to seize.
>
> Ibid.

Thus, harkening back to the Supreme Court precedential line of cases, our Court confirmed in Alston that "when there is probable cause to conduct an immediate search at the scene of the stop, the police are not required to delay the search by seizing and impounding the vehicle pending review of that probable cause determination by a magistrate." Id. at 234-35 (citing Chambers, 399 U.S. at 52.) As recognized in Smart, the Alston test was intended to be consisted with the contemporaneous federal standard. 253 N.J. at 168.

Similarly, in Martin, the Court confirmed the applicability of the automobile exception even in cases where police "actively sought a certain automobile" that they believed had been involved in a recent robbery. 87 N.J. at 563, 567. They located it in a parking lot near the scene of the crime, unoccupied. Ibid. Officers searched it and found evidence that ultimately led to defendants' convictions for robbery. Id. at 563. The Supreme Court confirmed "that the search of the car was justified as falling within the automobile exception as applied by the Supreme Court in Chambers v. Maroney[.]" Id. at 563-64.

Over the next few decades, the Court repeatedly reaffirmed the tenant that police may validly search a vehicle under the automobile exception even when

they suspect the specific contraband they believe will be found in it. See Nishina, 175 N.J. at 518–19 (finding warrantless search of vehicle for drugs valid after officer found evidence that led him "to suspect that the car contained illegal drugs.").

After a brief divergence into a stricter exigency standard,[3] the Court confirmed in State v. Witt that the Alston and Martin cases created the precedential automobile exception law in New Jersey. 223 N.J. 409, 447 (2015). "[W]e return to the standard that governed automobile searches in Alston—a standard that is more in line with the jurisprudence of most other jurisdictions, yet still protective of the right of citizens to be free from unreasonable searches." Id. at 415. It recognized prior precedent, noting that the Alston case accepted the standard created by Carroll and Chambers and that the Martin case "affirmed that we were keeping faith with the Chambers paradigm." Id. at 427, 429.

Nothing in Carroll, Chambers, Alston, or Martin supports defendant's position that officers must stop and obtain a warrant because they have accurately suspected the evidence they will find. Nor does Witt, in reaffirming the precedence of these cases, require this. To the contrary, these cases confirm

[3] The Supreme Court in State v. Cooke, 163 N.J. 657, 670 (2000), and then again in State v. Pena-Flores, 198 N.J. 6 (2009), "imposed a full-blown exigency analysis" that eliminated the automobile exception in nearly every case. Witt, 223 N.J. at 431.

that officers must suspect a vehicle contains a particular contraband in order for their probable cause to be valid, and in fact, may be "actively" seeking that vehicle on the suspicion it will contain evidence of a particular crime. This Court is bound by this long-standing precedent. Nothing in Smart overruled Witt, Alston, or Martin. On the contrary, the Court emphasized there was no justification to depart from Alston/Witt. 253 N.J. at 174.

Additionally, the Smart Court's reference in its holding to the dicta from Ercolano — a case that predates both Alston and Martin and was referenced disapprovingly in Alston — further confirms its inapplicability to this case. Ercolano involved the police investigating Ercolano for a week and eventually gathering enough information to obtain a search warrant for his residence. 79 N.J. at 46-47. Police also had information about the vehicle they knew the defendant had been driving, but did not request a warrant for it. Ibid. Instead, they impounded the vehicle and searched it "for the safety of the vehicle." Ibid. The Ercolano Court held that if it was practicable for the police to apply for and receive a search warrant for the residence, they could have applied for a warrant for the vehicle at the same time if they had probable cause. Ibid. The Court thus held the officers could not justify the search under the automobile exception. Ibid.

But Ercolano is inapplicable to this case for the same reason Smart is.

Unlike in those cases, police here had fresh probable cause that developed during a spontaneous interaction with defendant that lasted less than an hour with a previously unknown individual and vehicle. It was not feasible for police to obtain a warrant while the officers and defendant and his wife — with a cart full of groceries — stood in the middle of a public parking lot.

Defendant is urging an interpretation of "unforeseeable and spontaneous" that requires probable cause to be a "surprise." (Db29). This is a dangerous misinterpretation that would eviscerate the Alston standard that was carefully restored in Witt. Nowhere in Smart, Witt, or Alston itself did the Court ever suggest the simplistic interpretation that the unforeseeable-and-spontaneous test requires probable cause to be a "surprise." Very few occurrences are a genuine surprise to an experienced police officer. For example, an experienced trooper who stops a car on a highway for a traffic offense is never truly "surprised" to also detect the presence of drugs somewhere in the car; it is a common occurrence. Surely the automobile exception under Witt and Alston are far more practical and not meant to be restricted to only completely unpredictable fact patterns.

This misguided "surprise" requirement is just a repackaging of the discredited inadvertence prong that was eliminated from the plain-view exception to the warrant requirement, even when allowing for warrantless

searches of cars. See State v. Gonzales, 227 N.J. 77, 82 (2016) (holding inadvertence requirement for plain-view seizure at odds with objective reasonableness standard of New Jersey Constitution). Just as the inadvertence prong conflicts with the objective reasonableness standard for warrantless entries and seizures from a car under the plain-view doctrine, so is a virtually identical surprise requirement under the automobile exception. Requiring police to be surprised by probable cause will not help protect privacy rights when the police conduct is objectively reasonable.

Another significant distinction between Smart and the present case exists: in Smart, the facts were undisputed and the judge interpreted the law on the undisputed "non-testimonial" motion record, in which case "appellate review is de novo." 253 N.J. at 164. But here, the judge ruled that the circumstances giving rise to probable cause were unforeseeable and spontaneous based on credibility and factual findings. A point thus in need of clarification is whether "the circumstances giving rise to probable cause are unforeseeable and spontaneous" is a question of law to be reviewed de novo by an appellate court, or a question of fact to be decided by the motion judge and accorded deference.

In addressing a similar question in deciding that an automobile-exception search was improper in Witt, the Supreme Court deferred to the motion court's finding that exigent circumstances were lacking based on its factual findings,

acknowledging that it "must defer to those findings because they are supported by sufficient credible evidence in the record." 223 N.J. at 450. The Court further "acknowledge[d] that a different outcome might be reached under the Alston standard." Ibid.; See also, Gonzales, 227 N.J. at 103 (finding reviewing court failed to give proper deference to motion court's factual finding that inadvertence prong was met for warrantless entry and seizure under plain-view doctrine). It logically follows that if a reviewing court must defer to a judge's ruling of whether exigent circumstances existed based on the judge's factual findings to justify an automobile-exception search, then a reviewing court must equally defer to the judge's fact-based ruling — when supported by the credible evidence — that the circumstances giving rise to probable cause were sufficiently unforeseeable and spontaneous to justify an automobile-exception search. At least as much as exigency and inadvertence, unforeseeability and spontaneity are more akin to factual questions. Indeed, as noted above, "whether the circumstances giving rise to probable cause were unforeseeable and spontaneous is a fact-sensitive inquiry that should be analyzed case by case." Smart, 253 N.J. at 173 (emphasis added).

Finally, defendant's overly broad interpretation has been specifically and repeatedly rejected by this Court since Smart was issued on March 28, 2023. In State v. Gainey, A-3644-21 (App. Div. Nov. 2, 2023) (slip op. at *5), certif.

denied, 256 N.J. 199 (2024),[4] officers pulled defendant over after receiving an erratic driving complaint about him. Officers found indicia of CDS in the car and brought out a dog who alerted to the presence of CDS. Id. at *3. They subsequently searched the car and located over seventeen bricks of heroin along with cocaine and suboxone. Ibid.

The judge denied Gainey's motion to suppress, and Gainey appealed, contending that "the search of the car's interior was not unforeseeable and spontaneous because the amount of information progressively gained by the police to support probable cause could have been anticipated as they continued their investigation." Id. at *5.

This Court affirmed the motion court's ruling. It noted that Gainey was "plainly unlike Smart" because it was "not preceded by a two-month narcotics investigation." Ibid. And, it held, the defendant's interpretation of Smart went far afield of its holding:

> In essence, [the defendant] argues that if the information accumulated at any phase can be predicted to yield more incriminating facts, the police must halt their efforts and pursue a warrant. That argument, if carried to its logical conclusion, would virtually eliminate the automobile exception. Almost all police work that turns up information supporting facts of probable cause connected to a motor vehicle is gathered step by step. There is

[4] This unpublished decision has been included in the State's appendix. (Pa11-16). The State is unaware of any contrary authority for the general propositions cited.

> nothing in the Court's opinions in Witt or in Smart that supports such a strained interpretation of the law.
>
> [Ibid. (emphasis added).]

This Court thus rejected Gainey's attempt to expand Smart and denied that it mandated the suppression of the evidence in his case. Ibid.

And more recently, in State v. Summa, A-0369-22 (App. Div.) (slip op. at *5), certif. denied, __ N.J. __ (July 1, 2024),[5] a concerned citizen alerted officers to a van it believed was suspicious. Officers located the van, and after speaking to the occupants, called out a K-9 because they believed the van contained CDS. Id. at *2. After the dog alerted, officers searched the van and located LSD, cocaine, ketamine, and marijuana. Ibid. The defendants moved to suppress the evidence found in the van, but the motion court denied their motions. Ibid.

This Court affirmed the motion court's decision, finding the warrantless search of a van was justified because officers developed "a reasonable and articulable suspicion that drugs were present" and then called out a canine to confirm their suspicions. Id. at *5. It explicitly rejected the defendants' attempts to "dissect an ongoing investigation into pieces" in their attempt to argue that probable cause had become foreseeable under the circumstances. Ibid. "We are satisfied that the finding of probable cause here, predicated on

[5] This unpublished decision has been included in the State's appendix. (Pa17-22). The State is unaware of any contrary authority for the general propositions cited.

the smell of burnt marijuana and then the K-9 sniff, arose from unforeseeable and spontaneous circumstances." Ibid.

Here, as in Gainey and Summa, the events that rapidly unfolded in the ShopRite parking lot within a span of less than an hour were not foreshadowed by "prior indicia of criminality." Ibid. Officers did not know defendant and were not seeking him out. While conducting surveillance in an area known for CDS transactions, they developed a reasonable suspicion he was involved in CDS activity. Defendant then blurted out that there was CDS in his vehicle. The fact that defendant's admission related to the reason the officers were in the parking does not mean the probable cause arose foreseeably. This Court should continue to reject any reading of Smart that would illogically prohibit officers from searching a vehicle simply because they had applied their training and experience to developed probable cause to believe a specific contraband was present.

Adopting such a position would "virtually eliminate the automobile exception," Gainey, A-3644-21 at *5, and would also reawaken the negative and unintended consequences that flowed from the Cooke and Pena-Flores decisions that temporarily eliminated the Alston exigency standard. During the years the Alston standard was disfavored, the number of cases in which the State Police requested consent from drivers or occupants to search the vehicle rose over

733% and Troopers obtained consent in ninety-five percent of stops. Witt, 223 N.J. at 436-37.

In those cases where they could not obtain consent, officers either applied for a telephonic warrant—which took an average of one to two hours to obtain and the occupants and officers endangered themselves by waiting on the side of the road, or they impounded the vehicle in order to secure a search warrant. Id. at 436, 446. But, as the Supreme Court noted, impounding the vehicle created issues of its own:

> The current approach to roadside searches premised on probable cause—"get a warrant"—places significant burdens on law enforcement. On the other side of the ledger, we do not perceive any real benefit to our citizenry by the warrant requirement in such cases—no discernible advancement of their liberty or privacy interests. When a police officer has probable cause to search a car, is a motorist better off being detained on the side of the road for an hour (with all the accompanying dangers) or having his car towed and impounded at headquarters while the police secure a warrant? Is not the seizure of the car and the motorist's detention "more intrusive than the actual search itself"?
>
> [Id. at 446 (quoting United States v. Ross, 456 U.S. 798, 831 (1982) (Marshall, J., dissenting)).]

Thus, although not the primary motivation for re-adopting the Alston standard, the exponentially increased number of consent searches, prolonged roadside stops, and protracted vehicle impoundments concerned the Court enough to warrant a lengthy assessment and discussion in its Witt opinion. There is no reason now to unnecessarily revive these significant consequences by requiring

officers to stop their fluid investigation and obtain a warrant because they have developed reasonable suspicion before probable cause arose for the specific contraband they were investigating.

Judge Collins's decision appropriately acknowledged the circumstances leading to Detective MacRae's probable cause arose unforeseeably and spontaneously. He declined to accept defendant's argument that his impulsive statement admitting he had cocaine in his vehicle was nonetheless foreseeable simply because the officers were surveilling an area known for CDS and observed defendant conducting what they suspected to be CDS transactions. His holding was legally sound and factually based on his credibility findings and this Court should affirm it on appeal.

POINT II

DEFENDANT'S SEVEN-YEAR SENTENCE, WHICH IS THREE YEARS LESS THAN HE BARGAINED FOR WHEN PLEADING GUILTY TO A SECOND-DEGREE CRIME AND THREE YEARS LESS THAN THE MANDATORY MINIMUM EXTENDED TERM FOR WHICH HE WAS ELIGIBLE, SHOULD BE AFFIRMED.

In exchange for defendant agreeing to plead guilty to one count of second-degree possession with intent to distribute CDS, the State agreed to recommend a ten-year sentence, which was the bottom end of the extended-term range, despite being at the top of the ordinary second-degree range. The State also agreed to move for dismissal of the remaining counts. Despite this plea bargain,

the judge sentenced defendant to a seven-year prison term after weighing the appropriate sentencing factors. Defendant's sentence is thus more than fair as far as defendant is concerned and it should be affirmed.

After Judge Rahill weighed the relevant aggravating and mitigating factors, she sentenced defendant to a prison term shorter than the agreed-upon sentence in the plea agreement. On appeal, an appellate court must defer to the sound judgment of the sentencing court, provided the sentence is reasonable and supported by competent credible evidence in the record. State v. Pierce, 188 N.J. 155, 170 (2006); State v. Bieniek, 200 N.J. 601, 608 (2010). Reviewing courts "are cautioned not to substitute their judgment for those of our sentencing courts" and they should not intervene and disturb the sentence unless the sentencing judge abused his discretion in applying the facts to the law, which resulted in a sentence that "shocks the judicial conscience." State v. Case, 220 N.J. 49, 65 (2014); State v. Blackmon, 202 N.J. 283, 297 (2010). See also State v. Roth, 95 N.J. 334, 364-65 (1984) (confirming judge's need not fear reviewing courts second-guessing sentences which were imposed in accordance with our Code and caselaw).

A sentencing court is required to identify the relevant aggravating and mitigating factors, determine which factors are supported by sufficient credible evidence in the record, balance the relevant factors, and explain how it arrived

at the appropriate sentence. State v. Fuentes, 217 N.J. 57, 70 (2014); State v. O'Donnell, 117 N.J. 210, 215 (1989). Our sentencing statute contemplates a thoughtful weighing of the aggravating and mitigating factors and each factor must be given appropriate weight. State v. Denmon, 347 N.J. Super. 457, 467-68 (App. Div.), certif. denied, 174 N.J. 41 (2002); State v. C.H., 264 N.J. Super. 112, 141 (App. Div.), certif. denied, 134 N.J. 479 (1993).

In this case, on count two of the Indictment, Judge Rahill sentenced defendant to seven years in prison without a period of parole ineligibility and dismissed the remaining counts of the Indictment. (3T13-19 to 24). She determined mitigating factors eight and nine were present because defendant is an "integral" part of his employer's business, is a warehouse manager, and has remained offense free since the date of his arrest in the matter. (3T12-12 to 13-1). "You know, certainly, in view of your age, your marriage, you have a house, you have a company, it appears that you are now on the right track." (3T12-24 to 13-1).

Because defendant had not accrued any new offenses from 2019 until the time of his sentencing, she placed a "heavy weigh" on defendant's recent behavior and declined to find aggravating factor three. (3T13-2 to 8; 3T13-16 to 18). But she did recognize that defendant's lengthy criminal record, the seriousness of his prior offenses, and the need to deter him and others from

violating the law supported the imposition of aggravating factors six and nine. (3T13-8 to 13). She then determined that the mitigating factors outweighed the aggravating factors. (3T13-14 to 16).

Judge Rahill properly imposed aggravating factor nine—the "need for deterring the defendant and others from violating the law"—even though she had already determined mitigating factors eight and nine—that "defendant's conduct was the result of circumstances unlikely to recur" and his character and attitude "indicate that the defendant is unlikely to commit another offense"—were present. N.J.S.A. 2C:44-1a(9). N.J.S.A. 2C:44-1b(8); N.J.S.A. 2C:44-1b(9).

These factors are neither contradictory nor mutually exclusive. Judge Rahill could, and did, find both mitigating factors eight and nine and aggravating factor nine. Judge Rahill recognized defendant's lengthy record, including juvenile adjudications for weapons offenses and an "extensive" history of eleven prior indictable convictions, including two prior convictions for possession of CDS with intent to distribute and four for possession of CDS and prescription legend drugs. (3T11-10 to 25). Although she believed he was "now on the right track" and it was "unlikely" that he would reoffend, she could still properly find there was nonetheless a need to deter him from returning to his former criminal habits.

Moreover, the need for general deterrence is especially important in cases like this where defendant was likely actively selling CDS to multiple users. All parties involved need to know there are consequences for distributing drugs and engaging in such dangerous and life-altering conduct. See State v. Cancel, 256 N.J. Super. 430, 437 (App. Div. 1992) (noting deterrence factor for people who commit serious drug offenses "is obvious" because these offenders "must be impressed that they will pay a high price for what may seem like easy money.")

And Judge Rahill's belief that the circumstances of defendant possessing over 113 grams of cocaine, heroin, fentanyl, and oxycodone in his vehicle in the middle of a public parking lot were "unlikely to reoccur"—despite the fact that this was defendant's third conviction for possession of cocaine with intent to distribute and defendant admitted to "selling heroin to supplement his primacy occupation as a forklift operator"—does not invalidate her finding that defendant nonetheless needed to be reminded and deterred from putting himself in a similar situation again. (PSR5). Indeed, defendant was fortunate the judge determined these, or any, mitigating factors applied at all.

Moreover, Judge Rahill gave great weight to the two mitigating factors she found applicable and determined they outweighed the two aggravating factors. (3T13-14 to 24). She thus downward departed from the plea agreement and sentenced defendant to only a seven-year prison term instead of the ten years

he agreed to in pleading guilty. (Da21; 3T9-1 to 3). The court also sentenced defendant below the mandatory extended term of imprisonment required under N.J.S.A. 2C:43-6(f) due to his prior conviction for Possession of CDS with Intent to Distribute. Indeed, there is no indication anywhere in the record that the State agreed not to seek an extended term of confinement, even though the box next to the question on the plea agreement is checked. And in fact, the State noted during sentencing that defendant "is mandatory extended term because of his 2014 felony. So, the ten flat is the minimum for him." (3T9-1 to 3).

So in the event this matter is remanded, Judge Rahill would be unable to reimpose the same seven-year sentence. N.J.S.A. 2C:43-6(f) (noting courts "shall" sentenced defendants to extended term upon motion of prosecutor); State v. Lagares, 127 N.J. 20, 23 (1992) ("Once the prosecutor invokes the statute and establishes the existence of a prior conviction, the court's role is limited to determining the term of years within the extended-term range to be imposed."). She would be obligated to impose at least a ten-year prison term unless the State waived the extended-term requirement.

Therefore, as defendant received an incredibly beneficial sentence less than the terms agreed to at his plea hearing and he failed to establish the judge erred in her balancing of the aggravating and mitigating factors, Judge Rahill's sentencing should be affirmed.

CONCLUSION

For the foregoing reasons, the State urges this Court to affirm the denial of defendant's motion to suppress and affirm his conviction and sentence.

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1114-23T1
INDICTMENT No. 19-08-1327-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Essex County.
VINCENT RICHARDS	:	
		Sat Below:
Defendant-Appellant.	:	Hon. Michael T. Collins, J.S.C.,
	:	Hon. Kimarie Rahill, J.S.C.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS..... 1

LEGAL ARGUMENT 1

POINT I

THE CAR SEARCH WAS ILLEGAL BECAUSE ANY PROBABLE CAUSE DID NOT ARISE FROM UNFORESEEABLE AND SPONTANEOUS CIRCUMSTANCES..... 1

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE AND SHOULD BE REMANDED FOR RESENTENCING..... 11

CONCLUSION 15

INDEX TO APPENDIX

State v. Pittman, 2023 WL 6930025 (App. Div. Oct. 19, 2023)..... Dra 1-5

State v. Gilliard, 2024 WL 502337 (App. Div. Feb. 9, 2024) ..... Dra 6-12

State v. Martinez, 2023 WL 6460945 (App. Div. Oct. 4, 2023).....Dra 13-20

REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Vincent Richards relies on his initial brief.

LEGAL ARGUMENT

POINT I

THE CAR SEARCH WAS ILLEGAL BECAUSE ANY PROBABLE CAUSE DID NOT ARISE FROM UNFORESEEABLE AND SPONTANEOUS CIRCUMSTANCES.

In his initial brief, Richards argued that suppression was required because: (1) the stop was illegal because police did not have reasonable suspicion that Richards had engaged in criminal activity; (2) the car search was illegal because the police's uncorroborated claim that Richards volunteered there were drugs in the car should not have been credited; (3) and alternatively, if the police had probable cause, the circumstances leading to that probable cause did not arise under unforeseeable and spontaneous circumstances such that New Jersey's automobile exception was not satisfied. Richards relies on his initial brief regarding the first two arguments. (Db 16-25)[1]

In response to the third point – that the car search did not comport with our more-protective automobile exception – the State's primary claim is that because Richards "unexpectedly admit[ted] that he possessed CDS in his

[1] This reply uses the abbreviations from the initial brief and the State's response. In addition, Sb refers to the State's brief, and Dra refers to the appendix to this reply.

vehicle," that the "probable cause to search defendant's vehicle arose spontaneously and unforeseeably." (Sb 23) But this argument is critically flawed because the State applies the wrong standard. The State focuses on the probable cause itself, not the circumstances leading to that probable cause. The State argues that since Richards's admission was unforeseeable and spontaneous, everything that preceded that admission is essentially irrelevant.

However, New Jersey's automobile exception does not take the cramped view that if only the final step—probable cause—is unforeseeable and spontaneous, then everything is fine. Instead, the question is whether "the circumstances giving rise to probable cause" are unforeseeable and spontaneous. State v. Smart, 253 N.J. 156, 171 (2023) (emphasis added); see also State v. Witt, 223 N.J. 409, 414 (2015) ("In Alston, we determined that a warrantless search of an automobile was constitutionally permissible, provided that the police had probable cause to search the vehicle and that the police action was prompted by the unforeseeability and spontaneity of the circumstances giving rise to probable cause.") (emphasis added). Our caselaw thus instructs that courts assess the circumstances (plural) giving rise to probable cause, not simply the very last step.

Those circumstances leading to the probable cause to search Richards's car are far from unforeseeable and spontaneous. Contrary to the State's claims,

Richards's arguments do not "stretch" the holding from Smart. (Sb 23-24) Instead, as Smart instructed, Richards is simply asking this Court to analyze all the circumstances leading to probable cause[2]—that narcotics officers surveilling a parking lot for narcotics activity saw narcotics activity from a car and therefore decided to specifically surveil the car and stop its occupant. More specifically, as described by the State in its brief, these circumstances include:

- Officer Taranto, who had been "involved in hundreds of narcotics-related investigations" was on duty as part of the SET–"a plain-clothes unit that uses surveillance to monitor controlled-dangerous-substance (CDS) activity." (Sb 3)
- Taranto, "[h]aving conducted approximately one hundred surveillance operations from that location in the past, . . . was aware that the parking lot was frequently used to conduct narcotics-related transactions." (Sb 4)
- "Defendant's actions in going from talking to a person in one vehicle to talking to a person in another vehicle raised Taranto's suspicions" because "[t]hrough his training and experience, he was aware that CDS distributors will sometimes meet up with multiple users in parking lots in order to sell," and "[p]arking lots also have a large volume of

[2] The State also asserts that "A point thus in need of clarification is whether 'the circumstances giving rise to probable cause are unforeseeable and spontaneous' is a question of law to be reviewed de novo by an appellate court, or a question of fact to be decided by the motion judge and accorded deference." (Sb 36) Contrary to the State's claims, this question has already been settled by our Supreme Court. Whether the circumstances giving rise to probable cause are unforeseeable and spontaneous is a "legal question." Smart, 253 N.J. at 159. As such, while the facts underlying this legal question are entitled to deference on appeal, the legal conclusion about the spontaneity and unforeseeability of the circumstances leading to probable cause is a legal conclusion, reviewed de novo. In other words, the trial court's findings about what the police did and said and saw receive deference; its legal conclusion that the automobile exception was satisfied receives no deference.

vehicular and pedestrian traffic that can help mask any illicit activity." (Sb 5)

- Defendant "leaned through the window" of a car "with at least one arm for a few seconds," then the driver of that car, Lacicero, drove to an isolated area of the parking lot, parked, and looked down, which Taranto's "experience" told him could be related to drug activity because "he is aware that users will often examine the CDS they have just purchased and believed that was what Lacicero was doing." (Sb 5)
- "[H]e noticed Lacicero was leaning down and then quickly picking his head up, which Taranto testified to him to be 'indicative of [Lacicero] snorting something.'" (Sb 5-6)
- "Believing he had observed a CDS-transaction between defendant and Lacicero based on his training and experience," Taranto followed Lacicero's car and "requested the team. . . approach defendant upon his leaving the ShopRite." (Sb 6)
- Detective MacRae, having "heard Taranto relay his observations about a potential drug transaction in the ShopRite parking lot," "drove to the ShopRite and set up stationary surveillance on the vehicle Taranto had described." (Sb 6-7)
- 35 minutes after Taranto began his surveillance, MacRae and another detective "approached defendant with their badges around their necks, identified themselves as police officers, informed him of the narcotics-related investigation they were conducting, and patted him down." (Sb 7)
- At that point, according to MacRae, Richards volunteered that there were drugs in the car.

The State ignores all these circumstances, instead relying almost exclusively on the fact that Richards's alleged admission was spontaneous and that police did not know Richards prior to beginning surveillance. But under the

State's version of events, and its arguments trying to justify the stop,[3] experienced narcotics detectives engaged in a surveillance operation in a parking lot specifically known for narcotics activity, saw narcotics activity being conducted from Richards's car, and therefore surveilled the car for at least a half hour before stopping Richards by his car because they already suspected the car was involved in narcotics distribution. Under this version of events, before the police stopped Richards or approached his car, they already reasonably suspected, through the specific investigative steps they had already taken that evening, that his car was involved in drug distribution. The police could only be legally permitted to stop Richards because it was foreseeable that doing so would lead to evidence of the specific crime of narcotics distribution.[4] And,

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[3] Richards does not concede that the police's observations provided reasonable suspicion for the investigatory stop and relies on his initial brief in support of this argument. Here, he argues in the alternative, that if the State's view of the evidence is accepted, then that means that the circumstances giving rise to probable cause were not unforeseeable and spontaneous. Instead, any probable cause that developed was the culmination of the police's surveillance and investigation into what they believed to be narcotics activity involving Richards's car.

[4] In its arguments, the State tries to have it both ways—emphasizing just how much reasonable suspicion the police had from the location and their observations in an attempt to support the legality of the stop, then suddenly disclaiming all of this supposedly compelling evidence to try to show that what happened was unforeseeable and spontaneous. In other contexts, our courts have criticized the State for taking contradictory positions like this at suppression hearings. See State v. Johnson, 193 N.J. 528, 543 (2008) (describing one of the rationales for automatic standing as preventing the State from "taking seemingly conflicting positions, on the one hand prosecuting a defendant for possessing an

according to the State, probable cause did develop from this concerted sequence of police actions.

The State's other attempts to distinguish this case from the clear rule set forth in Witt and Smart should equally fail. The State points out that in Smart, the police's initial suspicions came from a tip from a few months prior and that police surveilled the car in Smart for longer than occurred here. (Sb 27) But Smart did not hold that circumstances leading to probable cause are unforeseeable and spontaneous only if they predate the stop by months or even hours; the Court used the words unforeseeable and spontaneous. Something that is foreseen—here, that after seeing what they believed to be a narcotics transaction involving Richards's car, that the car would contain narcotics—is necessarily not unforeseeable. The State also asserts that unlike in Smart, where the officers called a drug dog to conduct a sniff, the officers here "had no control over the development of the probable cause." (Sb 27) But that is belied by the record. After seeing what Taranto believed to be a narcotics transaction involving Richards's car, Taranto called his partners, described Richards's car, and asked them to surveil it and stop Richards when he returned to the car. The

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item in violation of the law while on the other arguing that the defendant did not, for standing purposes, possess a privacy interest in the property seized").

police clearly had control over all these investigative steps. And while those steps may have been reasonable, assuming the police did have reasonable suspicion, those planned investigative steps were certainly not spontaneous.

What occurred here is very different from the prototypical automobile exception case–where police stop a car for a traffic violation, happen to see or smell contraband in the car, and therefore conduct an immediate roadside search of the car for that contraband. Instead, here, as in Smart, if the police did not foresee the possibility that they would develop probable cause to search Richards's car, they had no reason to undertake the entirely not-spontaneous act of surveilling that car and stopping the defendant. Thus, as in Smart, the circumstances leading to probable cause were not unforeseeable and spontaneous. They were foreseen by the police and caused the police to undertake a series of non-spontaneous investigative steps.

The State also asserts that because our Court relied on United States Supreme Court cases "as the foundation for its own automobile-exception law," that these cases set the bounds of our state's automobile exception. (Sb 28-36) However, Smart is the most recent articulation of the "unforeseeable and spontaneous" requirement by our Supreme Court interpreting our constitution. And as the Court explained in Smart, "Witt thus deliberately kept the "unforeseeability and spontaneity" language first articulated in Alston and

explicitly fortified it with the extra protections guaranteed under Article I, Paragraph 7." Smart, 253 N.J. at 171 (emphasis added). Those extra protections, including a careful analysis of whether the circumstances leading to probable cause were actually unforeseeable and spontaneous, as opposed to foreseen and planned, is what our constitution requires. The car search here does not pass muster under our more-protective constitution.

Finally, the State cites unpublished cases in which panels of this Court upheld car searches. (Sb 37-40) Unpublished cases are not precedential, however, for the sake of completeness, undersigned counsel found three cases in which this Court suppressed evidence because the circumstances leading to probable cause were not unforeseeable and spontaneous.[5] In State v. Pittman, 2023 WL 6930025, at *4 (App. Div. Oct. 19, 2023), where a narcotics detective's suspicions of defendant's narcotics activity prompted the surveillance of defendant's car and formed the basis of a stop, during which a drug dog alerted, "[p]robable cause . . . most certainly did not 'aris[e] from unforeseeable and spontaneous circumstances.'" Here, as in Pittman, narcotics officers' suspicions that they saw narcotics activity is the reason that they stopped Richards as he

[5] All three cases are included in the appendix to this reply. (Dra 1-20) Part of the URL included by this Court in Martinez has been redacted per the case manager's deficiency notice.

returned to his car, so the subsequent probable cause did not develop under unforeseeable and spontaneous circumstances.

In State v. Gilliard, 2024 WL 502337 (App. Div. Feb. 9, 2024), an officer was monitoring an area where a shooting had occurred the night before, saw the defendant engaged in "suspicious behavior," including appearing to be "gripping" something, and then get into a car, which another officer stopped. Id. at *1-2. The circumstances were not unforeseeable and spontaneous but were instead "'deliberate,' and 'orchestrated[,]'" "based on the 'sequence of interconnected events' that began" when the officer who had seen the defendant get into the car radioed other officers so that they could stop the car. Id. at *7-8 (quoting Smart, 253 N.J. at 172). Here, as in Gillard, the investigatory stop of Richards next to his car leading to probable cause was deliberate and orchestrated by police because of their suspicions from their observations earlier that evening.

Finally, in State v. Martinez, 2023 WL 6460945 (App. Div. Oct. 4, 2023), police got a tip describing the defendant's drug-sale activity and his car, surveilled the location, saw what they believed to be a drug transaction by the defendant, and searched the car. Id. at *6. This Court wrote that the tip, surveillance, and suspected drug transaction "demonstrate the circumstances that gave rise to probable cause were foreseeable." Ibid. The circumstances were

also not spontaneous, "but rather show police reasonably anticipated finding drugs in defendant's vehicle." Ibid. Here, as in Martinez, the officers saw what they believed to be a narcotics transaction involving Richards and his car, so they surveilled the car and ultimately searched it because they anticipated finding evidence of narcotics distribution. So, as in Martinez, the circumstances giving rise to probable cause were not unforeseeable or spontaneous.

These cases show that where police have suspicions about potential contraband in a car before the stop and search, courts have applied the unforeseeable and spontaneous requirement and suppressed evidence. Here, as explained above and in Richards's initial brief, the circumstances giving rise to probable cause were foreseeable and not spontaneous. An experienced narcotics officer was surveilling a parking lot known for narcotics activity, saw what he believed to be narcotics activity, and radioed his partners to surveil Richards's car and stop Richards for involvement in narcotics activity. The only constitutionally permissible reason to undertake these actions would be because the police had reasonable suspicion that Richards was involved in narcotics distribution using his car. But given those suspicions that pre-dated the search of Richards's car, the State cannot now claim that the circumstances giving rise to probable cause were unforeseeable and spontaneous. This Court should reverse the denial of the motion to suppress.

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE AND SHOULD BE REMANDED FOR RESENTENCING.

In his initial brief, Richards pointed to several key errors at sentencing that render his sentence excessive and require a remand for resentencing. (Db 31-34) In response, the State asserts that since Richards was eligible for an extended term under N.J.S.A. 2C:43-6(f), there could be no conceivable issue with the seven-year sentence imposed by the court, and further, that even if this Court remanded, the trial court "would be unable to reimpose the same seven-year sentence." (Sb 47) The State's claims are disingenuous and both factually and legally wrong.

Both the plea forms and plea hearing confirm that this plea was for an ordinary-term sentence for a second-degree offense, with a sentencing range of five to ten years. There is no mention whatsoever of the State seeking, or waiving, an extended term at the plea hearing. (2T) The first page of the plea form states that the "max" sentence Richards can receive is 10 years. (Da 18) The "no" box is checked on the plea form for the question "Did you enter a plea of guilty to any charges that require a mandatory period of parole ineligibility or a mandatory extended term." (Da 20 (emphasis in original)) Thus, this plea was for an ordinary-term sentence on a second-degree offense: five to ten years in prison. The State's belated remark at sentencing does not change the fact that

this plea was for an ordinary rather than extended-term sentence. The fact that the trial prosecutor mentioned at sentencing that Richards was mandatory extended-term eligible is irrelevant because all of the information set forth at the plea hearing makes clear that this was an ordinary-term sentence. (Da 18, 20; 2T)

Nor do the potential ambiguities in the plea form that the State now points to change anything. The plea form states that the prosecutor will not move for an extended term or a mandatory period of parole ineligibility. (Da 21) The only potential relevance of this is in assessing whether the State sought to avail itself of the mandatory sentencing provisions of N.J.S.A. 2C:35-12. Under this statute, the State has the discretion to negotiate away a potential mandatory extended term and period of parole ineligibility and thereby bar the court from imposing any sentence lower than what the State recommended.

However, the State did not seek a Section 12 sentence in Richards's case, as evidenced by the fact that the State did not follow the specific procedure necessary to trigger the provision. Where the State is seeking to bind the court to its sentencing recommendation, "the trial court shall ask the prosecution on the record whether defendant is extended-term eligible," and "[d]efendant shall be given an opportunity to object." State v. Courtney, 243 N.J. 77, 90 (2020). If the defendant objects, "the prosecution would have to meet its burden of proof

by demonstrating defendant's eligibility," and the "trial court would then make a finding as to whether the prosecution has met its burden." Id. at 90-91.

This procedure is now codified by R. 3:21-4(f):

> Where the defendant is pleading guilty pursuant to a negotiated disposition governed by N.J.S.A. 2C:35-12, and, as part of that negotiated disposition, the prosecutor has agreed not to file a motion for a mandatory extended-term sentence under N.J.S.A. 2C:43-6(f), the prosecutor shall represent to the court, on the record at the time of the guilty plea, that (1) the plea is pursuant to N.J.S.A. 2C:35-12, (2) the defendant would ordinarily be eligible for a mandatory extended-term sentence under N.J.S.A. 2C:43-6(f), and (3) the State is waiving the extended-term sentence in exchange for the defendant's guilty plea. . . . [(emphasis added)]

The prosecutor here did not follow these requirements; the prosecutor did not "represent to the court, on the record at the time of the guilty plea" that the State was seeking to avail itself of the Section 12 provisions. Ibid. The State did not represent to the court, or to Richards, at the time of the plea that it was seeking sentencing under Section 12, leading everyone to correctly understand that the 10-year recommended sentence was not a Section 12 plea that bound the court. The State cannot now claim on appeal that Richards sentence must be affirmed because the 10-year sentence could have been a Section 12 plea.

The fact that the supplemental plea form states that the parties have agreed to provide "for a lesser sentence or period of parole ineligibility than would otherwise be required" changes nothing. (Da 23) The State

here appropriately followed Attorney General Directive No. 2021-4, which bars the State from seeking a mandatory minimum sentence for certain non-violent drug offenses. Thus, this supplemental form must necessarily refer to the State's decision to recommend a flat sentence rather than one with a mandatory minimum, pursuant to the Directive. This interpretation of the supplemental form — that it is referring to the flat sentence rather than the ordinary term – is demonstrated by: (1) the fact that the plea forms state that Richards's maximum exposure is 10 years; (2) the fact that the plea forms state that Richards is not eligible for a mandatory extended term; and (3) the fact that the prosecutor made no mention at the plea hearing that Richards was mandatory extended term eligible or that its recommendation of a ten-year sentence was made pursuant to Section 12, as would be required if the State wanted to avail itself of that provision.

Thus, the State is wrong that Richards's seven-year sentence is essentially beyond review. The State did not avail itself of an extended-term waiver under Section 12 that would bind the sentencing court to its ten-year recommended sentence, and Richards was told that he was only subject to an ordinary-term sentence. If this case is remanded, the maximum sentence Richards could receive would be seven years because

seven years is a legal sentence, and double jeopardy bars any increase. State v. Thomas, 195 N.J. 431, 435 (2008) ("[W]here a defendant files an appeal, courts are permitted to revise a sentence 'notwithstanding his initial commencement of the sentencing term, providing that any new sentence is in accordance with the substantive punishment standards under the Code and not in excess of the sentence originally imposed.'"). The seven-year sentence is excessive because the court erred in finding a need to deter without explanation and in light of its finding that Richards was unlikely to reoffend. This Court should remand for resentencing where the trial court explains the basis for factor 9 and considers whether, in light of appropriately found aggravating and mitigating factors, a five or six-year sentence is instead appropriate.

CONCLUSION

For the reasons set forth here and in defendant's initial brief, the evidence should be suppressed, or alternatively, the sentence remanded for resentencing.

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