SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2030-22
IND. NO. 18-08-1159-I

| | | |
|---|---|---|
| STATE OF NEW JERSEY,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>GUY C. JACKSON<br>A/K/A GUY JACKSON,<br><br>Defendant-Appellant. | :<br><br>:<br><br>:<br><br>:<br><br>: | CRIMINAL ACTION<br><br>On Appeal From a Judgment of Conviction of the Superior Court, Law Division, Middlesex County.<br><br>Sat Below:<br><br>Hon. Barry Weisberg, J.S.C.;<br>Hon. Joseph Paone, J.S.C. |

# BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

**JENNIFER N. SELLITTI**
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
973-877-1200

TAMAR Y. LERER
Assistant Deputy Public Defender
Tamar.Lerer@opd.nj.gov
Attorney ID: 063222014

Of Counsel and
On the Brief

**DEFENDANT IS CONFINED**

Dated: February 29, 2024

# TABLE OF CONTENTS

**PAGE NOS.**

## TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED



## INDEX TO APPENDIX

# TABLE OF AUTHORITIES

**PAGE NOS.**

## Cases

# TABLE OF AUTHORITIES (CONT'D)

**PAGE NOS.**

**Cases (Cont'd)**



**Statutes**

## TABLE OF AUTHORITIES (CONT'D)

**PAGE NOS.**

**Statutes (Cont'd)**



**Constitutional Provisions**



**Other Authorities**

## PRELIMINARY STATEMENT

Officers in Old Bridge Police Department were conducting an investigation into David Mundy, whom they believed to be dealing heroin. This investigation eventually yielded a search warrant for Mundy's person. On the day police went to execute this warrant, they saw Mundy approach a car, money in hand, and tell its occupants, "Nice car." Officers then detained Mundy and stopped the car's occupants, not knowing who was inside. This stop was undertaken without any reasonable suspicion particularized to the people in the car. This illegal action requires suppression of all evidence subsequently found.

After stopping the car, officers approached it. Inside, they recognized defendant Guy Jackson and his wife. Officers had suspicions that Jackson was involved in drug distribution, but had conducted no investigation into him, had not seen him deal any drugs, and did not see him behave in any illegal manner that day. Without any probable cause to search his vehicle, police entered his car, ostensibly to find his registration. During this search officers observed what they believed to be contraband and obtained a search warrant based on those observations. Because the warrant was tainted by officers' illegal behavior, the evidence found pursuant to that warrant must be suppressed.

## PROCEDURAL HISTORY

Middlesex County Superseding Indictment No. 18-08-1159 charged defendant Guy Jackson with: second-degree conspiracy to possess a controlled dangerous substance with intent to distribute, contrary to N.J.S.A. 2C:5-2, 2C:2-6, and 2C:35-5 and/or 2C:35-10a (Count One); two counts of third-degree possession of a controlled dangerous substance, contrary to N.J.S.A. 2C:35-10a (Counts Two and Four); two counts of second-degree possession of a controlled dangerous substance with intent to distribute, contrary to N.J.S.A. 2C:35-5 (Counts Three and Five); second-degree possession of a controlled dangerous substance with intent to distribute within 400 feet of certain public police, in violation of N.J.S.A. 2C:35-5 and 2C:35-7.1 (Count Six); and third-degree financial facilitation of criminal activity, contrary to N.J.S.A. 2C:21-25(a) (Count Seven). (Da 1-2)[1] Two co-defendants, David Mundy and Lashawn Mealing, were charged in various counts.

[1] The following abbreviations will be used:
Da - appendix to defendant-appellant's brief
1T – October 27, 2015
2T – December 23, 2015
3T – August 24, 2018
4T – June 24, 2019
5T – May 12, 2020
6T – October 17, 2022
PSR – Presentence Report

Jackson moved to suppress the physical evidence retrieved by police. A hearing was held before the Honorable Barry Weisberg, J.S.C., on October 27 and December 23, 2015. (1T, 2T) Judge Weisberg denied the motion on January 20, 2016. (Da 5-20) Jackson filed two subsequent motions for reconsideration, both of which were denied by the Honorable Joseph Paone, J.S.C., on August 24, 2016, and June 24, 2019. (Da 21-22)

On May 12, 2020, Jackson pleaded guilty to Counts Three, Five, and Seven before Judge Paone. (5T 4-12 to 16-21) On October 17, 2022, Judge Paone sentenced Jackson to two concurrent, extended-term sentences of 15 years with a 7.5-year period of parole ineligibility. (6T 19-16 to 20-11) The remaining indictable offenses were dismissed, as was Count Seven, on the State's motion. (6T 21-17 to 22-8)

A notice of appeal was filed on March 13, 2023, as within time. (Da 48-52)

## STATEMENT OF FACTS

In the summer of 2013, Joseph Gougeon of the Old Bridge Police Department began an investigation into heroin distribution centered around Nicholas Zafferese. (Da 5) Gougeon testified that the investigation into Zaffarese led to a CDW for his phone. (1T 41-24 to 25) Logs revealed that Zaffarese called David Mundy frequently. (1T 43-7 to 9) Officers also put a GPS on Zaffarese's car. (1T 40-22 to 41-2)

According to Gougeon "it all sort of came together," from citizen and informant sources that "around the same time [] Mr. Zaffarese was meeting a guy he referred to as Big Mike," who may have been supplying him drugs. (1T 17-12 to 15) Gougeon testified that his Sergeant, Peter LoPresti was "familiar with somebody he arrested years ago that went by the name of Mike and his name was Guy Jackson" and believed that person to be Big Mike. (1T 17-20 to 24) In 2003, Jackson had been arrested with heroin, cocaine, and a handgun; when officers came to arrest him, he attempted to back up and hit a police car. (1T 20-16 to 21; 2T 11-18 to 24) Given a picture of Jackson, a confidential informant identified him as "Mike." (1T 19-15 to 23) Every few days Zaffarese would drive to an auto parts store that Jackson owned. (1T 41-8 to 15)

The investigation turned to Mundy. Officers made multiple controlled buys from Mundy. (1T 57-1 to 61-22) None of the controlled buys involved Jackson. (1T 114-2 to 9) Eventually officers obtained a search warrant for Mundy on March 14, 2014. (1T 68-19) On March 19 in the evening, two officers in two separate cars set up surveillance outside of Mundy's house. (1T 72-1 to 9) Officers saw Mundy enter a car and leave; officers lost track of that car. (1T 75-16 to 21) As officers waited, a black BMW pulled into the parking lot and parked near the rear door of Mundy's residence with the engine running. (1T 75-22 to 76-25) Then a silver Mazda pulled in next to Gougeon's car. (1T 77-4 to 8) Gougeon could not see who was in the Mazda and had no prior knowledge about that car. (1T 100-22 to 101-9) When Mundy returned, the car he was in parked a few spots away from the Mazda. (1T 77-22 to 21) Mundy exited the car and walked up to the Mazda. (1T 79-21 to 22) Gougeon heard Mundy say "nice car" and take money out of his pocket. (1T 81-8 to 17)

After seeing the money, but not seeing anything exchange hands, Gougeon's partner drove his truck over and blocked in the Mazda. (1T 83-1 to 24; Da 8) Gougeon testified that Mundy "sort of backed up" and put the money back in his pocket. (1T 81-8 to 17) At this point neither Gougeon nor his partner had any idea who was in the Mazda. (1T 85-10 to 86-9, 111-21 to 18; Da 8) Gougeon approached the car and asked the occupants to put their hands

up—at that point he recognized them as Jackson and Mealing, Jackson's wife. (1T 85-10 to 86-9, 111-21 to 18) Jackson and Mealing identified themselves and were told to exit the car and put their hands on the trunk, which Jackson did. (1T 86-10 to 24) Mealing complained of leg pain, so Gougeon opened the back door of the Mazda for her to sit inside. (1T 87-9 to 13) It was at that point, according to Gougeon, that he smelled the odor of raw marijuana. (1T 87-18, 93-6) Later, when the car was searched, the only marijuana found was a small amount inside of two bags, which were inside of the glove compartment. (2T 101-1 to 102-2) Gougeon testified that when asked why they were meeting, Mundy said he was buying a car from Jackson and Jackson said he was selling car parts. (1T 124-13 to 20)

A search of Mundy revealed $3117 in cash. (1T 88-6) Gougeon asked Jackson for consent to search, which was denied. (1T 92-13 to 14) LoPresti arrived on the scene. (2T 15-1 to 3) Jackson gave him a valid driver's license and told him the insurance and registration were in the car. (2T 16-10 to 17-21) LoPresti testified that Jackson was neither unwilling nor unable to get the registration, but that LoPresti would not let him enter the vehicle to retrieve it:

> **Q:** Did you ask Mr. Jackson to retrieve the registration and the insurance?
>
> **A:** No, I did not.
>
> **Q:** Why not?

> **A:** From prior dealings with Mr. Jackson I wasn't going to let him back into the vehicle. For my safety. I don't know what's in the glove box at that point, I've already had an arrest involved with him with a handgun. I was not letting him, for my safety I was not going to let him go into the glove box of the vehicle, not at that time.
>
> (2T 18-2 to 13)

When he entered the vehicle, supposedly to conduct a search for the registration, LoPresti saw in the glove compartment a leather document pouch that was open a few inches and contained items wrapped in newspaper, which LoPresti asserted he "believed to be heroin packets." (2T 19-2 to 6) LoPresti then exited the car, called for a tow truck, and arrested all three defendants. (2T 28-1 to 10)

Gougeon applied for a search warrant. His application did not mention the supposed smell of marijuana. (2T 60-20 to 73-25, 88-17 to 22) The trial court found that it was very unlikely that the specific marijuana found in the car could be detected. (2T 147-25 to 148-11) The court speculated in its opinion that "there could have been far larger amounts of marijuana that had just recently been removed from the vehicle[,]" but "acknowledge[d] that there is no evidence of any other marijuana recently being in the car[.]" (Da 18) There was no assertion that Jackson dealt any marijuana. A search warrant for

the car was granted and executed, revealing money, heroin, and cocaine in the trunk, as well as heroin in the glove compartment. (2T 102-1 to 24)

The trial court found that Jackson was stopped when the Mazda was blocked in, but that the stop was justified by reasonable suspicion that Mundy was about to engage in a drug transaction with the occupants of the car. (Da 11-12) The trial court found that the suspected, inchoate drug deal justified ordering Jackson and Mealing out of the car. (Da 14) The court found that LoPresti's search of the car for credentials was justified "because it was clear that the officers were not going to let him back in the car as a safety precaution." (Da 15) Last, the trial court found that putting aside the evidence found during the credentials search, there was probable cause for a warrant because of "Jackson's furtive hand movement towards the key of the vehicle, the smell of raw marijuana, Gougeon's observation of the hand-to-hand transaction between Jackson and Mundy, and the conflicting stories as to why the defendants were at the scene, all in the context of the information the police had from their ongoing investigation." (Da 20) The subsequent motions for reconsideration were denied on the basis that officer-safety concerns allowed for entry into the car without first giving the occupants an opportunity to retrieve the registration. (3T 49-12 to 59-19; 4T 32-18 to 36-16)

## LEGAL ARGUMENT

## POINT I

### THE STOP AND SEARCH OF THE DEFENDANT WERE ILLEGAL. (Da 4-20; 3T 49-12 to 59-19; 4T 32-18 to 36-16)

Officers in this case stopped Jackson and Mealing for simply having a conversation with a person suspected of dealing drugs. That initial stop, which occurred before officers had any idea that it was Jackson in the car, was unlawful. The subsequent search of the car, ostensibly for the registration, was illegal both because officers refused to give Jackson or Mealing an opportunity to retrieve those credentials and also because the registration-search exception does not apply when a car is stopped on suspicion of criminal activity. Because the stop and search were illegal, and because the officers relied on the fruits of those unlawful actions to obtain a warrant, all the evidence found in the car must be suppressed. U.S. Const., amend. IV; N.J. Const., art. 1, par. 7.

**A. The initial stop of the defendant was illegal.**

The Fourth Amendment and Article 1 Paragraph 7 of the New Jersey Constitution protect people against unreasonable searches and seizures. The United States Supreme Court has explained that "the most basic constitutional rule" of search and seizure jurisprudence is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per

se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." Coolidge v. N.H., 403 U.S. 443, 454-55 (1971) (emphasis added) (internal quotation marks omitted). The exceptions to this warrant requirement are "jealously and carefully drawn." Ibid. Because warrantless searches and seizures are presumptively invalid, the State bears the burden of proving the validity of these actions. State v. Edmonds, 211 N.J. 117, 129-30 (2012).

One such exception is an investigatory stop. A police officer may conduct an investigatory stop if, "based on the totality of the circumstances, the officer had a reasonable and particularized suspicion to believe that an individual has just engaged in, or was about to engage in, criminal activity." State v. Stovall, 170 N.J. 346, 356 (2002). Because New Jersey's "constitutional jurisprudence evinces a strong preference for judicially issued warrants," the State bears the burden of proving by a preponderance of the evidence that a warrantless stop was justified by such a suspicion. State v. Elders, 192 N.J. 224, 246 (2007). The State failed to meet that burden in this case because there was no reasonable, particularized suspicion of criminal activity to justify the stop of Jackson.

The trial court found, and the State did not dispute, that the Mazda was stopped at the time it was blocked in by a police vehicle and that at that point

officers did not know who was in the car. (1T 85-10 to 86-9, 111-21 to 18; Da 8) The car was stopped because a suspected drug dealer went to the car with money (not drugs). There was no hand-to-hand transaction. The conversation the police overheard was entirely benign. Because police cannot stop every single person who speaks with a suspected drug dealer, even people who do business with a drug dealer, the stop was unlawful.

State v. Rosario, 229 N.J. 263 (2017), a case in which a stop was held to be unlawful despite a significantly greater amount of suspicious activity, demonstrates the lack of reasonable suspicion in this case. In Rosario, the officer had received an anonymous tip that the defendant was selling heroin from her home and car. Id. at 267. A few days later, at 11:30 p.m., the officer saw the defendant in front of her home, moving inside of that car in a "furtive" manner. Id. at 277. Officers conducted a stop by blocking in her car. Id. at 267. Our Supreme Court held that there was insufficient suspicion of criminality to justify a stop. Id. at 277. In this case, the officers knew nothing about the passengers in the car. This case is therefore in stark contrast to Rosario, where there was some basis to believe the person in the car dealt drugs. Further, there was nothing unusual about the car in this case, nor did the officers claim there was. No drugs were seen, and the money Mundy was holding did not exchange hands. The only basis to stop the car was its association with Mundy. That is

not reasonable suspicion for a stop of the car's occupants. See State v. Kuhn, 213 N.J. Super. 275, 280-81 (App. Div. 1986) (no reasonable suspicion to stop defendants when their car was parked in a high-crime area, in an "unusual" manner, the arrangement of the three individuals "fits the profile of a drug transaction.").

State v. Pineiro, 181 N.J. 13 (2004), a case in which there was reasonable suspicion for a stop, further reveals the deficiency of suspicion in this case. In Pineiro, an officer observed "the passing of a cigarette pack in a high crime area between a known felon and a suspected drug dealer." Id. at 27-28. In finding that there was reasonable suspicion to stop the defendants, the Supreme Court relied on the presence of multiple factors that are notably missing here. First, there was an actual exchange between two people, as opposed to an officer's suspicion that an exchange may occur some time in the future. Second, Pineiro took place in a high-crime neighborhood. Id. at 25. Third, the officer was personally familiar with one of the men in addition to having received reports about the other, ibid.; in this case, nothing was known about the occupants of the car. Unlike in Pineiro, there was no basis to believe the car's occupants were engaged in illegal activity.

In sum, there was no basis to stop the unknown occupants of the Mazda who were simply speaking to a target of an investigation. With no allegation

that the occupants of the Mazda had done anything illegal, where they were not behaving in a suspicious way, no exchange had taken place, and officers had no preexisting knowledge that would lead them to suspect criminal activity was afoot, there was no basis for an investigatory stop. Because the subsequent police action was the fruit of the unlawful stop, all the evidence must be suppressed. Wong Sun v. United States, 371 U.S. 471, 487-88 (1962).

**B. It was unlawful to search the car for the registration.**

Even if the stop of the Mazda was lawful, the entry into it in order to retrieve the car's registration was an unlawful search. Because automobile travel "is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities," the privacy interest a person has in his automobile is high. Delaware v. Prouse, 440 U.S. 648, 662 (1979). Therefore, an individual has a constitutionally protected privacy interest in the government not rummaging through the private contents of his car, and a warrant or probable cause and a valid exception to the warrant requirement is generally required to enter a person's car.

One exception to the warrant requirement, recognized only in New Jersey and California, is the registration-search exception. Because of the right of privacy in one's car and the strong preference for probable cause and warrants before a search is conducted, the registration-search exception is a

narrow one. Only "after a driver is given the opportunity to present the vehicle's ownership credentials but is unwilling or unable to do so, a police officer may engage in a pinpointed search limited to those places, such as a glove box, where proof of ownership is ordinarily kept." State v. Terry, 232 N.J. 218, 243 (2018). In balancing the need to determine ownership of a car against the privacy interests of those in the car, this prerequisite — that the person is given an opportunity to present these documents — is a constitutional necessity. The registration search in this case was illegal for three reasons.

First, it is undisputed that neither Jackson nor Mealing was given an opportunity to produce the registration. (2T 18-2 to 13; Da 9) The failure to give them an opportunity is fatal to the search. As this Court has recently held, "providing a detained motorist a meaningful opportunity to produce the registration certificate is an indispensable prerequisite to conducting a registration search." State v. Johnson, 476 N.J. Super. 1, 13 (App. Div. 2023). This prerequisite cannot be dispensed with due to officer safety concerns: "a motorist is not 'unable' to produce a registration certificate within the meaning of the exception when the sole reason for that inability is a police officer's discretionary decision to prevent reentry." Ibid. While these concerns may allow the officer to prevent a defendant from reentering a parked vehicle, the

decision to prevent reentry "ha[s] the effect of foreclosing a warrantless registration search, requiring the detectives instead to use other methods to investigate whether defendant was in lawful possession of the vehicle, such as an MVC database look-up." Ibid.

Johnson controls this case. The search for the registration was unlawful because officers failed to give the occupants of the car an opportunity to provide the registration. Further, insofar as the officers had any valid safety concerns regarding Jackson, which is dubious given their total reliance on a 10-year-old incident as the basis for that concern, there would be no reason Mealing—who had no such history and was already physically in the car—could not obtain the registration.

Second, the registration exception allows for a search only in the context of a motor vehicle stop. In explaining the reason for the exception, our Supreme Court reasoned, "We have held that a traffic violation may justify a search for things relating to that stop." State v. Keaton, 222 N.J. 438, 448 (2015) (emphasis added). See also Terry, 232 N.J. at 222 ("A police officer has the lawful right to request that a driver, stopped for a motor vehicle violation, provide proof of ownership." (emphasis added)). In Terry itself, the stop was initiated for motor vehicle infractions. Terry, 232 N.J. at 244. Later, reasonable suspicion developed that the car was stolen. Ibid. Thus, the

justification for the search stemmed primarily from the motor vehicle infraction. Insofar as the suspicion of criminal activity was used to justify the search in Terry, it was suspicion of a crime that relates directly to the ability to provide proof of ownership of the car. But in this case the police stopped Jackson on suspicion of criminal activity wholly unrelated to the ownership of his vehicle. Entering his car, supposedly to look for registration information, is completely untethered from the basis of the stop. Therefore, it cannot be justified under Terry.

It is true that in Keaton, the unlawful entry into the car was to complete an accident report. Keaton, 222 N.J. at 442. However, because the search was found to be unlawful due to a failure to give the motorist an opportunity to provide credentials, Keaton is not an example of a registration search that was upheld in any context other than a motor vehicle infraction. Allowing the credentials exception to allow entry into a car for the purposes of a criminal investigation for which there is no probable cause is untethered from the purposes of the narrow exception and violates the state and federal constitutional privacy rights.

Last, this search cannot be sustained as a registration search because the registration-search exception violates the federal constitution. The United States Supreme Court interpretations of the federal constitution establish "the

floor of minimum constitutional protections." State v. Gilmore, 103 N.J. 508, 524 (1986). Thus, although our courts are free to provide greater constitutional protections than the United States Supreme Court has found the federal constitution necessitates, our courts cannot provide lesser constitutional protections. Ibid. As both the majority and Chief Justice Rabner's dissent in Terry recognize, the United States Supreme Court has never recognized a registration-search exception to the probable-cause and warrant requirements. 232 N.J. at 242, 272. Although the majority in Terry concluded that the exception passes constitutional muster, the dissent correctly recognized that the registration-search exception falls below the constitutional floor set by the United States Supreme Court because a search that dispenses not only with the warrant requirement but also with the probable-cause requirement does not comport with the Fourth Amendment. Id. at 267 (Rabner, C.J., dissenting) (noting that "[s]earch of the car should be permitted only when the failure to produce the registration and the other relevant circumstances establish probable cause that the car is stolen. Absent such evidence, further detention for investigation would be justified if the Terry reasonable suspicion test was met") (emphasis added); see also Arizona v. Hicks, 480 U.S. 321, 327 (1987) (noting that "[d]ispensing with the need for a warrant is worlds apart from

permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause").

In sum, the search of the car under the registration exception to the warrant requirement was unlawful. Because the search warrant was the fruit of this unlawful search, the evidence seized must be suppressed.

**C. The unlawful search cannot be saved by resort to the inevitable discovery doctrine.**

The trial court held that even discounting the heroin seen during the illegal search, there was sufficient probable cause for a warrant to the Mazda. This seems to be a ruling on the State's inevitable discovery argument. In essence, the trial court reasoned that even without the illegal action there was sufficient probable cause so there is no reason to suppress. This is the wrong inquiry under the inevitable discovery doctrine. That doctrine permits the admission of illegally seized evidence if the State can establish that it was inevitable that the evidence would have been lawfully obtained, absent the illegality, not that it could have been. Because the State failed to make that showing, the evidence must be suppressed.

Generally, when police gather evidence through an illegal search, that evidence must be suppressed. State v. Novembrino, 105 N.J. 95, 157 (1987). The inevitable discovery doctrine is an exception to this general rule requiring suppression. In applying this doctrine, it is crucial to remember that when the

State relies on the doctrine, the "police have already violated the law[,] [e]vidence has been obtained unlawfully; a defendant's constitutional rights have been denied." State v. Sugar (II), 100 N.J. 214, 239 (1985). In these cases, the "State itself is directly responsible for the loss of the opportunity lawfully to obtain evidence; the State has created a situation in which it is impossible to be certain as to what would have happened if no illegal conduct had occurred." Ibid. Because of this misbehavior and the infringement of a defendant's constitutional rights that has already occurred, courts must carefully hold the State to its burden of showing by clear and convincing evidence that the unlawfully seized evidence would inevitably have been discovered through untainted, lawful means. Id. at 237-40. "[T]he doctrine cannot be used to elide the warrant requirement." See State v. Camey, 239 N.J. 282, 302 (2019).

In light of these concerns, our Supreme Court has adopted a "restrictive formulation" of inevitable discovery, requiring the State to establish by clear and convincing evidence that:

> (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case;
>
> (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and

> (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.

Sugar (II), 100 N.J. at 237-38.

The first and third prongs are most relevant to this case. Under the first prong, the State must establish that proper procedures "would have been pursued" to continue the investigation leading to the discovery of the evidence. Ibid. (emphasis added). "Would" does not mean "could"; it requires much more than a mere expression of hope as to what the police ought to have done instead of conducting an illegal search. See Wayne LaFave, Search and Seizure, §11.4(a), at 359 (5th ed. 2012) ("[C]ourts must be extremely careful not to apply the 'inevitable discovery' rule upon the basis of nothing more than a hunch or speculation as to what otherwise might have occurred."); Byrnes, Current N.J. Arrest, Search & Seizure (Gann), §33:3-3, at 991 (2018) ("The fact that police could have obtained a search warrant does not mean that they would have obtained a search warrant) (citing State v. Keaton, 222 N.J. 438, 451 (2015)).

Under the third prong of the inevitable discovery doctrine, the State must establish that the discovery of the evidence through the use of the proposed hypothetical inevitable procedure would have occurred wholly independently of the discovery of such evidence by unlawful means. Sugar (II), 100 N.J. at

237-38. In other words, the State must prove that the illegal action did not taint any theoretical independent avenue to obtain the evidence.

In this case, the State failed to establish both the first and third of these prongs of inevitable discovery. Absent the flagrantly illegal stop of the Mazda, the State would not have been able to detain its occupants. No information would have been gleaned about its occupants, no normal and specific investigatory procedures would have been pursued, and the evidence in the car would never have been found.

Even if the stop was lawful, the State has failed to prove that the evidence would have been discovered absent the unlawful credentials search. Assuming the only illegality was the credentials search, the State cannot meet prongs (1) or (3) for the same reason: there is no basis to believe the officers would have sought a search warrant without seeing suspected heroin in the car and no basis to believe they would have gotten one. The warrant application relied on the heroin found in the car. (2T 60-20 to 73-25) There was not any mention of marijuana. The reason there was no mention of the odor of marijuana is because there was no such odor. And despite the trial court's attempt to massage that fact in its opinion, it made quite clear on the record that the odor was an impossible claim when examining the marijuana found in the car:

> I won't call it a minuscule, but a very small amount of marijuana. Testimony is it's within this bag, you know, as it, not in the evidence bag, obviously. But in the sealed and knotted plastic, which is not, you know -- And then that was inside, stuffed inside bricks of heroin inside that black bag, inside a closed glove compartment.
>
> And when the door opened, that immediately gave rise to the smell of marijuana. I've got some credibility issues with that. I have to tell you that. I'm struggling with it.
>
> (2T 147-25 to 148-11)

In order to save the search and avoid calling the officer incredible in its opinion, the trial court speculated that perhaps large amounts of raw marijuana had recently been removed from the car. Not only is there no basis for that speculation—in particular because Jackson had never been accused of dealing marijuana—but speculation that fills in the gaps in the State's record cannot be used in the context where the State bears the burden of proof. The argument in support of application of the inevitable discovery doctrine amounts to: "Maybe there is a reason that the odor of marijuana could have been detected, and based on this unsubstantiated reason the officers would have gotten a search warrant for marijuana despite never having mentioned marijuana when they actually got the warrant." This supposition does not meet the requirements of the inevitable discovery doctrine. Instead, the record shows that absent seeing the suspected heroin in the car during the illegal registration search, officers

did not have probable cause to obtain a warrant and would not have sought a warrant.

State v. Finesmith, 406 N.J. Super. 510, 514 (App. Div. 2009), a case where inevitable discovery was found, shows how significant the record must be to find the State has met its burden under the inevitable discovery doctrine. In Finesmith, the police were searching the defendant's home for computers pursuant to a valid search warrant. Id. at 514-15. During this search, the police questioned the defendant without reading him his Miranda rights, and the defendant revealed the location of a laptop. Id. at 516-17. The police then seized the laptop. Ibid. In holding that the laptop did not need to be suppressed, this Court applied the inevitable discovery doctrine. Id. at 522-23. The Court noted that the police were already in the process of executing a valid search warrant; they were not trying to get the search warrant as an initial matter. Thus, in Finesmith, the police would inevitably have discovered the evidence in question, without relying on the defendant's suppressed statement, because they were continuing to execute a valid search warrant. Ibid.

In contrast, here, there was no ongoing investigation of Jackson that would have led to the evidence nor is there any basis to believe the officers would have followed constitutional protections they had so flagrantly ignored throughout the case. The police did not have a warrant for the car, they were

not already in the process of applying for a warrant at the time they chose to engage in flagrant misconduct, nor had they taken any concrete steps to secure that hypothetical warrant. Without any of these concrete steps towards the hypothetical lawful procedure, there is simply no evidence that the police would have applied for an untainted search warrant. Nor is there any evidence that that hypothetical search warrant would have been granted, because absent the mention of heroin in the actual search warrant there is no probable cause to search the Mazda.

In sum, the police in this case took a flagrantly illegal shortcut when they entered the car and searched the glove compartment without a warrant and without giving the cars' occupants an opportunity to retrieve the credentials. In trying to justify this search, the State is essentially asking to avoid the exclusionary rule because "if we hadn't done it wrong, we would have done it right." LaFave, Search and Seizure, §11.4(a), at 352-53. That is not what the inevitable discovery doctrine means, and this Court should reject the argument. The State failed to present competent, clear, and convincing evidence that the inevitable discovery doctrine applied to save the otherwise illegally seized evidence from exclusion. Inevitable discovery does not apply to save the police from their misconduct in this case. This Court should reverse the trial court's denial of the motion to suppress.

**D. The evidence must be suppressed.**

Officers in this case repeatedly violated Jackson's rights, first by unlawfully stopping his car and then by unlawfully searching it. All evidence found in the car is the fruit of these unlawful actions. Because the State cannot demonstrate that a warrant, untainted by this flagrantly unlawful behavior, would have been sought and granted, the evidence must be suppressed.

## POINT II

## DEFENDANT'S SENTENCE IS EXCESSIVE.

Jackson was sentenced to the most he could be under the plea agreement with the prosecutor: 15 years with 7.5 years of parole ineligibility. The cursory analysis supporting this sentence is insufficient. Specifically, the trial court failed to find a sufficient basis to justify the imposition of aggravating factor (5), failed to consider evidence of Jackson's rehabilitation, failed to consider the applicability of mitigating factor (11), and failed to justify the imposition of a discretionary parole disqualifier. The sentence must be vacated, and the matter remanded 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). "Mitigating factors that are called to the court's attention should not be ignored and when amply based in the record . . . , they must be found," State v. Case, 220 N.J. 49, 64 (2014) (internal quotation marks and citations omitted). Aggravating factors must be grounded by "competent, credible evidence in the record." Id. at 67. Moreover, simply enumerating the applicable aggravating

and mitigating factors is insufficient. State v. Kruse, 105 N.J. 354, 363 (1987). Rather, a court's sentencing decision must "follow[] not from a quantitative, but a qualitative analysis." Ibid. 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).

The trial court's obligation to find and weigh factors thoroughly and appropriately is not at all changed in the context of a plea bargain. State v. Warren, 115 N.J. 433, 447 (1989) ("[T]he sentencing court is enjoined to consider the aggravating and mitigating factors and other Code considerations in determining whether to follow a recommended sentence that is proffered as part of a plea bargain. The court in discharging its sentencing responsibilities may not simply accept the terms of a plea agreement.") (internal citations omitted). In other words, while the sentence recommended in the plea agreement is the maximum sentence allowed, the trial court still must exercise its discretion to determine if a lesser sentence is appropriate. When a sentencing court fails to discharge its responsibility, the sentence must be vacated.

The trial court found aggravating factors (3) the risk that the defendant will commit another offense; (5) there is substantial likelihood that defendant is involved in organized criminal activity; (6) the extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted; and (9) the need for deterring the defendant and others from violating the law. N.J.S.A. 2C:44-1a. (6T 19-7 to 15) It found no mitigating factors. (6T 19-15) There were a number of issues with these findings.

First, there was an insufficient basis to find aggravating factor (5). The trial court simply stated that Jackson "didn't have a substance abuse issue, so the motivating factor here was profit. This was an organized crime." (6T 19-2 to 3) The trial court's assertion is factually incorrect: the PSR states that Jackson "reported past daily marijuana and cocaine use." (PSR 15) This fact supports that he does in fact have a substance abuse issue. The trial's conclusion is also legally incorrect: it cannot be that any drug deal that is undertaken for profit satisfies the finding of this factor. If so, almost every drug distribution charge would allow for a finding of this factor, as, by definition, money is made by the dealer. This outcome would undermine the purposes of aggravating factors, which is identify "individual circumstances which distinguish the particular offense from other crimes of the same nature."

State v. Yarbough, 195 N.J. Super. 135, 143 (App. Div. 1984), mod. 100 N.J. 627 (1985).

Second, the trial court failed to consider evidence of Jackson's rehabilitation during the nine years between arrest and sentencing, including four years during which he was incarcerated. During his incarceration, Jackson worked as a cook at the jail, obtained a certificate as a forklift operator, and signed up for a parenting class. (Da 45) In State v. Randolph, 219 N.J. 330, 334 (2012), the Supreme Court held affirmed that when a defendant is sentenced, no matter the context, "the trial court should view defendant as he stands before the court on that day." The Court explained that rehabilitative efforts during incarceration relate to the risk of re-offense, aggravating factor (3). Id. at 343-44. Of course, the less likely re-offense is, the less important specific deterrence, a component of aggravating factor (9), is. In addition, rehabilitation would be relevant to mitigating factor (9), the character and attitude of the defendant indicates he is unlikely to commit another offense. Here, the trial court made no reference to the rehabilitative efforts or their relationship to the aggravating and mitigating factors. This oversight is particularly problematic in this case, where almost ten years elapsed from the date of the offense until the date of sentencing. All of us change in a decade. The failure to consider how Jackson changed requires a resentencing.

Third, the trial court failed to consider Lashawn Mealing's health conditions when rejecting mitigating factor (11), that imprisonment would be an excessive hardship to Jackson's dependents. Mealing, Jackson's wife, is "seriously ill. She's had a ton of strokes . . . [p]art of her body is paralyzed." (6T 6-18 to 7-2) Jackson provides care for her. (Da 45) Mealing's reliance on Jackson for physical care should have been considered. Courts have found that mitigating factor eleven applies when incarceration would pose a hardship to a defendant's children. State v. Marinez, 370 N.J. Super. 49, 58 (App. Div. 2004) ("We are also satisfied that because of defendant's sick young child, the family hardship of lengthy incarceration was also a legitimate mitigating factor."). But children are not the only people who can be dependent. The State recognized that Mealing "would be the only considered dependent[.]" (6T 11-14 to 15) Although the State asserted that her family was taking care of Mealing, there is no information in the record to support that assertion. The trial court erred in dismissing the application of this mitigating factor without at least learning more about Mealing's care.

In addition to failing to consider mitigating factors brought to its attention and finding aggravating factors without a sufficient basis, the trial court erred in imposing a discretionary parole disqualifier without sufficient justification. In April 2021, the Attorney General issued Law Enforcement

Directive No. 2021-4, Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12 (April 19, 2021) (the Directive) (Da 33-43). The Attorney General issued this directive in response to the Criminal Sentencing and Disposition Commission's recommendation to eliminate mandatory minimum terms for non-violent drug-related offenses to address racial disparities in the prison population. State v. Arroyo-Nunez, 470 N.J. Super. 351, 357-59 (App. Div. 2022). Under the directive, a county prosecutor is required to offer a plea agreement waiving the mandatory minimum term required for certain drug offenses, including possession of narcotics with the intent to distribute under N.J.S.A. 2C:35-5(a)(1), as Jackson pleaded guilty to here. Directive at 6-7 (Da252-53).

The parties, however, "may agree to, a provision of a plea agreement whereby the court at sentencing is authorized to decide whether to impose an additional, discretionary period of parole ineligibility, pursuant to N.J.S.A. 2C:43-6(b).'" Directive at 7. "The AG 'anticipated' there would be few motions seeking discretionary parole disqualifiers because consultation with the DCJ Director would 'ensure that prosecutors request discretionary parole disqualifiers rarely and in a consistent manner.'" Arroyo-Nunez, 470 N.J. Super. at 363 (quoting Directive at 6). Here, the court did impose this

discretionary parole disqualifier under N.J.S.A. 2C:43-6(b). That statute provides for the imposition of such a disqualifier when the court is "clearly convinced that the aggravating factors substantially outweigh the mitigating factors." The trial court did not make this finding, instead merely stating that "[t]he aggregating [sic] factors preponderant [sic]." (6T 19-15) This finding is insufficient to justify the imposition of this period of parole ineligibility.

"[P]eriods of parole ineligibility are the exception and not the rule. They are not to be treated as routine or commonplace." State v. Kruse, 105 N.J. 354, 359 (1987) (internal quotation marks omitted). Recently, our Attorney General has directed that "prosecutors request parole disqualifiers rarely" in non-violent drug cases. Because the trial court did not find that the legal standard for imposition of this period of ineligibility was met, and there was no showing that this is the rare case in which such a disqualifier would be appropriate, the period of parole ineligibility must be vacated.

In sum, the trial court imposed aggravating factors without justification, rejected without explanation mitigating factors brought to its attention, and imposed a period of parole ineligibility without finding the legal standard to do so was met. The sentence must be vacated, and the matter remanded for resentencing.

## CONCLUSION

For all the reasons set forth in Point I, the denial of the motion to suppress must be reversed and the matter remanded for Jackson to determine whether to withdraw his plea. In the alternative, the sentence must be vacated and the matter remanded for resentencing.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant
BY: /s/ TAMAR Y. LERER
Assistant Deputy Public Defender
Attorney ID: 063222014

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2030-22T1

| | |
|---|---|
| STATE OF NEW JERSEY,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>GUY C. JACKSON<br>A/K/A GUY JACKSON,<br><br>Defendant-Appellant. | Criminal Action<br><br>On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Middlesex County.<br><br>Sat Below:<br>Hon. Barry Weisberg, J.S.C.<br>Hon. Joseph Paone, J.S.C. |

# BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

YOLANDA CICCONE, PROSECUTOR
County of Middlesex
Attorney for Plaintiff
25 Kirkpatrick Street, 3rd Floor
New Brunswick, NJ 08901
732-745-3300

ANTHONY J. ROBINSON
Assistant Prosecutor
Of Counsel and on the Brief
Anthony.Robinson@co.middlesex.nj.us
Attorney No. 059632013

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## STATUTES

## PRELIMINARY STATEMENT

On March 19, 2014, detectives from the Old Bridge Police Department disrupted the sale of narcotics. This was not a random encounter, but the culmination of a long-term investigation into the distribution of this poison in their community. They knew who they were looking for and why, where he would be and when, and were prepared to satisfy their duty to execute an order of the Court.

Enter defendant, Guy Jackson. A known drug dealer with a penchant for violent and unpredictable attempts at escape. Though he was not the intended target of the operation, his role within that operation became quickly apparent.

After observing multiple, previous transactions featuring their target, David Mundy, they see Mundy approach Jackson with a wad of cash. Rightly suspecting they were witnessing yet another sale, the detectives intervened. They took all reasonable measures to secure the scene, protect themselves, and respect the rights of their suspects.

The resulting investigation discovered significant quantities of controlled dangerous substances and led to defendant's arrest and prosecution. Defendant pled guilty and was sentenced according to that plea agreement. There is nothing in the record to suggest that defendant was anything but consciously willing to accept the sentence he ultimately received. The Court

committed no reversible error in enforcing the agreement and defendant was not subject to any punishment disproportionate to his status within the criminal justice system.

It is defendant's regret that motivates this appeal rather than any defect in process. The appeal is consequently without merit and the trial court's decisions should be affirmed.

## COUNTER-STATEMENT OF PROCEDURAL HISTORY

Middlesex County Indictment No. 14-11-01248-I charged defendant, Guy Jackson ("defendant"), Lashawn Mealing, and David Mundy with second-degree Conspiracy to Commit Possession of a Controlled Dangerous Substance, contrary to N.J.S.A. 2C:5-2, (Count 1), two counts of third-degree Possession of a Controlled Dangerous Substance, heroin and cocaine, contrary to N.J.S.A. 2C:35-10(a)1 (Counts 2 and 4), two counts of second-degree Possession with Intent to Distribute heroin and cocaine, contrary to N.J.S.A. 2C:35-5(a)1 and 2C:35-5(b)2, (Counts 3 and 5), second-degree Possession with Intent to Distribute heroin and cocaine within 500 feet of a School, contrary to N.J.S.A. 2C:39-7.1, (Count 6), and third degree Financial Facilitation of Criminal Activity, contrary to N.J.S.A. 2C:21-25(a) and 2C:21-25(b)1, (Count 7). (Da1 to 3).[1]

[1] The record is cited as follows:

Defendant filed a motion to suppress evidence, which was heard on October 27 and December 23, 2015, by Hon. Barry Weisberg, J.S.C. (1T, 2T). The motion was denied on January 20, 2016. (Da5-20). Defendant subsequently filed two motions for reconsideration, both of which were denied by Hon. Joseph Paone, J.S.C., on August 24, 2016 and June 24, 2019.

On May 12, 2020, defendant plead guilty to Counts 3, 5, and 7 before Judge Paone. (5T4-12 to 16-21). On October 17, 2022, Judge Paone sentenced defendant in conformity with the negotiated plea agreement which recommended an aggregate, fifteen-year term of incarceration with a seven and one-half year term of parole ineligibility. (Da23-32) This sentence contemplated Counts 3 and 5 running concurrently, along with the dismissal of Count 7 on the State's motion. (Da29-32). The sentence was also run concurrent with federal indictment 20 CR 161. (Da29-32).

## COUNTER-STATEMENT OF FACTS

As far back as 2003, defendant was the subject of a narcotics investigation out of Old Bridge Township. (2T10-5 to 15). At that time, DSgt.

---

Db = Defendant's brief
Da = Defendant's appendix
1T = Transcript of Motion, October 27, 2015
2T = Transcript of Motion, December 23, 2015
3T = Transcript of Motion, August 24, 2018
4T = Transcript of Motion, June 24, 2019
5T = Transcript of Plea, May 12, 2020
6T = Transcript of Sentence, October 17, 2022

Peter LoPresti ("LoPresti") of the Old Bridge Police Department ("OBPD") was investigating the sale of cocaine by an individual known as "Big Mike." (2T11-1 to 3). As part of that inquiry, LoPresti made an undercover purchase of narcotics from a female later identified as LaShawn Mealing, who was the paramour of Guy Jackson. (2T11-3 to 6). LoPresti ultimately identified "Big Mike" as Jackson, the defendant here. (2T11-7 to 9).

LoPresti executed an arrest of Mealing and defendant at which time defendant attempted to evade custody by driving over top police vehicles before being detained. (2T11-18 to 24). OBPD executed search warrants on property related to defendant and recovered significant quantities of cash, narcotics, and a handgun. (2T12-2 to 24).

Come 2014, little had changed. (2T21-11 to 18). In the summer of 2013, OBPD Det. Joseph Gougeon ("Gougeon") received information from a confidential informant ("CI") and concerned citizens regarding the sale of narcotics in Old Bridge. (1T13-16 to 14-16). This lead to an investigation into a Nicholas Zaffarese. (1T16-14 to 16). That investigation discovered that Zaffarese was purchasing his product for distribution from a supplier known as "Big Mike." (1T16-10 to 15).

Gougeon reviewed the investigation with LoPresti, who informed Gougeon that "Big Mike" was, in fact, defendant. (1T18-10 to 16). At this

point, Gougeon recognized that defendant's involvement meant that the operation was "larger scale." (1T20-22 to 21-3). In September of 2013, OBPD conducted a controlled buy of narcotics from Zaffarese. (1T40-9 to 14). The product retrieved from the buy possessed a stamp identifying that brand of heroin as "dog food." (1T40-14). A CI advised that "dog food" was the brand of heroin distributed by defendant. (1T40-15 to 19).

Contemporaneously, a Communications Data Warrant ("CDW") was obtained for Zaffarese's phone. (1T41-24 to 25). The CDW revealed that Zaffarese was often in contact with David Mundy ("Mundy"). (1T42-3 to 4). After checking this name with a previously reliable CI, Gougeon was advised that Mundy was distributing heroin. (1T46-13 to 17). Additional information from a CI indicated that Mundy was purchasing heroin from defendant in Red Bank for resale. (1T51-11 to 15). Gougeon added that the location of the transaction in Red Bank matched the data that a GPS transmitter installed to track Zaffarese's location produced. (1T51-20 to 24).

Between December 2013, and March 2014, OBPD observed at least four hand-to-hand drug transactions involving David Mundy; following at least one of these, the purchasers confirmed that they had, in fact, purchased heroin from David Mundy, while the remaining involved controlled buys with informants. (1T52-16 to 17, 56-23 to 24; 57-4 to 8; 1T60-13 to 24; 61-20 to

23). As a result, OBPD applied for a search warrant for the person of David Mundy. (1T68-9 to 11). This warrant was approved by Hon. Alberto Rivas, J.S.C. (1T70-20 to 25).

On March 19, 2014, OBPD attempted to execute the warrant on Mundy. (1T72-1 to 9). Gougeon set up surveillance in a parking lot outside Mundy's residence, while OBPD Det. Montagna ("Montagna") was performing "moving surveillance." (1T74-1 to 18). Gougeon observed Mundy exit his residence, enter a white Kia, and leave the property. (1T75-16 to 18). About this time, a silver Mazda entered the lot and parked next to Gougeon. (1T77-4 to 8). Shortly after, the Kia returned and parked near the Mazda. (1T77-20 to 21).

Mundy then stepped out of the Kia and approached the Mazda. (1T79-21 to 22). Mundy complimented the Mazda to the driver and retrieved a roll of cash from his pocket. (1T81-8 to 13). Montagna arrived and pulled in front of the driver's side of the Mazda, at which point Mundy placed the money roll back in his pocket. (1T81-14 to 17). Gougeon and Montagna identify themselves as police and detain Mundy, at which point the driver of the Mazda puts the keys in the ignition and "turned the key forward." (1T82; 83-1-5).

Gougeon recognized the occupants of the Mazda as defendant and Lashawn Mealing and asked them to confirm their identity, which they did. (1T86-2 to 15). Considering there were only two detectives and three potential

suspects – one of whom had a history of violently evading capture – defendant and Mealing were asked to exit the vehicle and walk to the rear. (1T86-17 to 87-4). Mealing complained of leg pain and asked if she could sit in the car. (1T87-9 to 10). Gougeon accommodated this request and opened the passenger door for her to sit. (1T87-11 to 13).

Opening the vehicle to assist Mealing, Gougeon detected the odor of marijuana coming from the cabin. (1T87-16 to 17). At this time, $3,117 in cash was seized from Mundy's pocket and consequently, all three individuals were Mirandized. (1T89-4 to 25). Mundy and defendant agreed to answer questions, during which they gave conflicting stories explaining their purpose: Mundy claiming he was buying car parts, defendant claiming he was selling a car. (1T90-5 to 16). Mealing then reminded defendant that he does not sell cars. (1T90-16 to 18).

Gougeon then asked defendant to confirm his ownership of the car and for consent to search the vehicle based on the odor of marijuana; defendant attempted the former and declined the latter. (1T92-8 to 25). LoPresti then arrived and an application for a telephonic search warrant for the vehicle was sought. (1T93-11 to 22). The warrant was ultimately granted by Hon. Lisa Vignuolo, J.S.C.. (2T54-18 to 23).

Meanwhile, LoPresti attempted to obtain defendant's driver's license, registration, and proof of insurance. (2T16-10 to 17-24). Defendant advised that his registration and insurance cards were either in the glove box or the arm rest. (2T17-22 to 18-1). Given LoPresti's intimate knowledge of defendant's history, LoPresti did not allow defendant to return to the vehicle to retrieve the documents, electing to gather them himself. (2T18-2 to 21). While retrieving the documents from the glove box, LoPresti recognized wrapped heroin bundles inside a leather document holder similar to that which contains an owner's manual. (2T19-2 to 6). LoPresti did not take or otherwise manipulate the leather container. (2T21-19 to 21).

The search warrant was executed, revealing cocaine, heroin, marijuana, a large sum of cash, and various items of paraphernalia from the glove box and surrounding vehicle. (2T78-19 to 86-22). Curiously, no car parts or vehicle deeds were retrieved.

At sentencing, Hon. Joseph Paone, J.S.C., noted defendant's then-twenty-five-year criminal history and his frequent residency in the prison system. (6T18-2 to 24). The court also recognized that defendant was subject to a significant term of incarceration derivative of a federal prosecution that began after the charges for which he was being sentenced. (6T17-1 to 12). This federal sentence involved a sixteen-year term of imprisonment. (Ibid.)

Ultimately, the Court sentenced defendant to a fifteen-year term of incarceration with a seven and one-half year period of parole ineligibility, concurrent to the federal sentence. (6T19-16 to 20-11).

# LEGAL ARGUMENT

## POINT I
## DEFENDANT WAS SUBJECT TO A LAWFUL INVESTIGATORY STOP AND THE DENIAL OF THE SUPPRESSION MOTION WAS PROPER

A. Law – Initial Stop

A motor vehicle stop is justified if the attending officer establishes an articulable and reasonable suspicion that a motor vehicle infraction occurred. Delaware v. Prouse, 440 U.S. 648, 663 (1979); State v. Smith, 251 N.J. 244 (2022); State v. Robinson, 228 N.J. 529, 548 (2017). It is important to note that a subsequent conviction for the offense is not necessary, so long as an objectively reasonable belief that it occurred existed at the time of the stop. State v. Oliveri, 336 N.J. Super. 244, 247 (App. Div. 2001).

While this standard is fairly low, the State must provide some evidence that can be tested through the adversarial process to support the reasonableness of the suspicion that led to the stop. State v. Atwood, 232 N.J. 433, 448 (2018). In a word, the State needs to have something.

Further, an appellate court is traditionally loath to disturb a lower court's findings of fact. Indeed, an appellate court reviewing a motion to suppress evidence "must uphold the factual findings underlying the trial court's decision, so long as those findings are supported by sufficient credible

evidence in the record." State v. Evans, 235 N.J. 125, 133 (2018) (internal quotations removed).

B. Law – Removal of Occupants

Following a stop, police may order the occupants from a car under the circumstances presented here. The United States Supreme Court has long held that ordering a driver from a vehicle is a minor intrusion on liberty and constitutionally acceptable. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977). To order a passenger from a vehicle, "an officer must be able to point to specific and articulable facts that would warrant heightened caution" to permit the ordering of a passenger from a vehicle for a traffic violation." State v. Smith, 134 N.J. 599, 618 (1994) (emphasis added). The officer "need point only to some fact" lending itself to the notion that ordering a passenger out would create a more secure scene. Ibid.

C. Law – Plain View Doctrine and Credential Search

Germane to the discovery of evidence, the State may seize evidence without a warrant if that evidence is discovered in "plain view[2][3]." The plain view exception to the warrant obligation requires that: 1) police perceived the existence of the evidence from a lawful vantage point; 2) the officer has to

[2] The State acknowledges that the law on "plain view" substantively changed in favor of admission in 2016 with State v. Gonzales, 227 N.J. 77 (2016), so our analysis will involve the law as it was pre-Gonzales.
[3] Although the evidence discovered in plain view was not seized, the analysis girds the notion that the officer was acting within his constitutional limitations.

discover the evidence inadvertently, that is, he did not know in advance where the evidence was located nor intend to seize it; and 3) it was immediately apparent to the police that the item was evidence or contraband. State v, Mann, 203 N.J. 328, 341 (2010).

N.J.S.A. 39:3-29 grants authority to police to request the driver's license, registration, and proof of insurance of any driver. Likewise, police may perform a limited search for those credentials when a driver is "unable or unwilling" to do so. This search must be confined to places where such documentation would ordinarily be kept. State v. Terry, 232 N.J. 218, 222-223 (2018) (citing State v. Keaton, 222 N.J. 438, 449-451 (2015)). Moreover, State v. Slowbocker 79 N.J. 1 (1979), allows for this kind of search when there is a "substantial necessit[y] grounded in public safety."

D. Facts

Here, OBPD obtained a search warrant pursuant to an investigation into a known associate of defendant. Leading up to the execution of that warrant, OBPD observed multiple hand-to-hand transactions conducted by the target, David Mundy, with occupants of vehicles in the parking lot outside his residence. During the progression of the investigation, defendant became known to OBPD as a potential supplier of Mundy. During the execution of the

warrant, Mundy approached defendant with a wad of cash. When confronted by police, Mundy hid the money and appeared as if he was prepared to run.

i. Initial Stop

Appreciating now that they were witnessing yet another transaction involving Mundy – performed in an identical manner to the others – officers rightly suspected that defendant, towards whom Mundy was approaching with a handful of cash, was involved in in the transaction as well. Although at this point, the investigatory stop of the defendant was justifiable, that justification became unassailable once detectives recognized who defendant was: the suspected supplier of the very man about to hand him a large sum of money.

ii. Ordering of Occupants Out of Vehicle

Police were therefore within their rights to order the occupants of the vehicle to exit: defendant's vehicle was stopped pursuant to a criminal investigation. Defendant-driver could be ordered out as a matter of course, considering his history of violently evading capture, narcotics distribution, and weapons possession. Likewise, Mealing was defendant's well-known, long-time accomplice, from whom purchases had also been made. It is not a reach to suspect that they were at it once again. Although Mealing was not ultimately required to exit the vehicle, police had every right to insist.

iii. Retrieval of Documents

LoPresti, who had first-hand experience with defendant's penchant for escape, properly searched for defendant's registration and insurance card himself, rather than allow defendant to retrieve them. Several established doctrines coalesce to justify this decision. First, Terry permits such retrieval when a defendant is unable or unwilling to do so and there is an open question as to the ownership of the vehicle. Qualifying the intent of that exception, the Terry Court adds that it is "based primarily on public-safety concerns that require prompt action." Terry, 212 N.J. at 222. This meshes neatly with the holding in Slowbocker that minimal intrusions into privacy are acceptable in the interests of public safety.

LoPresti testified that "the reason [he] needed that registration [was that] it had the old-time [temporary] license place where you couldn't run it." (2T16-23 to 25). There was therefore an open question of ownership that validated the need to search. Further, defendant told LoPresti precisely where his paperwork would be found.

The "inability" discussed in Terry is not limited merely to physical incapacity. Defendant here was "unable" to retrieve the documents because doing so presented a risk of danger, not only to the officers, but the community at-large. Defendant was "unable" inasmuch as he was "ineligible." LoPresti

knew firsthand defendant's proclivity to flee police detention by any means, heedless of the safety of others. In recognition of that risk, LoPresti made the only rational decision a police officer in his position could make: keep defendant away from the vehicle. To do otherwise would have been, as the trial court found, "foolhardy." (Da016).

The test, as Terry reiterates, is "whether the officers acted in an objectively reasonable manner in light of the tense and perilous situation confronting them." Terry, 212 N.J. at 245. "Police officers…must make decisions in the moment, with uncertain information at hand and without the luxury of considered reflection." Id. at 245-46.

LoPresti had seen this movie before: defendant was not above using his vehicle as a weapon to escape detention, nor keeping an illegal firearm within reach. However, nothing at this stage would have justified placing defendant under arrest. Considering the circumstances as LoPresti must have considered them, he cannot be said to have acted unreasonably. The minor inconvenience of a police officer fetching paperwork from the glove box does not become constitutionally defective because a defendant elected to store his heroin alongside that paperwork. Neither can the desire to avoid that same inconvenience can be held to outweigh the police officer's obligation to

minimize the risk that a defendant known for reckless flight and weapons possession poses to the community.

While defendant leans heavily on State v. Johnson, 476 N.J.Super. 1 (App. Div. 2023) to limit an officer's ability to retrieve credentials, that decision does not impact the analysis here. First, the additional requirement placed on officers by Johnson, namely, that they confirm the existence of paper documentation and its location, was not only explicitly applied "prospectively" but satisfied here, nonetheless. Johnson 476 N.J.Super. at 35. Defendant told LoPresti exactly where his credentials might be and, being 2014, they existed in paper form only.

Second, Johnson focuses on the prerequisite that officers must provide a "meaningful opportunity" to provide their credentials and how police determinations of risk factor into that analysis. The court held that "a motorist is not 'unable' to produce a registration certificate within the meaning of the exception when the sole reason for that inability is a police officer's discretionary decision to prevent reentry." Johnson 476 N.J.Super. at 13 (emphasis added). To support that limitation, the court emphasizes language in Keaton which confines safety-centric decisions to retrieve credentials to only those cases presenting "substantial necessities grounded in public safety." Johnson, 476 N.J.Super. at 23, quoting Keaton, 222 N.J. at 450.

The court raises a justifiable concern: seeking to limit an officer's ability to rely upon an arbitrary determination of danger as a pretext to rifle through a motorist's glove box. Here, however, the risk was not theoretical and the decision to prevent reentry was neither discretionary nor arbitrary. The last time LoPresti sought to apprehend defendant, defendant endangered the lives of the responding officers and the community by recklessly attempting to flee by driving over their vehicles. In addition, he was found with a firearm and was the subject of a significant criminal history.

This time, it is important to note, defendant was observed attempting to start the vehicle when approached, no doubt at least contemplating a repeat attempt at escape.

There was an obvious, objective, and substantial risk to public safety here that did not exist in Johnson and would have been unreasonable – if not outright dangerous – to ignore.

Third, defendant is requesting the imposition of the "Exclusionary Rule" in seeking to suppress the evidence discovered. "The overarching purpose of the [exclusionary] rule is to deter the police from engaging in constitutional violations by denying the prosecution any profit from illicitly-obtained evidence." State v. Williams, 192 N.J. 1, 14 (2007). There is nothing to deter here.

By any measurement, LoPresti exercised admirable caution in his dealings with defendant, especially considering their history. There is nothing in the record to suggest that LoPresti engaged in any unlawful conduct requiring rebuke. It is also important to recognize that LoPresti, in 2014, would have been operating without the collective insight of Keaton, Terry, and Johnson, all of which were decided after. He had to make "decisions in the moment, with uncertain information at hand and without the luxury of considered reflection." Terry, 212 N.J. 245-46.

LoPresti confined his search to those areas where defendant himself advised these documents would be: the glove box or the arm rest. It is critical to note that Judge Weisberg found LoPresti's testimony on this point "credible;" credibility "bolstered" by LoPresti's subsequent discretion in obtaining the documents and nothing more. (Da018). LoPresti laudably navigated the intersection of due process and public safety and his conduct here should not be the basis for suppression.

iv. Plain View Discovery of Heroin

The retrieval of credentials puts LoPresti at a lawful vantage to view the interior of the glove box. Only expecting to find the sought-for paperwork, LoPresti observed an object that was immediately identifiable as heroin or the packaging of heroin. Although he was permitted to seize that object pursuant

to "plain view," he did not. Instead, he waited for the approval of a search warrant before proceeding.

E. Inevitable Discovery

The responding officers applied for a search warrant for defendant's vehicle before any document search occurred. Even if LoPresti was not lawfully in position to observe the heroin by opening the glove box himself, the discovery of the heroin was therefore inevitable. The inevitable discovery doctrine permits the admission of otherwise unlawfully obtained evidence if the State can demonstrate by clear and convincing evidence that the evidence would have been lawfully discovered independent of the unlawful means. State v. Shaw, 237 N.J. 588, 620-622 (2019).

The standard is more explicitly pronounced by the Supreme Court in State v. Sugar, 100 N.J. 214, 238-240 (1985). Sugar held that that State must be able to show that:

> 1) proper, normal, and specific investigatory procedures would have been pursued in order to complete the investigation of the case; 2) under all the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and 3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of the evidence by unlawful means.

At the time of LoPresti's retrieval of the documents, sufficient evidence existed to seek a search warrant and a search warrant was sought. The facts supporting the search warrant were sufficient without and before the discovery of the heroin. As the trial court found, there was substantial proof to support the issuance of the search warrant before the heroin was found. (Da019). These include the furtiveness of Mundy, the exchange of cash between Mundy and defendant, the clearly bogus and contradictory explanations for their meeting, defendant's attempt to start his vehicle, the officers' knowledge of Mundy and defendant's relationship, and the smell of marijuana, among others.

Upon issuance of the warrant (which the trial court, in its assessment of the facts before it, found to be "inevitable" (Da020)), the vehicle would have been searched and the contraband discovered anyway. It is, in fact, pursuant to the execution of the warrant that the heroin was removed from the vehicle. The warrant was to search the entire vehicle, so the heroin would have been found. LoPresti's act of retrieving the documents had no impact on the search warrant and was immaterial to the ultimate discovery of the evidence.

Further, had LoPresti allowed defendant to retrieve his driver credentials, defendant would have opened the glove box himself. Presumably, LoPresti or another officer would have been watching defendant to ensure he

did not retrieve anything other than those credentials; the heroin would have been just as exposed, and LoPresti would have been just as able to perceive it. By any factual progression, this evidence would have been seized: either immediately following an observation of the open glove box, or shortly after, upon the grant of the warrant.

The trial court's denial of the suppression motion does not suffer from any deficiency subjecting it to reversal and should be affirmed.

## POINT II

## THE TRIAL COURT'S SENTENCE WAS LAWFUL

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). An appellate court "must not substitute its judgment for that of the sentencing court," State v. Fuentes, 217 N.J. 57, 70 (2014), and is bound to affirm the sentence absent a "clear abuse of discretion." State v. Roth, 95 N.J. 334, 363 (1984); see State v. Bolvito, 217 N.J. 221, 228 (2014).

As our Supreme Court has explained:

> Appellate courts must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not "based upon competent credible evidence in the record;" or (3) "the application of the guidelines to the facts" of the case "shock[s] the judicial conscience."
>
> [Bolvito, 217 N.J. at 228 (alteration in original) (quoting Roth, 95 N.J. at 364- 65).]

In general terms, judges are given wide but not unconstrained discretion at sentencing. State v. Case, 220 N.J. 49, 53-54 (2014). The New Jersey Supreme Court has articulated the extent and limit of that discretion as follows:

> When the aggravating and mitigating factors are identified, supported by competent, credible evidence in the record, and properly balanced, we must affirm the sentence and not second-guess the sentencing court, provided that the sentence does not shock the

> judicial conscience. On the other hand, if the trial court fails to identify relevant aggravating and mitigating factors, or merely enumerates them, or forgoes a qualitative analysis, or provides little insight into the sentencing decision, then the deferential standard will not apply.
>
> [Id. at 65 (internal citations and quotation marks omitted).]

The trial court sentenced defendant to a fifteen-year, custodial sentence, with a seven and one-half year period of parole ineligibility. (Da029). This sentence was run concurrently to a pending, sixteen-year term of federal incarceration. Ibid. All of which was pursuant to the plea agreement. (Da025). It should also be noted that, as part of that plea agreement, defendant conceded his extended-term eligibility, which increased his maximum exposure to twenty years.

Nevertheless, defendant negotiated and voluntarily accepted the terms of the plea agreement according to which he was sentenced. As the trial court put it, defendant "knew exactly what he was getting." (6T17-18). A negotiated disposition, in the center of the sentencing range, cannot be excessive. This is especially true considering that the court ran defendant's state sentence concurrent with his – longer – federal sentence. Depending on his actual service in federal prison, defendant is the beneficiary of a substantial reduction – if not elimination – in his material State sentence.

The Court's evaluation was likewise sufficient. To justify imposing aggravating factors 3, 6, and 9, the Court took note of defendant's significant, repetitive criminal history and his prior visits to State prison. (6T18-2 to 24). To support the finding of factor 5, that is, the "substantial likelihood defendant is involved in organized criminal activity", N.J.S.A. 2C:44-1(a)5, the Court noted that defendant was a "higher level echelon drug distributor" who, at the time of his arrest, was "actually engaged in a transaction with…a lower level distributor." (6T17-20 to 25). The Court found no mitigating factors. (6T19-14).

Withal, the analysis of the aggravating and mitigating factors is less important when the plea is negotiated. The purpose of the aggravating and mitigating factors is to "insure that sentencing is individualized without being arbitrary." State v. Sainz, 107 N.J. 283, 288 (1987). "Careful application of the factors promotes uniformity in sentencing." State v. Cassady, 198 N.J. 165, 179-80 (2009). Here, there was no risk of arbitrariness: the sentence was negotiated and accepted by defendant.

Further, the sentence of the court actually defied the theory of State v. Case, which held that "when the mitigating factors preponderate, sentences will tend towards the lower range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." 220

N.J. at 64-65. Here, the aggravating factors predominated and defendant was still sentenced in the center of that range.

The substantial deference bestowed to sentencing courts has been earned here. There is no manifest defect requiring appellate intervention and remand. The defendant entered his agreement with the assistance of counsel and received what he expected. The sentence was cooperatively reached, fair, and should be affirmed.

## CONCLUSION

Both judges made appropriate findings substantiated by the record; findings which should be upheld on review. The State therefore respectfully requests that this Court affirm defendant's conviction and sentence.

Respectfully submitted,

YOLANDA CICCONE
Middlesex County Prosecutor

By: _____
ANTHONY J. ROBINSON
Assistant Prosecutor
Attorney No. 059632013

Date: July 26, 2024

**PHIL MURPHY**
*Governor*

**TAHESHA WAY**
*Lt. Governor*

**State of New Jersey**
**OFFICE OF THE PUBLIC DEFENDER**
**31 Clinton Street, 10th Floor, P.O. Box 46003**
**Newark, New Jersey 07101**
**Tel. 973-877-1200 · Fax 973-877-1239**
Tamar.Lerer@opd.nj.gov

**JENNIFER N. SELLITTI**
*Public Defender*

July 29, 2024

TAMAR LERER
ID. NO. 063222014
Deputy Public Defender

Of Counsel and
On the Letter-Brief

**REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2030-22
INDICTMENT NOS. 18-08-1159-I

| | | |
|---|---|---|
| STATE OF NEW JERSEY, | : | CRIMINAL ACTION |
| Plaintiff-Respondent, | : | On Appeal from a Judgment of Conviction of the Superior Court |
| v. | : | of New Jersey, Law Division, Middlesex County. |
| GUY JACKSON, | : | |
| Defendant-Appellant. | : | Sat Below: |
| | : | Hon. Barry Weisberg, J.S.C.<br>Hon. Joseph Paone, P.J.C. |
| | | DEFENDANT IS CONFINED |

Your Honors:

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

# TABLE OF CONTENTS

**PAGE NOS.**

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Guy Jackson respectfully refers this Court to the procedural history and statement of facts set forth in his brief previously submitted in this matter.

## LEGAL ARGUMENT

Jackson relies on the arguments made in his previously filed brief, and adds the following:

### POINT I

### THE STOP OF DEFENDANT AND THE SEARCH OF HIS CAR WERE ILLEGAL.

In his initial brief, Jackson argued that the stop and search of his car were illegal because (1) his car was stopped without reasonable suspicion before officers knew who was in the car; (2) it is unlawful to search for a driver's registration without first giving him an opportunity to retrieve it for himself, even if officers appropriately determine that the driver cannot reenter the car for safety reasons; and (3) the search warrant for the car relied on what the officer saw during the unlawful search for registration. Jackson replies to the State's brief defending the seizure and searches in order to correct four inaccurate assertions.

First, there was no reasonable suspicion because the stop of Jackson occurred before officers had any idea who he was. The State argues there was reasonable suspicion because officers saw Mundy, a suspected drug dealer, performing "yet another transaction . . . in an identical manner to the other[]" transactions in which Mundy was selling drugs. (Sb 12)[1] But this interaction was not identical, because Mundy approached Jackson's car with money in this hand, not drugs. (1T 81-8 to 17) Mundy was suspected of selling drugs. This involves other people giving him money and him giving them drugs. That is not what officers saw right before the stop. What they saw—a probable drug dealer approaching a car with money in hand and saying "nice car—does not give rise to reasonable suspicion that the person in the car was buying drugs. Because police cannot stop every single person who speaks with a suspected drug dealer, even people who do non-drug business with a drug dealer, the stop was unlawful.

Second, contrary to the State's assertions, the relevant part of Johnson's holding, which belies any claim that officers could enter the car to search for credentials due to safety concerns, is not prospective. Johnson held, without any prospective limitation, that "the decision to prevent defendant from reentering the parked vehicle, while unquestionably lawful, had legal

[1] Sb – State's brief

consequences, precluding the use of the narrowly drawn registration search exception." State v. Johnson, 476 N.J. Super. 1, 27 (App. Div. 2023). It makes sense that this unambiguous holding was not subject to any retroactivity analysis, because it was not a new rule of law. The Johnson court was simply interpreting the scope of an exception that has been discussed for decades. See State v. Lark, 163 N.J. 294 (2000) (holding that there is no independent exception to the search warrant requirement to locate a driver's credentials). The portion of Johnson that is a new rule of law based on modern technological developments and was given prospective application is that "police may not enter a detained vehicle under the authority of the registration search exception without first asking the motorist whether the registration is stored in paper form rather than in electronic form." Johnson, 476 N.J. Super. at 14. That holding has nothing to do with this case.

Third, Jackson had not tried to "evade custody by driving over top police vehicles" ten years before the stop in this case, a fact the State uses to emphasize the purported danger to officers during the stop. (Sb 4) The incident has no bearing on officers' right to search Jackson's car, but because the State suggests it has relevance, Jackson writes to correct the facts regarding that incident. In that 2003 incident, the car he was driving "backed into a police vehicle." (2T 40-1 to 15; See also 2T 45-15 to 16 ("[H]e placed his vehicle in

reverse and rammed the police car behind him and attempted to flee the area.")) But even if Jackson's actions a decade earlier made the police believe that he could be dangerous, that does not justify the warrantless search. What happened ten years prior does not change the law that makes clear that perceived dangerousness is not a basis to deny a motorist his opportunity to retrieve his own registration before his car can be searched for that registration. Johnson, 476 N.J. Super. at 27.

Fourth, the fact that "responding officers applied for a search warrant for defendant's vehicle before any document search occurred" (Sb 19), is either irrelevant or untrue. If by "document search" the State means that the leather document bag that LoPresti saw in the glove box was not searched until after the warrant was obtained, that is irrelevant. What gave the basis for the probable cause was what LoPresti was able to perceive without opening the pouch. If by "document search" the State means the search for the registration documents, that assertion is untrue. As the transcript of the telephonic warrant application makes clear, first the officers entered the car and searched for the documents, then they relied on what they found during the search as a basis for the search warrant. (2T 68-12 to 69-2 ("[I]n speaking with Jackson we asked him if he had the registration and insurance card, there was a temporary tag on the vehicle. Jackson stated his insurance card was in the center console. Sgt.

Lopresti lifted the center console up to retrieve the card and in plain view of the center console was what he believes to be heroin. . . . At that point nobody else entered the vehicle. The keys were removed, windows rolled up and the tow company came and towed the vehicle to our sally port.")) It is because the warrant relied on the plain view of suspected heroin in the car—and never referred to incredible assertion that LoPresti smelled marijuana—that the warrant is a fruit of the unlawful police search.

## CONCLUSION

For all the reasons set forth in this brief and in Jackson's initial brief, the denial of the motion to suppress must be reversed.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: ____/s/ TAMAR Y. LERER_____
Deputy Public Defender
Attorney ID: 063222014

Dated: August 1 2024