FILED, Clerk of the Appellate Division, May 15, 2024, **A-002045-22**

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LETTER-BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2045-22
IND. NO. 14-02-232

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from the Denial of a Motion to Withdraw a Guilty Plea,
v.	:	Law Division, Mercer County.
JAMAR MYERS,	:	Sat Below: Hon. Peter E. Warshaw, Jr., J.S.C.
Defendant-Appellant.	:	

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 1

LEGAL ARGUMENT 8

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO WITHDRAW FROM HIS GUILTY PLEA BECAUSE HE WAS ENTITLED TO WITHDRAW UNDER THE CONDITIONAL PLEA RULE. (3T 26-21 to 52-10; Da 75) 8

CONCLUSION 15

FILED, Clerk of the Appellate Division, May 15, 2024, **A-002045-22**

TABLE OF JUDGMENTS, ORDERS, & RULINGS BEING APPEALED

Order denying motion to withdraw from guilty plea................................Da 75

Opinion denying motion to withdraw from guilty plea ....3T 26-21 to 52-10

INDEX TO APPENDIX

Mercer County Superseding Indictment 14-02-0232 ....Da 1-13

Mercer County Indictment 11-08-833 ....Da 14-25

Order granting and denying suppression motion in part...........................Da 26

Opinion granting and denying 404(b) motion in part ....Da 27-53

Plea agreement ....Da 54-60

Pennsylvania nol pros order and underlying Information ....Da 61-62

Judgment of Conviction, Indictment 14-02-0232 ....Da 63-66

Judgment of Conviction, Indictment 11-08-833 ....Da 67-70

Order dismissing Indictment 11-08-833 ....Da 71

Motion to withdraw from guilty plea ....Da 72-74

Order denying motion to withdraw from guilty plea................................Da 75

Notice of appeal ....Da 76-80

Notice of SOA docketing..Da 81

Order denying motion to transfer case from SOA to plenary ....Da 82

Order affirming denial of motion to withdraw from guilty plea ....Da 83

Order granting motion for reconsideration ....Da 84

Certification of Transcript Completion and Delivery...............................Da 85

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Mercer County Superseding Indictment 14-02-0232 charged Jamar Myers with: murder, contrary to N.J.S.A. 2C:11-3a (Count One); murder as an accomplice, contrary to N.J.S.A. 2C:11-3a and 2C:2-6 (Count Two); felony murder, contrary to N.J.S.A. 2C:11- 3a(3) (Count Three); first-degree robbery, contrary to N.J.S.A. 2C:15-1 (Count Four); four counts of second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Counts Five, Six, Seven, and Twelve); two counts of second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Counts Eight and Nine); fourth-degree tampering with evidence (Count Ten); and first-degree robbery, contrary to N.J.S.A. 2C:15-1 and 2C:5-1 (Count Eleven). (Da 1-13)[2] These charges relate to two incidents that occurred on April 29, 2011: an attempted robbery of Vizzoni's Pharmacy in Hamilton, and a robbery and shooting at the Brunswick Avenue Pharmacy in Trenton. (Da 1-13); State v.

[1] Due to the interrelated nature of the procedural history and statement of facts, the two sections have been combined for clarity to the reader.

[2] Da = defendant-appellant's appendix
1T = 11/29/16 plea transcript
2T = 7/7/17 sentencing transcript
3T = 3/3/23 motion transcript
4T = 3/19/24 SOA transcript

Myers, Docket No. A-0185-17, 2019 WL 1581430, at *1-3 (App. Div. Apr. 12, 2019).

Mercer County Indictment 11-08-833 charged Myers with: first-degree robbery, contrary to N.J.S.A. 2C:15-1 (Count One); third-degree theft by unlawful taking, contrary to N.J.S.A. 2C:20-3a (Count Two); fourth-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) (Count Three); third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3a (Count Four); second-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4a (Count Five); second-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5b (Count Six); fourth-degree possession of a defaced firearm, contrary to N.J.S.A. 2C:39-3d (Count Seven); third-degree theft by receiving stolen property, contrary to N.J.S.A. 2C:20-7a (Count Eight); and fourth-degree unlawful taking of a means of conveyance, contrary to N.J.S.A. 2C:20-10d (Count Ten). (Da 14-25) These charges relate to an armed robbery at a 7-Eleven in Hamilton that occurred on May 7, 2011. (Da 14-25); Myers, 2019 WL 1581430, at *1-3.[3]

Myers moved to suppress evidence in the 7-Eleven Case, namely evidence found during the search of a car in which Myers was a passenger.

[3] For clarity, Indictment 14-02-0232 will be referred to as the "Pharmacy Case," and Indictment 11-08-833 will be referred to as the "7-Eleven Case."

Myers, 2019 WL 1581430, at *3. The car was pulled over following the 7-Eleven robbery, and a warrantless search of the car led to the recovery of clothing, money, and a gun allegedly linking the occupants to the robbery. State v. Nyema, 249 N.J. 509, 515-18 (2022). On October 4, 2013, the trial court granted the suppression motion in part, suppressing the gun but finding the clothing and money admissible. (Da 26)

In the Pharmacy Case, the State filed a N.J.R.E. 404(b) motion seeking to admit the following evidence against Myers: the clothing and money deemed admissible in the 7-Eleven Case; surveillance footage from the 7-Eleven Case; surveillance footage from another robbery that took place in Pennsylvania; and a letter allegedly sent by Myers in which he appeared to threaten someone. (Da 33, 52) On September 30, 2016, the trial court granted the 404(b) motion in part. While the court excluded the surveillance footage from the Pennsylvania robbery, the court deemed all the other evidence admissible. (Da 42-53)

On November 29, 2016, the trial court held a pretrial hearing. (1T) The court noted that it had a few motions to address and then would proceed to trial on the Pharmacy Case. (1T 3-15 to 4-14) The court reiterated that once the trial began, it would not accept a negotiated plea. (1T 3-18 to 21) The court summarized Myers's sentencing exposure and asked the State for its final plea

offer. (1T 4-18 to 5-4) The State explained that if Myers pleaded guilty to the felony murder charge in the Pharmacy Case and the armed robbery charge in the 7-Eleven Case, it would request a 30-year sentence with 30 years of parole ineligibility on the felony murder, concurrent to a 12-year NERA sentence on the armed robbery. (1T 5-5 to 6-2) The State would also ask Pennsylvania to run any convictions from the Pennsylvania robbery concurrent to Myers's New Jersey sentence. (Ibid.) The State told Myers that if he went to trial on the Pharmacy Case and was acquitted, it would seek an extended term on the 7-Eleven Case, which would subject Myers to life in prison. (1T 4-11 to 25, 5-24 to 6-7, 9-3 to 10) The State also threatened to seek consecutive sentences on all cases if Myers proceeded to trial (1T 5-24 to 6-7, 9-10 to 15), and the judge stated that he would in fact impose consecutive sentences. (1T 8-11 to 23)

After conferring with defense counsel, Myers decided to accept the State's global plea offer. (1T 9-3 to 23, 12-9 to 28-16; Da 54-60) Pursuant to Rule 3:9-3(f), Myers entered into a conditional plea, preserving his right to appeal the 404(b) decision in the Pharmacy Case and the suppression decision in the 7-Eleven Case. (Da 54, 56)[4] Immediately before Myers's conference

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[4] Rule 3:9-3(f) states: "With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea.

with defense counsel in which he decided to plead guilty, the court explained to Myers that, "over the last few years I've been handling your cases I've made a number of decisions," and that "[o]bviously, even with a guilty plea, that doesn't prevent you from filing an appeal and if an appellate court judge finds that I committed an error, that I was wrong in my 404(b) decisions or anything else, your guilty plea could be reversed." (1T 9-25 to 10-8) The plea also gave Myers the right to withdraw if Pennsylvania did not run any potential sentence concurrent to his New Jersey sentence. (1T 15-12 to 24; 2T 4-23 to 5-20; Da 56, 58) Pennsylvania declined to prosecute any charges against Myers. (Da 61-62)[5]

On July 17, 2017, Myers was sentenced in accordance with the plea agreement to 30 years of imprisonment with 30 years of parole ineligibility on

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Nothing in this rule shall be construed as limiting the right of appeal provided for in R. 3:5-7(d)."

Rule 3:5-7(d) states that rulings on motions to suppress physical evidence are always subject to appellate review following a guilty plea. Thus, while it was not necessary for Myers to explicitly condition his plea on his right to appeal the suppression motion, he did so anyway. (Da 54)

[5] Myers also pleaded guilty to three violations of probation in exchange for a sentence of time served. (2T 15-2 to 8; Da 54, 56) The State agreed to dismiss the remaining counts in the Pharmacy and 7-Eleven cases, as well as a fourth-degree charge in another indictment. (2T 15-8 to 11; Da 56)

the Pharmacy case, concurrent to a 12-year NERA sentence on the 7-Eleven Case. (2T 16-13 to 24-22; Da 63-70)

Myers appealed from his pretrial rulings, and on April 12, 2019, the Appellate Division affirmed in an unpublished opinion. Myers, 2019 WL 1581430, at *4-9. The New Jersey Supreme Court subsequently granted certification limited to the suppression issue, and on January 25, 2022, the Supreme Court reversed the denial of Myers's suppression motion, finding that the police lacked reasonable suspicion to stop the car that Myers was a passenger in and that all evidence found as a result of the stop must be suppressed. Nyema, 249 N.J. at 531-35. The 7-Eleven indictment was then dismissed due to "insufficient evidence upon which to predicate successful prosecution" (Da 71), and Myers moved to withdraw from his global plea agreement. (Da 72-74)

On March 3, 2023, the trial court held a hearing on Myers's motion to withdraw. (3T) At the hearing, defense counsel argued that because Myers entered into a "contingent plea," his understanding was that if he was successful in appealing from any of his pretrial motions, he would be able to withdraw from his entire plea. (3T 14-10 to 15-20) Defense counsel also flagged that although the Supreme Court's decision was about the 7-Eleven Case, it weakened the proofs in the Pharmacy Case, as the items suppressed by

the Supreme Court had been deemed admissible 404(b) evidence. (3T 11-8 to 12-4) Counsel argued that if that 404(b) evidence been properly suppressed at the time of the plea, the outcome of the plea negotiations could have been different. (Ibid.)

The trial court denied Myers's motion to withdraw, concluding that Myers's plea was taken in a "legally appropriate" way, and that Myers failed to meet his burden under State v. Slater, 198 N.J. 145 (2009). (3T 41-7 to 52-9; Da 75)

Myers filed a timely notice of appeal. (Da 76-80) Following the denial of Myers's motion to transfer his case from the SOA calendar to the plenary calendar (Da 81-82), Myers's appeal was argued on the March 19, 2024 SOA calendar. (4T) This Court affirmed the decision below (Da 83), and Myers moved for reconsideration pursuant to Rule 2:11-6. This Court granted Myers's motion and transferred his case to the plenary calendar for briefing. (Da 84) This brief follows.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO WITHDRAW FROM HIS GUILTY PLEA BECAUSE HE WAS ENTITLED TO WITHDRAW UNDER THE CONDITIONAL PLEA RULE. (3T 26-21 to 52-10; Da 75)

In denying Myers's motion to withdraw, the trial court found that Myers's plea was taken in a "legally appropriate" way, and that Myers failed to meet his burden under State v. Slater, 198 N.J. 145 (2009). (3T 41-7 to 52-9; Da 75) But the legality of Myers's plea and the standard articulated in Slater were entirely inapplicable to Myers's motion. Rather, Myers's motion was governed by Rule 3:9-3(f) ("Conditional Pleas"), which requires that defendants be permitted to withdraw from their guilty pleas following successful appeals from pretrial rulings. Because the trial court applied the wrong standard in denying Myers's motion to withdraw, and Myers has a right to withdraw under the proper standard, the decision below must be reversed.

Rule 3:9-3(f) – the conditional plea rule – permits defendants to plead guilty while preserving the right to appeal from an adverse pretrial ruling. The rule states: "If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea." R. 3:9-3(f) (emphasis

added). In other words, in the case of a conditional plea, the plea is just that – conditional. Thus, motions to withdraw pursuant to the conditional plea rule are entirely different from motions to withdraw under Rule 3:9-3(e) (before sentencing) or Rule 3:21-1 (after sentencing). In the latter two situations, a defendant has changed his mind about pleading guilty and must show that the four factors articulated in Slater warrant withdrawal. Slater, 198 N.J. at 156-62. But a defendant who enters into a conditional plea and succeeds on appeal has a right to withdraw under Rule 3:9-3(f), and Slater provides no grounds for denying the withdrawal motion. See State v. Diloreto, 362 N.J. Super. 600, 615-16 (App. Div. 2003) (noting that unlike traditional applications to withdraw a guilty plea, a conditional plea is "premised on the right of a defendant to withdraw his plea" if his pre-plea motions were wrongly decided). Because our court rules automatically preserve the right to appeal rulings on physical suppression motions, the conditional plea rule applies to these motions, as well as to any other motion preserved in the plea agreement. See id. at 615-16. The right to withdraw also applies when "the defendant simultaneously pleads to multiple indictments and the pre-plea motion relates to only one." Id. at 616 n.6.

Here, Myers pleaded guilty to multiple indictments as part of a global plea deal and preserved his right to appeal from two adverse pretrial rulings –

the suppression decision and the 404(b) decision. (Da 54)[6] As the trial court explicitly told Myers prior to his decision to plead guilty, "even with a guilty plea, that doesn't prevent you from filing an appeal and if an appellate court judge finds that I committed an error, that I was wrong in my 404(b) decisions or anything else, your guilty plea could be reversed." (1T 10-4 to 8) (emphasis added). On appeal, the denial of Myers's suppression motion was reversed. Nyema, 249 N.J. at 531-35. Under a straightforward application of the conditional plea rule and Diloreto, Myers has the right to withdraw from his guilty plea. See also State v. Kovack, 91 N.J. 476, 482 (1982) ("It is fundamental that when a defendant pleads guilty pursuant to a plea agreement, the terms of the agreement must be fulfilled. . . . and a defendant's reasonable expectations generated by plea negotiations should be accorded deference.") (citation omitted). The decision below depriving Myers of his right to withdraw was error.

The rationale underlying the conditional plea rule further demonstrates why Myers should be permitted to withdraw. The conditional plea rule reflects the "basic principles of contract law" that govern plea agreements. State v. Means, 191 N.J. 610, 622 (2007). When the State and the defendant enter into

[6] Again, though it was unnecessary for Myers to explicitly preserve his right to appeal from the suppression decision, his decision to do so underscores the conditional nature of his guilty plea.

a plea agreement, they "reach a meeting of the minds," and "consideration is present," i.e., the defendant agrees to plead guilty to certain charges, and the State agrees to recommend a certain disposition. Ibid. The agreement is based on the information available to both parties at the time the defendant decides to plead guilty. When a defendant successfully appeals from a pretrial ruling, the defendant is in a different – and better – negotiating position. The conditional plea rule recognizes this change by permitting the defendant to reevaluate whether he would like to maintain his plea, renegotiate, or go to trial. Diloreto, 362 N.J. at 616.

The conditional plea rule also aligns with the well-established notion that a defendant who pleads guilty based on misinformation should be permitted to withdraw from his plea agreement. See State v. Taylor, 80 N.J. 353, 365 (1979). When a defendant pleads guilty based on an erroneously decided pretrial ruling, he is essentially pleading guilty based on "misinformation," as his plea is based on an inaccurate understanding of the State's leverage against him. Thus, it would be "manifestly unjust to hold the defendant to his plea" after a successful appeal from a pretrial ruling. Kovack, 91 N.J. at 482 (citation omitted).

It is not necessary for Myers to demonstrate why he may wish to withdraw, as he has a right to withdraw pursuant to the terms of his plea

agreement; however, the reasons he may wish to withdraw are fairly obvious from the record. When Myers pleaded guilty, evidence from the 7-Eleven Case (the clothing and money found in the car and the surveillance footage) was going to come in at his Pharmacy trial under 404(b). (Da 33, 42-53) Because our Supreme Court determined that the evidence found in the car was obtained in violation of Myers's constitutional rights, Nyema, 249 N.J. at 531-35, it can no longer be used against him in the Pharmacy Case. See State v. Johnson, 118 N.J. 639, 651 (1990) ("[E]vidence obtained in violation of a defendant's federal- or state-constitutional rights is generally excluded as proof against the defendant.") (citing cases).

As the trial court acknowledged, the evidence unlawfully recovered from the car was critical to the State's proofs in the Pharmacy Case. (Da 50) (trial court reasoning that "the State's identification evidence is limited to the credibility of [the] cooperating witness . . . and the clothing and cash discovered in the suspect's automobile"). This is because the suspects' faces were covered in the surveillance footage from both the 7-Eleven and the Pharmacy incidents. (Da 41, 50) The trial court reasoned that because the evidence in the car connected the occupants to the 7-Eleven robbery, it was admissible in the Pharmacy Case to prove identity due to a similar manner in which one of the suspects walked in the various surveillance videos. (Da 47-

50) Without the car stop, the State's evidence of identity is significantly weaker. See (Da 71) (dismissing 7-Eleven indictment due to "insufficient evidence upon which to predicate successful prosecution"). Put simply, our Supreme Court's decision directly impacts the strength of the State's case on the remaining indictment. Myers therefore has an incentive to withdraw and attempt to negotiate a new plea or proceed to trial.[7]

Myers's sentencing exposure has also changed because of his successful appeal. On the day of his guilty plea, Myers was ready to go to trial on the Pharmacy Case, but he pleaded guilty after the State emphasized the amount of prison he was facing due to a combination of the indictments against him. The State told Myers that if he went to trial on the Pharmacy Case and was acquitted, it would seek an extended term on the 7-Eleven Case, which would subject Myers to life in prison. (1T 4-11 to 25, 5-24 to 6-7, 9-3 to 10) The State further threatened to seek consecutive sentences on all cases if Myers proceeded to trial (1T 5-24 to 6-7, 9-10 to 15), and the judge stated that he would in fact impose consecutive sentences. (1T 8-11 to 23)

[7] At the SOA, this Court asked, "what can [Myers] get better than a 30 with 30?" (4T 4-11 to 5-20) If Myers chooses to withdraw, the State may offer him the opportunity to plead to a lesser charge in the indictment (Da 1-13), or Myers could go to trial and receive an acquittal.

One can understand why Myers might have chosen to plead guilty out of fear of the worst-case scenario. See Means, 191 N.J. at 618 (acknowledging that plea bargaining "enables a defendant to reduce his penal exposure") (citation omitted). But now, the worst-case scenario has changed. The 7-Eleven Case was dismissed due to Myers's successful appeal (Da 71), and the Pennsylvania case was never prosecuted. (Da 61-62) Thus, Myers's aggregate sentencing exposure is lower, and he may feel differently about proceeding to trial on the Pharmacy Case. Put simply, the parties' negotiating positions have changed. It is for this reason that the conditional plea rule permits defendants in Myers's position to withdraw from their plea agreements.

Jamar Myers explicitly conditioned his global plea agreement on the right to appeal from two adverse pretrial rulings. Myers rightly and reasonably understood that if he succeeded in appealing either of these rulings, he would be permitted to withdraw from the agreement. Under the trial court's decision applying the wrong standard, Myers's right to withdraw as a result of our Supreme Court's decision in his case is not being honored. Myers respectfully requests that this Court reverse the decision below and permit him to withdraw from his plea.

CONCLUSION

For the reasons stated above, the denial of Jamar Myers's motion to withdraw from his guilty plea must be reversed.

Respectfully submitted,

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Public Defender
Attorney for Defendant-Appellant

BY:________________________________
ALISON GIFFORD
Assistant Deputy Public Defender
Attorney ID: 310912019

Dated: May 15, 2024

Jamar Myers
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January 16th, 2024

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Trenton, NJ 08625-0006

Re: State v. Jamar Myers
Ind. 14-02-0232-I
Docket No: A-002045-22T5

Dear Mr. Orlando,

Please accept this letter brief in lieu of a more formal brief, in support of Defendant Myers withdrawal of his global conditional plea, governed by court rule 3:9-3(f).

Sincerely,

Jamar Myers

INDEX TO APPENDIX

Plea Hearing, Conditional Please … November 29th, 2016,……………… **Da1-16**

Plea Forms……………………………………………………………………… **Da 17-21**

New Jersey Supreme Court Suppression of evidence, Vacation of Sentence, and remand to the trial Court- State v. Nyema,, State v. Jamar Myers January 25, 2022,……………………………………………………………………… **Da 22-58**

Mercer County Prosecution Dismissal of Robbery case Indictment 11-08-0833-I February 25th, 2022……………………………………………………………………… **Da 59**

Motion to Withdraw guilty plea Transcripts Hon Judge P. Warshaw March 3rd, 202……………………………………………………………………… **Da 60-73**

New Jersey Appellate Court SOA oral Argument March 19th, 2023…. **Da 74-84**

2024, Defense Reconsideration Motion March 28th ……………………………………………………………………… **Da 85-91**

Order of New Jersey Appellate Div. Granting Jamar Myers Reconsideration Motion April 4th, 2024……………………………………………………………………… **Da 92**

Jamar Myers interview with lead investigating detective Gary Britton Informing Det. Britton of Threats to Myers family June 24th, 2011, …………… **Da 93**

Detective John Kelly Investigation Report showing video of initial stop was destroyed without authorization ……………………………………………………………………… **Da 94-95**

Trial Court Judge Hon Robert Billmeier Opinion regarding 404-B evidence……………………………………………………………… **Da 96-98**

TABLE OF AUTHORITIES

CASES PAGES

State v. Diloreto, 362 N.J. Super, at 615-16 (Citing R. 3:5-7(d); R. 3:9-3(f)....20

State v. Jamar Myers, 245 N.J. 250, 251 (2021)....................................15

State v. Peter Nyema, 465 N.J. Super. 181, 185 (App Div. 2020)................15

State v. Nyema, 245 N.J. 256, (2021)..16

State v. Stevens, 115 N.J. 289, 304 (1989)..18

State v. Vallejo, 198 N.J. 122, 133 (2009)..18

Rules

NEW JERSEY COURT RULES Sec.

3:9-3(f) Conditional Pleas.......................................3:9.........13, 14, 15, 16, 17, 18, 19, 20, 21

Other Authorities

Criminal Practice and Procedures, Subsection 12.22 Conditional guilty pleas......13-14

PROCEDURAL HISTORY

On May 7th, 2011 Jamar Myers was arrested after being racially profiled and wrongfully accused of an armed robbery after a vehicle he occupied as a passenger was illegally stopped without probable cause or reasonable articulate suspicion. The vehicle was occupied by Jamar Myers, Ajene Drew, and Peter Nyema.

On this same night of May 7th, 2011 Jamar Myers was also accused by Ajene Drew of the murder of Arjun "Reddy" Dyapa at the Brunswick Ave Pharmacy in the City of Trenton, New Jersey, that took place on April 29th, 2011, although Ajene Drew's claims contradicted and were inconsistent to the facts and evidence of the case.

On May 14th May 15th, and August 7th of 2013 in a motion to suppress in the armed robbery case Jamar Myers stood before Hon Judge Pedro Jimenez who granted in part and denied in part. Judge Jimenez ruled that a weapon found under the car hood would be suppressed ruling that it was obtain in an unlawful search, but the clothing and money found was admissible as evidence in the robbery case. Jamar Myers argued in his Pro Se brief that there was no probable cause or reasonable articulate suspicion to *stop* the vehicle Myers occupied, but stated they were stopped due to racial profiling. Myers also argued that the cloths were planted and were not in the car he occupied, but were found up the road. Which created a Brady issue in

the case with the video footage of the initial stop being destroyed without authorization or a copy persevered for discovery purposes (Da 94-95). Defendant Myers remained in the Mercer County Jail for 7 years fighting in his innocence the false accusations against him.

On November 10, 2016, and October 14, 2016 defendant, Jamar Myers appeared before Honorable Robert Billmeier, J.S.C. on the State's motion to admit certain evidence pursuant to N.J.R.E. 404(b). Judge Billmeier granted the motion, ruling that: evidence from the unrelated robbery Indictment 11-08-0833 would be admissible in the murder trial of Indictment 14-02-0232; Billmeier also ruled the two incidents charged in Indictment 14-02-0232 could be tried together.

On November 29, 2016, Jamar Myers was forced under duress to enter into a global *Conditional plea* agreement, Under Rule 3:9-3(f). Without having full discovery and knowledge of the case against him. Myers took this conditional plea because illegally obtained evidence from the unrelated robbery case that was obtained through an unlawful search and seizure was improperly and illegally admitted into Jamar Myers homicide trial. Myers also plead guilty due to threats to kill his family if he spoke on his innocence and did not take the charge. Jamar Myers plead guilty to the felony murder charge in indictment number 14-02-0232-I and the

armed robbery charge in indictment number 11-08-833 that is protected my Court Rule 3:9-3(f) (Da 1-16).

In exchange, the State agreed to recommend a 30-year sentence with 30 years of parole ineligibility on the felony murder, concurrent to a 12-year NERA sentence on the armed robbery. The State also agreed to dismiss other New Jersey charges and agreed to actively pursue Pennsylvania to run pending charges concurrent to Myers's New Jersey sentence, which the State failed to do because *PA never pursued any charges*. Myers plea was conditioned on his right to appeal the denial of an N.J.R.E. 404B motion from the felony murder case, and a suppression motion from the armed robbery case of evidence that was illegally obtained by an unlawful search and seizure. Thus, Myers plea was conditioned on his right to appeal the trial court error of admitting under N.J.R.E. 404B motion the evidence from the case armed robbery case into the felony murder trial, as well as the trial court suppression of illegally obtained evidence of an unlawful search and seizure in the robbery case. Again, evidence that was illegally obtained from the unrelated stop due to racial profiling. Under Rule 3:9-3(f), Jamar Myers preserved his right to appeal the decisions on the motions to suppress and to admit 404(b) evidence from the robbery case (clothing, video footage, and money) into Jamar Myers murder trial.

On July 7, 2017, Mr. Myers was sentenced in accordance with the plea agreement. A notice of appeal was filed on September 13, 2017.

On April 12, 2019 in an unpublished opinion, the Appellate Court Division affirmed the denial of Myers pretrial motions. On or about the year of 2020 in State v. Nyema, 465 N.J. Super, 181, 185 (App. Div. 2020) reversed Nyema's conviction, and *his* sentence was vacated. (Emphasis added)

On February 12, 2021, the New Jersey Supreme Court granted certification on the suppression issue related to Myers's armed robbery case.

On January 25, 2022, in State v. Nyema, 245 N.J. 256 (2021), the New Jersey Supreme Court reversed the denial of Myers's suppression motion, finding that there was no probable cause and the police lacked reasonable suspicion to stop the car that Myers was a passenger in, and thus all illegally obtained evidence found as a result of the illegal stop and unlawful search and seizure was suppressed. Myers armed robbery case was vacated and the matter remanded to the trial court. (Da 26, paragraph 3).

On February 25, 2022, the armed robbery indictment and all counts was dismissed by the Mercer County Prosecutors office due to lack of evidence (Da 59).

On or about April 15, 2022, Jamar Myers moved to withdraw from his global conditional plea agreement under Court rule 3:9-3(f) conditional pleas, and Myers asserts that: (1) He would have went to trial if the illegally obtained evidence from the unlawful search and seizure was not, in error, wrongfully and illegally admitted

into Jamar Myers murder trial, Myers definitely would have went to trial, (2) Myers only accepte*d the plea deal because HIS 6TH Amendment Right to a fair trial was not "offered,"* to him and was violated when the illegally obtained evidence prejudiced was admitted (3) He is innocent (4 The agreement pertaining to the global conditional plea deal was not upheld by the trial court, the State or his attorney from what Mr. Myers understood the conditional plea deal to be (5) 404-B evidence that was overwhelmingly prejudice that was improperly admitted and unlawfully obtained was admitted into Myers homicide trial was suppressed.

On or about March 3rd, 2023, Jamar Myers stood before Judge Peter Warshaw for a hearing for Myers motion to withdraw his plea. The court denied the motion, concluding that Myers was not permitted to withdraw under State v. Slater, 198 N.J. 145 (2009) (Da 60-73).

The lower court improperly used the wrong law State v. Slater, 198 to govern Jamar Myers motion to withdraw his plea. Myers did not file a motion to withdraw his plea before his sentence, or after his sentence. Which are both governed by State v. Slater, 198 N.J. 145 (2009), and the prongs Slater holds. Defendants who enter into conditional pleas, who succeed on appeal his/her Right to withdraw is governed under Court R. 3:9-3(f), As in the above case with Myers. Slater has no standing here.

On March 14, 2023, Myers filed a Notice of Appeal on the trial court's denial of Myers motion to withdraw plea, it was assigned to the SOA track.

Sometime after being put on the SOA track Myers respectfully requested that his appeal be transferred from the SOA calendar to the plenary track for briefing. The request to transfer from the SOA calendar to the plenary track was denied.

The case involves significant and complex issues which are not amendable to resolution on the SOA calendar and requires briefing. The argument sought to be briefed by Myers include, but are not limited to:

1. The trial court applied the wrong standard in denying Myers's motion to withdraw. The trial court conducted an analysis under State v. Slater, 198 N.J. 145 (2009),but the proper question was whether Myers should be permitted to withdraw pursuant to R. 3:9-3(f), which governs plea withdrawals following successful appeals of pretrial motions.
2. 2 The trial court erred in denying Myers's motion. Rule 3:9-3(f) permits withdrawal when a defendant successfully appeals from a pretrial ruling. This rule applies where, as here, the defendant Myers simultaneously pleads to multiple indictments. See State v. Diloreto, 362 N.J. Super 600, 616 n.6 (App. Div. 2003). The rationale behind this rule is rotted in basic principles of contract law and fundamental fairness.

3. Without the providence and protection of Court Rule. 3:9-3(f), that gives Myers the right to decide to withdraw his plea, Myers would have went to trial, and never took any plea deal.

On March 19th, 2024, Jamar Myers oral argument took place, on March 19th, 2024 Myers SOA oral argument was decided and denied (Da 74-84).

On March 28th, 2024 Myers defense filed a motion for reconsideration to the appellate court (Da 85-91). On April 4th, 2024, the appellate court of appeals vacated its denial of Myers appeal for the motion to withdraw his guilty plea and the appellate court granted Myers motion for reconsideration and transferred his motion to the plenary calendar Myers initially requested and a scheduling for legal brief arguments have been set (Da 92).

STATEMENT OF FACTS

On May 7, 2011 Jamar Myers and codefendants Ajene Drew and Peter Nyema were arrested after being racially profiled pulled over without probable cause and wrongfully accused of a 7-11 robbery solely because of the defendant's skin complexion matched the suspects as black men. Myers and defense counsel asserted that certain clothing evidence` was found up the road, and was planted in the vehicle Myers occupied, and that the video of the initial stop would have proved such. But it was destroyed without authority, which created a brandy issue and violation (Da 94-95).

On the same night May 7, 2011 Jamar Myers was accused by codefendant Ajene Drew who alleged that Jamar Myers was the one who killed Brunswick Ave Pharmacist Arjun Reddy Dyapa on April 29th, 2011, in the City of Trenton, New Jersey, although Ajene Drew's claims contradicted and were inconsistent to the facts of the case and the investigation. Sometime in 2011 after defendant Myers arrest he received an anonymous threat letter by someone that was threatening to kill Myers family if he said anything and did not take the murder charge he was accused of.

On Friday, June 24, 2011 Jamar Myers sought to speak to detective Gary Britton to inform the detective that people were threatening to kill and take the lives of Myers family, and police detective Gary Britton did nothing to help the

defendant protect his family from people who might have been making actual possible threats towards Myers family. The detective also did no further investigation of Myers claims of people possibly threatening his family (Da 93). Jamar Myers stayed in Mercer County Corrections Center for seven years awaiting trial for a 7-11 robbery Myers was accused of.

On November 10, 2015, and August 30th, 2016 a 404-b motion was heard before Judge Robert C. Billmeier and evidence of an unrelated crime (the robbery indictment) was prejudicially, illegally, and improperly admitted into Jamar Myers murder trial. The 404-B admission of the illegally obtained evidence into Myers murder trial prejudiced Myers from being offered a fair trial.

Vizzoni's Pharmacy; On April 29, 2011, about 5:30 p.m., a person dressed in all dark clothing wearing a hooded sweatshirt and dark colored boots with a mask on his face approached the front door, and attempted to gain entry[to Vizzoni's pharmacy]. When the suspect could not gain entry, he turned and walked away. That person attempted to open the door with his right hand. His left hand was in his pocket not visible. Although the elements of the crime *do not* support the crime charge, Jamar Myers was still charged with robbery and attempted robbery although "*no attempted robbery" occurred.* The trial court believed that the same individual has 'dog-eared' boots in the two pharmacy surveillances, was wearing a black sweatshirt

with the Champion brand emblem visible in the two pharmacy incidents, and appears to be wearing a black handkerchief with white spots.

Brunswick Avenue Pharmacy; On April 29, 2011 at about 5:55 p.m., there was a robbery and homicide at the Brunswick Avenue Pharmacy in Trenton. The two victims/ eyewitnesses, who were also employees at the pharmacy gave statements to the police that a masked man came in, demanded narcotics, and engaged in a struggle with Mr. Dyapa, during which the gun went off and the man fled the pharmacy. Mr. Dyapa died as a result of his injury. The two female victims/eyewitnesses stated that the suspect had "*dread style hair*" was brown skin, between 20–25 years of age. A hair style (dread style hair) that Jamar Myers has *never* had, which is a main description factor to the suspect's physical identity that Myers does not fit, and exculpates Myers.

Hamilton 7-11 Robbery; On May 7, 2011, at 12:12 a.m., there was a robbery at a 7-11 in Hamilton. The store clerk told police that two black males wearing dark clothing stole around $358 from the register and a cellphone then fled on foot out of sight. The clerk said that the man holding the gun *was wearing a dark sweatshirt, panty hoes as a mask, dark gloves and tan boots.*

On October 25, 2021 the robbery case indictment 11-08-0833 was argued before the Supreme Court on the issue of whether officers had a reasonable articulate reason to stop the car the defendant Myers occupied as a passenger.

On January 25, 2022 the Supreme Court made their decision granting Myers certification reversing State v. Myers, 245 N.J. 250, 215 (2021) vacated the conviction and remanded back to the trial court. (Da 22-58). Then on February 25, 2022 the prosecution office dismissed all charges and the whole robbery indictment 11-08-0833-1 (Da 59).

In essence and totality of the Supreme Court decision the 404-B evidence from the robbery case that was dismissed that was illegally, wrongfully and improperly admitted into the defendants homicide trial which hindered the defendant from obtaining and being offered a fair trial; was in fact directly affected by the Supreme Court decision. It is an error, and prejudice for evidence of any kind from another case/indictment that has been illegally obtained, to lawfully be used under 404-B or any other lane of admission into a defendant's trial; Myers was *never offered* a fair trial.

Myers argues that the deal was a *global conditional* plea deal. Myers asserts that his understanding, that was given by the trial courts (Da 6, box 10, lines 3-9, and by his attorney (Da 6, box 10, lines 9-15, and Da 6, box 11, lines 1-15). Myers

understanding that it was all together (the robbery case and the murder case) and if Myers prevailed on appeal the whole plea and sente4dnce would be reversed, and remanded back to the trial court. The defendant must stress the courts that Myers would NOT have taken any plea deal, and stress that he was readily willing to go to trial.

Furthermore, sadly on April 19, 2022, at three a.m. in Hamilton Township, New Jersey, Myers mother was shot in her head and face and Myers younger brother who now suffers from brain damage was shot in his neck and was practically paralyzed. The victims, the defendant Jamar Myers mother positively identified the suspect who attempted to murder her and her son as the person Peter Nyema.

On or about April 28th, 2022, after Jamar Myers mother and younger brother were almost murdered, the Trenton Police Department arrested and accuses Peter Nyema for the attempted murder of Jamar Myers mother and brother, and Peter Nyema now awaits Prosecution for two count of attempted murder and a slew of other serious charges by the Mercer County Prosecution office. These charges brought against the suspect accused for attempting to murder Myers family is sufficient evidence of Myers asserting that threats to his family had in fact, been made back on June 24, 2011 when Myers requested to speak to Det. Gary Britton (Da 93, last paragraph).

Legal Argument

DEFENDANT PREVAILED ON APPEAL, AND DUE TO COURT RULE

3:9-3(F) MYERS MUST BE AFFORDED THE OPPORTUNITY TO WITHDRAWL HIS PLEA

Court Rule 3:9-3(f) states: Conditional Pleas. With the approval of the court and the consent of the persecuting attorney's defendant may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any pretrial motion. If the defendant prevails on appeal, the defendant shall be afforded the right to withdraw his or her plea. Nothing in this rule shall be construed as limiting the right of appeal provided for in R. 3:5-7(d) (Page 1-2 of Table of authorities).

The word SHALL in the Merriam –Webster's Dictionary and Thesaurus, copyrighted 2014, it defines shall as: "MUST" or need, and likely in the future. Without R. 3:9-3(f) in place that does protect and provide the right for Myers who prevailed on appeal, to withdraw his plea. Myers would not have plead guilty to crimes he is innocent of.

Furthermore, New Jersey Criminal Practice and Procedures, subsection 12.22, under Conditional Pleas states: Rule 3:9-3(f) provides for "conditional pleas" of

guilty. A "conditional plea" of guilty is a guilty plea where the defendant reserves the right to appeal from the adverse determination of any specific pretrial motion. If the defendant wins the appeal, he/she is then afforded an opportunity to withdraw his/her guilty plea (Page 3-4 of Table of authorities).

The New Jersey Supreme Court ruled that the stop was raced based, without probable cause, or reasonable articulate suspicion (Da 26, Da 27).There was also the evidence issue and Brandy violation of the video of the initial stop being destroyed. Defendant Myers, Nyema, and counsel's argued that the clothing was not found in the vehicle they occupied, but that a cop pulled up to the scene where the defendants were stopped at and stated: "I found these up the road." Defendant stated that the video of the initial stop would have shown and proved this (Da 94-95. The video, #795, was destroyed 'without' authorization or a copy made for discovery purposes. (Da. 95).

Thus, it was a great prejudicial issue to admit this evidence into the murder trial Myers is accused of, which extremely prejudiced Myers and violated his right to be 'offered' a fair trial in the murder case. Again, Myers prevailed on appeal and should be afforded his right to stand in his legal right, of prevailing on appeal, and be given the opportunity to withdraw his plea.

On November 29th, 2016 Jamar Myers agreed to a "conditional guilty plea" under Court R. 3:9-3(f) based on the condition that Myers preserved his right to appeal a motion to suppress in the robbery case of illegally obtained evidence from an unlawful search and seizure, and also under the conditional plea Myers preserved his right to appeal a 404-b pre-trial motion to admit evidence from the robbery case into Jamar Myers homicide trial (Da 6, box 10, lines 4-9) starting at : 'Obviously, Here the trial courts directly informed Myers that his guilty plea could be *reversed* if an appellate court made court judge finds that I committed "*an error*" that was wrong in my 404 (b) decision or *anything else* (Da 6, box 10).

On January 25, 2022 the Supreme Court revered State v. Jamar Myers, 245 N.J. 250, 251 (2021), vacated the conviction and remanded to the trial court (Da 26 paragraph 4)). Also, In State v. Nyema, 245 N.J. 256 (2021) the New Jersey Supreme Court and New Jersey Court of Appeals not only vacated the conviction they also vacated the sentence.

On February 25th 2022, the Mercer County Prosecution Office dismissed Indictment; 11-08-0833-I against Jamar Myers and all charges and counts.

Thus, Jamar Myers "*prevailed on appeal,*" so he "shall be afforded the right to withdraw his plea." Quoting New Jersey Court **R.** 3:9-3(f), (Page 1-2 of Table of authorities). The decision from the Appellate Court in State v. Nyema, 465 N.J. Super and the New Jersey Supreme Court in Nyema, 245 N.J. and the certification of State v. Jamar Myers, alone affords Myers the right to withdraw his guilty plea. With the Mercer County Prosecution dismissing the indictment due to an unlawful stop, based on racial profiling, and an unlawful search and seizure, and illegally obtained evidence was in error wrongfully admitted into Jamar Myers murder trial. Jamar Myers firmly states that he would not have plead guilty, and would have went to trial to have his innocence proved (emphases added). In state v. Nyema, 465, N.J. Super. 181, 185 (App. Div. 2020). It states: Accordingly, Nyema's conviction was reversed *and his sentence was vacated*. Moreover, Nyema's sentence was vacated by this very same appeals court. Maybe a different panel, but yet and still by the same appellate court. It would be manifestly unjust for Jamar Myers "global" plea, and the entire plea deal to also not be vacated. The word global is defined as: "Of, relating to or applying to a whole.

Also, if the appeals court is saying that the murder indictment sentence can stand on its own while the robbery case indictment can be dismissed individually, that is not a global plea to what Myers understanding of the trial

court's explanation was, or Myers attorney, and it is not a conditional plea from the defendants understanding, and that means the defendant was told a lie, and put under false pretense by the trial court, of what the "global" conditional plea deal meant. Because again, Myers strongly state, he would not have taken a plea deal and would have went to trial if the trial court judge Billmeier had informed defendant that one of the sentences under the "global/whole conditional plea deal could still stand. So what is being stated, that is making it an issue now that Myers has in fact prevailed on appeal, and wises to take his rightly opportunity to withdraw his plea?

because Myers did in fact prevail on appeal, and the guilty plea is governed under 3:9-3(f) he should be afforded "his right *to decide*" whether he wants to renegotiate plea terms since things are significantly differently with the robbery case indictment dismissed and completely out the picture, or decide to go to trial as Myers initially planned to, being that he plead guilty on the day he was to start his jury selection.

On page 15-16 of the trial courts 404-b opinion the trial court judge Robert Billmeier stated that Ajene Drew was to testify that Myers is the masked suspect he drove to several crimes, although there is no evidence that supports Ajene Drew's claims. Ajene Drew also cannot testify in any way to Drew's unsupported allegations of Myers alleged involvement in the 7-11

alleged robbery in Hamilton Township at Myers murder trial (Da 96-98). The State also no longer has the ability to speak of or admit the illegally obtained evidence from the robbery case at Myers murder trial due to the Mercer County Prosecutor office dismissal of the robbery case indictment (Da 59).

With all the above factors that have completely changed the murder case and the State's ability to pile up multiple things that did in fact prejudice the defendant Jamar Myers from being offered a fair trial, the murder case position, and bargaining positioning has changed. The New Jersey Supreme court has declared that "Other crimes evidence is considered *highly prejudicial* State v. Vallejo, 198 N.J. 122, 133 (2009) (citing State v. Stevens, 115, N.J. 289, 309 (1989). The trial court in the above case matter admitted the 404-b evidence from the robbery case into the murder trial Myers is accused of, although it was in fact highly prejudicial. Jamar Myers states that the trial court great error, and abused its discretion, when it admitted the evidence, and years later now, the New Jersey Supreme court has agreed that the stop was unlawful so everything seized from the stop was unlawfully obtained. Thus anything used from the robbery case is prejudicial and illegal.

Jamar Myers simply request the New Jersey Appeals Court to stand by its "own" laws, and court rule (court R. 3:9-3(f) that states: "It shall afford a defendant the right to withdraw his or her plea (Page 4-5 of Table of

authorities). Myers prevailed on appeal and respectfully ask to withdraw his plea to go to trial, knowing he will *now* have a fair chance at trial. Myers asserts that he would have never taken any plea deal had the lower trial court not admitted illegally obtained evidence from an unrelated case of an unlawful search and seizure into Myers murder trial, that the State only were using to bolster its case.

At the SOA hearing the appeals court stated: "Where do we go next?" Myers asserts that should be afforded to Myers to be able to make the decision of, where does he go from here (Da 82, lines 16-20). Myers can decide several directions to go in:

(1) Jamar Myers can go to trial like Myers originally was going to do, even with the fact his lawyer had not given Myers full discovery. Along with the fact that illegally obtained evidence from an unlawful search and seizure from an unrelated robbery case was admitted into Myers murder trial.

(2) Myers can now renegotiate a new agreement due to the change of facts, and evidence, etc. Which allow Myers to argue other factors and unaddressed evidence issues that can change the standards of the degree of crime Myers is charged with to a lower degree.

Furthermore, it was not a "bargain" deal that Myers got as it has so easily been stated by the State, may I remind the court's, the state is not the defendant. So for the state to assert that Myers got a bargain that is saying to Myers he got the best deal so accept it. It also implies that Myers does not have a right to be protected by all laws such as R. 3:9-3(f). State v. Diloreto, 362 N.J. and R. 3:9-3(f) which provides protection for Myers and all defendants to withdraw their conditional guilty plea. This rule provides a defendant the ability to argue his pretrial issues that a defendant believes were wrongfully, improperly, and/or illegally ruled or admitted into his/her case.

At the SOA hearing, the prosecutor stated: "additionally, although counsel argues that bargaining positions have changed, the law hasn't." (Da 81, 19-20)

The state is right, the law has not changed and the Supreme Court has "made law" and established R. 3:9-3(f) which states that a defendant who prevails on appeal shall be offered the opportunity to withdraw his/her plea. That is the law (emphasis added).

Thus, Myers has prevailed on appeal by the New Jersey Supreme Court, a conditional plea was in place and established and Myers must be afforded his right and the opportunity to withdraw his plea (Da 22-58).

Being that R. 3:9-3(f) is the law, and it comes from one of the highest courts of law, the Supreme Court. What is the state implying? That the law does not apply to Jamar Myers. Is the State asserting that Myers is not afforded the right to withdraw his plea, based on what grounds), Myers prevailed on appeal that is it. If the state is implying that this law, (3:9-3(f), does not apply to Myers, when it specifically does. Then who is the state saying it applies to? Non-Black defendants, people of a certain ethnic background? Does not R. 3:9-3(f) apply to all defendants who have a conditional plea in place, who prevailed on appeal?

The state further incorrectly states; "if the defendant plead guilty to first degree murder again, he would still have to be sentenced to the mandatory minimum 30/30 and the state "thinks" it would be prejudiced. (Da 81, 19-24). Although the state has not provided "how it thinks" it would be prejudiced, that holds no strength here at all, when a defendant wins on appeal by the higher Court.

Whether the state thinks it would or wouldn't be prejudiced, it was the state who agreed to the conditional plea, that was global and all together, as the defendant Jamar Myers understood it to be, and the state knew of the conditional plea and the State knew conditional pleas are protected and governed by R. 3:9-3(f). So, the State could not be prejudiced by the withdrawal of Myers decision to withdraw.

In fact, it is the defendant Jamar Myers who will be prejudiced and has been prejudiced by the trial court's error and improperly admitting illegally obtained evidence that stemmed from a vehicle stop that was based solely on racial profiling that wrongfully allowed an unlawful stop and seizure to take place. If the evidence was not admitted in error, some years ago into the murder Myers is accused of, Myers would have continued with his jury selection and trial (Da 2, box 3, lines 25).

What Myers did not get was the benefit of being offered a fair trial, and Myers did get a bargain deal as the State wises to suggest. So, to be forced to plead guilty to crimes Myers is innocent of, and would have rather went to trial on, that is no bargain. (Da 81, 3-18). Myers asserts if the evidence that was obtained by an unlawful search and seizure was not, in error, admitted into Myers' murder trial, defendant Myers would have went to trial on <u>all</u> case matters against him.

There are multiple issues within the <u>other</u> cases the state was more than willing to dismiss. Those cases were dismissed because the state had no evidence that established or supported Myers' guilt of any of the crimes charged, because the elements of the crime do not support the crimes charged.

The trial court judge Billmeier may have claimed that Myers would "get a fair trial" (Da 3, box 4, lines 1-2). But no fair was would have taken place with the admission of the illegally obtained evidence that took away Myers right to be offered

a fair trial. It took the New Jersey Supreme court to suppress and correct the lower court's error.

For multiple reasons the state would not be prejudiced. Myers also will not have to plead to 30/30 or plead to anything. It still is the defendant's decision and opportunity to make that choice, and that choice and opportunity is what the State is trying to take away from Jamar Myers, that the law states Myers has a right to (emphasis added). The state is trying to deny Myers and all other future defendants their legal right to choose to withdraw their plea. This is a direct attack on a defendant's right to challenge a lower court's decision, it is an also attack on defendant's challenging alleged evidence against him/her, and the evidence legal admission into a defendants trial etc.

For the appellate court not to allow Myers to withdraw his guilty plea he is entitled to be afforded the opportunity to do would be to say a defendant has no definite right to appeal, even especially after *prevailing* on appeal, as in this above case. That comes from a court rule of 3:9_3 (f). This would open a battle in every county in New Jersey and 3rd circuit states, once the state can challenge a Supreme Court decision, and a defendant ability to prevail on appeal who wants to withdraw his plea. What's next?

It will destroy the laws in place, protections for defendants like Jamar Myers and process of the appeal courts that defendants should never feel unsafe from challenging an unjust lower court's ruling, and/or erroneous decision, or the denial to be protected by the law. Supreme Court Rule. 3:9-3(f) is the law.

Therefore, Jamar Myers respectfully and urgently request the Appellate court to uphold the law the Supreme court has set and established under court R. 3:9-3 (f). Myers plea was a global plea, it was conditional, and Myers asserts he wants to withdraw his plea and prepare for trial as he stands in his innocence. Myers kindly request the appellate courts vacate his conviction, vacate Myers sentence, and remand back to the trial courts.

Sincerely,

Jamar Myers

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CRIMINAL PART
MERCER COUNTY, NEW JERSEY
INDICTMENT NOS. 14-02-0232-I
11-08-00833-I
A.D. #A-000185-17T4

STATE OF NEW JERSEY)
) TRANSCRIPT
)
) OF
v.)
) PLEA HEARING
JAMAR MYERS,)
)
Defendant.)

Place: Mercer County Courthouse
400 South Warren Street
Trenton, NJ 08608

Date: November 29, 2016

BEFORE:

THE HON. ROBERT C. BILLMEIER, J.S.C.

TRANSCRIPT ORDERED BY:

FRANK J. PUGLIESE, ESQ. (Office of the Public Defender)

APPEARANCES:

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FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

I N D E X

PAGE

WITNESS
JAMAR MYERS
Examination by the Court 13
Examination by Mr. Hesketh 21
Examination by Mr. Grillo 24
Examination by Mr. Hesketh 25
Examination by the Court 25

1 THE COURT: ...it is superseding indictment
2 14-02-0232.
3 May I have your appearances?
4 MR. GRILLO: Good morning, Your Honor.
5 Assistant Prosecutor Michael Grillo appearing on behalf
6 of the State.
7 MR. NARDELLI: And this is Prosecutor Mike
8 Nardelli for the State.
9 THE COURT: All right. Counsel?
10 MR. HESKETH: Good morning, Your Honor.
11 Edward Hesketh for Jamar Myers to my left.
12 THE COURT: All right. Mr. Myers, I believe
13 you've been in jail since about May 2011 --
14 MR. MYERS: Yes.
15 THE COURT: -- well over five-and-a-half
16 years so I've cleared my calender for the month of
17 December, I know the attorneys have, so you're going to
18 be given your day in court. There's a couple of
19 motions that I need to address before the jury is
20 brought over but once, you know, I start proceeding
21 then I'm not going to accept any negotiated plea. I
22 know Mr. Hesketh has been working very hard, him and
23 Mr. Garzio, to try to resolve the case, you know, I
24 know you're facing a very serious charge on this first
25 degree murder and jury will determine your guilt or

1 innocence. I have nothing to do with it and believe me
2 you're going to get a fair trial.
3 However, I think, you know, perhaps we were
4 scheduled to have the voir dire conference a couple of
5 weeks ago. Mr. Hesketh was on trial outside of Mercer
6 and that's the only reason that conference did not take
7 place but what you would have heard two weeks ago, and
8 you probably have heard already but I'll repeat it, if
9 a jury finds you guilty you're exposed to 75 years
10 NERA, which means you would have to serve approximately
11 64 years before you're eligible for parole. If in fact
12 the jury finds you innocent of this first degree
13 murder, then I'm going to move on to the armed robbery
14 at the 7-Eleven in Hamilton. You already have a trial
15 date of a January 2017, you and Pete Nyema, and with
16 that armed robbery, I know you're somewhat familiar
17 your prior criminal record, you probably could be found
18 as a persistent offender.
19 And you could be facing, I want to say, Mr.
20 Grillo, life in prison for that armed robbery given Mr.
21 Myer's prior criminal history?
22 MR. GRILLO: Yes, Your Honor, that's correct.
23 Given his status as a persistent offender it would be
24 the State's intention to move for an extended term
25 should he be convicted by a jury.

1 THE COURT: And tell me once again, Mr.
2 Grillo, what is the State's final offer to resolve this
3 murder case as well as any other pending charges
4 against Mr. Meyers?
5 MR. GRILLO: As Your Honor is aware, Mr.
6 Myers was also charged in a first degree armed robbery
7 in the Commonwealth of Pennsylvania for an incident
8 that occurred approximately a half-an-hour before the
9 robbery in Hamilton Township. Within the past couple
10 of weeks I've had communication with Mr. Hesketh, the
11 State has indicated it would be willing to call
12 Pennsylvania and ensure that they would run any
13 sentence he may receive for that armed robbery
14 concurrent to what has been extended in our state.
15 That is, that he plead guilty to murder, to receive a
16 30-year period of New Jersey State Prison with a 30-
17 year period of parole ineligibility. That would run
18 concurrent to not only the Pennsylvania charge but to
19 the robbery in Hamilton as well, I believe the number
20 we placed on it was a 12 NERA. We have every reason to
21 believe, although we have not received an assurance
22 from Pennsylvania, based on what he is facing, his
23 criminal history and what he would be facing here, that
24 they would be willing to do that, but, as I've
25 indicated to Mr. Hesketh, the minute the first juror

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22

FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

1 walks in the door and we begin picking that offer is no
2 longer available. In the same vein, we would rescind a
3 concurrent offer on our robbery here in the State of
4 New Jersey. Mr. Meyers would face each of his three
5 charges in succession and any sentence would be
6 required to run consecutive and that, as Your Honor is
7 well aware, comes from State v. Yarbough.
8 THE COURT: Mr. Hesketh, anything you would
9 like to add?
10 MR. HESKETH: Judge, I'd like to just add a
11 couple of things. Number 1 is during the pendency of
12 this matter, obviously, the discovery was very
13 voluminous. I have had the opportunity to give -- I
14 believe Mr. Meyers has all the paper discovery in the
15 case. Additionally, some of the videotape statements,
16 or all of the videotape statements, to my knowledge
17 have been transcribed and he's had access to them.
18 What he did not have access to was the actual video --
19 audio/video statements themselves on the CD media.
20 Obviously, that's a -- it's a number of hours. It
21 would be difficult for the jail and myself to sit down
22 with Mr. Meyers for hours on end looking at videos.
23 He did see the pertinent videos here in court
24 during the 404(b) motions and I'm satisfied, Judge,
25 that those are the pertinent videos that would be used

1 in this trial by the State but nevertheless, Judge, on
2 behalf of Mr. Meyers I did submit all of the DVDs and
3 CDs to the Public Defender's Office and requested that
4 they put them on a flash drive. I have repeatedly
5 asked them to do it, I know it's a -- it's a difficult
6 task. They accommodated me, they finally came through
7 with a flash drive which I have now turned over. I
8 believe I've indicated to the Court I've asked for some
9 assistance in perhaps allowing that to go back to the
10 jail and I know that there's an e-mail message out to
11 Deputy Warden Oliver as to that effect, but, in
12 essence, Judge, once he has that flash drive in his
13 hand he will have everything completed.
14 And Judge, he wants to see the videos. He
15 wants to see them, not read the transcripts, he wants
16 to see them and he -- that's his prerogative.
17 THE COURT: Well, let me ask Mr. Grillo. The
18 video that the State hopes to get before the jury would
19 be the video of the murder of the pharmacist at the
20 Brunswick Pharmacy, the attempted robbery of Vizzoni's
21 on South Broad Street, Vizzoni's Pharmacy, and third,
22 the 7-Eleven video surveillance from that robbery on
23 Arena Drive in Hamilton.
24 Other than those three videos, do you intend
25 to show the jury any additional videos?

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1 MR. GRILLO: No, Judge. It's just those
2 three.
3 THE COURT: Because as you indicated, Mr.
4 Hesketh, when we -- when I conducted a 404(b) hearing
5 those videos were shown to me. They were put up on a
6 screen. In fact, Mr. Meyers has the best view in the
7 courtroom because he's right next to the screen so I'm
8 convinced he's had an opportunity, like I did, to look
9 at those videos and the videos speak for themselves,
10 that -- they don't change.
11 But so, Mr. Meyers, as I said, this is your
12 last opportunity to accept the plea as indicated by Mr.
13 Grillo. Once I start moving forward this morning then
14 that plea is off the table. Even if you tell me during
15 jury selection, Judge, I want to plead, I'm not going
16 to let you. The rule is you have to plead open to all
17 the charges in the indictment, including the murder
18 charge. That, as I said, under case law from the New
19 Jersey Supreme Court, if you're found guilty of
20 whatever charges you're charged with then I have to run
21 everything consecutive. I will not run anything
22 concurrent because that's contrary to the holdings of
23 the New Jersey Supreme Court.
24 Do you want me to give you a moment or
25 whatever to speak with Mr. Hesketh privately or do you

1 want me to just proceed with the trial? Because once I
2 start there's no turning back.
3 MR. HESKETH: Judge, I'd like to speak to him
4 privately but I would just like to address one other
5 issue. So basically what Mr. Grillo said and so that
6 Mr. Meyers understands it, that if in fact he was to
7 prevail here at the homicide trial the next case would
8 put him in jeopardy of, in essence, getting something
9 perhaps even worse than a 30 do 30 because of his
10 status as a persistent offender. He then would have to
11 go to Pennsylvania and face whatever charges he has to
12 face there without the benefit of having any
13 involvement of the State to try to make a global deal
14 here today that we're talking about, so that would be
15 two issues. And then, obviously, if he was to be
16 convicted of the homicide charge certainly the Court
17 can sentence him up to 75 years in jail, which is
18 essentially life.
19 So Judge, just so he's aware of that and what
20 I would like to do is if I could just have a couple of
21 minutes to speak with him, Your Honor, before he
22 answers in open court and this way I understand exactly
23 where he's coming from.
24 THE COURT: And that's fine.
25 And obviously, Mr. Meyers, over the last few

FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

1 years I've been handling your cases I've made a number
2 of decisions. Some decisions were contrary to the
3 State, some were contrary to your interests.
4 Obviously, even with a guilty plea, that doesn't
5 prevent you from filing an appeal and if an appellate
6 court judge finds that I committed an error, that I was
7 wrong in my 404(b) decisions or anything else, your
8 guilty plea could be reversed. So I will give Mr.
9 Hesketh a few minutes.
10 Why don't we take Mr. Meyers back into the
11 holding cell?
12 And Mr. Hesketh, let me know when you're
13 ready to proceed.
14 MR. HESKETH: And Judge, just one --
15 MR. GRILLO: Your Honor --
16 MR. HESKETH: -- one more issue if I could.
17 THE COURT: Yes.
18 MR. HESKETH: A couple of weeks ago, although
19 I've been in trial September, October, November,
20 various counties, I did have a chance to sit down with
21 Mr. Meyers and discuss this case. With the assistance
22 of the Court Deputy Warden Oliver allowed him to come
23 upstairs to the regular attorney visitation room. I
24 know Mr. Garzio, who represents him on the robbery, has
25 had an opportunity to speak with him, and, lastly, on

1 the Wednesday before Thanksgiving Mr. Garzio and I met
2 with Mr. Meyers to discuss this matter. So just that
3 the record is clear, okay, although I have been in
4 trial there has been no -- at no time has Mr. Meyers
5 been left to his own devices to try to figure this out.
6 He's had the assistance of, I believe, two veteran
7 defense attorneys who were able to speak with him at
8 length given the -- given the input.
9 So Judge, if you will allow us a few minutes
10 I think that we'll get a final answer from Mr. Meyers
11 and we'll know whether we're going forward or not.
12 THE COURT: All right. So the Court is in
13 recess until so -- to give Mr. Meyers one last
14 opportunity to speak to his attorney, Mr. Hesketh,
15 privately. Thank you.
16 MR. GRILLO: Your Honor, just one --
17 THE COURT: Oh, yes. Mr. Grillo?
18 MR. GRILLO: -- thing before. I just want to
19 make that the record is entirely complete and accurate
20 and Mr. Meyers has a full understanding of what he's
21 facing. Even in a scenario where he prevails in the
22 homicide, based on N.J.S.A. 2C:43-7a(1) through (7),
23 which encompasses extended term ranges, if he's found
24 guilty of the first degree robbery in Hamilton and just
25 the first degree robbery in Hamilton alone, he would be

FILED, Clerk of the Appellate Division, March 15, 2023, **A-002045-22**

1 facing, based on his criminal record, a term of 20
2 years to life.
3 THE COURT: Okay. So I think everyone has
4 had their opportunity to say what they needed to say so
5 we're in recess.
6 Thank you, counsel.
7 MR. GRILLO: Thank you.
8 (Recess)
9 THE COURT: You may be seated. All right.
10 Good afternoon, counsel. The Court has been
11 presented plea papers in the matter of State of New
12 Jersey versus Jamar Myers. There are several
13 indictments involved but I think the main one is
14 Indictment 14-02-0232 wherein defendant is charged with
15 first degree murder.
16 Counsel, may I have your appearances?
17 MR. GRILLO: Michael Grillo on behalf of the
18 State, Your Honor.
19 MR. HESKETH: Edward Hesketh, Your Honor, Mr.
20 Jamar Myers to my left.
21 Stand up Mr. Myers, please.
22 THE COURT: All right. Mr. Myers, in order
23 to accept your guilty plea I need to place you under
24 oath. If you put your left hand on that Bible?
25 MR. HESKETH: He'll affirm, Judge.

1 THE COURT: Oh, okay.
2 J A M A R M E Y E R S, DEFENDANT, AFFIRMED
3 EXAMINATION BY THE COURT:
4 Q Mr. Meyers, I want to advise you that if
5 you provide the Court with any false testimony you can
6 be charged with perjury and the guilty plea could be
7 withdrawn, do you understand that?
8 A Yes.
9 Q Do you have any difficulty with hearing,
10 seeing or reading English?
11 A No.
12 Q How old are you?
13 A Thirty-one.
14 Q How far did you go in school?
15 A I graduated.
16 Q From high school?
17 A Yeah, I graduated to college as well.
18 Q Are you under the influence today from any
19 alcohol, drugs or medication that could affect your
20 ability to think clearly or understand the nature of
21 today's proceeding?
22 A No.
23 Q I'll be asking you a series of questions that
24 sometimes call for a yes or no answer, I do this so I
25 can focus in on deciding whether or not to accept your

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**
FILED, Clerk of the Appellate Division, March 15, 2023, **A-002045-22**

1 guilty plea. By asking you these questions I'm not
2 trying to lead you into saying anything that is not
3 true or what anyone else wants you to say, do you
4 understand that?
5 A Yes.
6 Q If you feel you're being forced into an
7 answer or being forced to say something which is not
8 true by the way I or any attorney asks you a question
9 let me know before you respond, do you understand that?
10 A Yes.
11 Q I'm going to ask you to listen as the
12 prosecutor puts the proposed negotiated plea on the
13 record since -- excuse me -- I'll be asking you if that
14 is your understanding.
15 THE COURT: Mr. Grillo?
16 MR. GRILLO: Thank you, Judge. It's the
17 State's understanding that Mr. Meyers is prepared to
18 enter a guilty plea to Count 3 of Indictment 14-02-0232
19 which charged felony murder in first degree. In
20 exchange the State is recommending a 30-year period of
21 incarceration with a 30-year period of parole
22 ineligibility. That would run concurrent to a plea of
23 guilty to Count 1 of Indictment 11-08-833 which charged
24 robbery in the first degree. The State would be
25 recommending 12 years subject to No Early Release Act

1 on that charge.
2 In addition, it's the State's understanding
3 that Mr. Meyers will be pleading guilty to three
4 separate VOPs. They are contained in Accusation 08-03-
5 0231, 09-10-0992, that's an indictment and Indictment
6 10-01-0100. Mr. Meyers will receive time served
7 sentences on each of those three violations of
8 probation. Finally, the State will be dismissing the
9 entirety of, I believe it's Indictment 11-07-0657,
10 which charged fourth degree aggravated assault on a law
11 enforcement officer.
12 In addition, the State has indicated to Mr.
13 Meyers that it is seeking a guarantee from the
14 Commonwealth of -- Commonwealth of Pennsylvania that
15 upon a plea of guilty to first degree armed robbery
16 it's an offense committed there, they would recommend a
17 concurrent sentence. Based on some conversations and
18 our understanding with the charges there they would be
19 inclined to do so, but at this point, short of the
20 guarantee, what we've indicated in the plea papers is
21 if for some reason, some unforseen reason that
22 Pennsylvania is not willing to run their sentence
23 concurrent, Mr. Meyers is free to withdraw his guilty
24 plea without opposition from the State.
25 THE COURT: And it's -- and I know this from

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

FILED, Clerk of the Appellate Division, March 15, 2023, **A-002045-22**

1 having conducted some hearings, the Pennsylvania
2 charges are specifically related to alleged crimes Mr.
3 Meyers committed at the 7-Eleven in Falls Township, New
4 -- Pennsylvania?
5 MR. GRILLO: That's correct, Judge. Your
6 Honor I believe has seen the video. The offense
7 occurred about a half-an-hour prior to the robbery in
8 Hamilton. The proofs are essentially the same.
9 THE COURT: Thank you. Mr. Hesketh, is that
10 the plea you negotiated?
11 MR. HESKETH: Yes, that's correct, Your
12 Honor. And just to have you made aware that I did
13 complete a NERA form for Mr. Meyers, one for the armed
14 robbery, first degree, in Hamilton, which would subject
15 him to a five-year period of parole supervision after
16 the completion of his sentence. And I also -- I also
17 completed one for the felony murder, Judge, just to be
18 safe but I'm not certain that if he does 30 do 30 if
19 that would apply but I did complete it and it's
20 attached to the plea form.
21 And lastly, Your Honor, you could see on the
22 bottom of the first page that Mr. Meyers is reserving
23 his right to appeal the 404(b) decision in the homicide
24 case and the motion to suppress physical evidence in
25 the Hamilton armed robbery case.

1 Other than that, Judge, I think that's --
2 that's what our deal is.
3 THE COURT: Right. And this Court made the
4 decision on the 404(b) in the murder charge and Judge
5 Jimenez rendered an opinion as to the armed robbery and
6 I think he suppressed -- did not suppress cash and
7 clothing found in a car but did suppress the gun found
8 under the front hood.
9 MR. HESKETH: Correct.
10 THE COURT: But certainly -- Mr. Meyers
11 certainly has the opportunity to file that appeal.
12 BY THE COURT:
13 Q So Mr. Meyers, I understand you're prepared
14 to plead guilty to a first degree felony murder, is
15 that correct?
16 A Yes.
17 Q A first degree armed robbery?
18 A Yes.
19 Q And the three VOPs for which everyone agrees
20 you're going to get time served when I sentence you, is
21 that your understanding?
22 A Yes.
23 Q And you understand with your felony murder
24 that's going to be 30 years and you would have to do 30
25 years before you're eligible for parole?

FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

1 A Yes.
2 Q And everything else runs concurrent to that?
3 A Yes.
4 Q Do you have any questions about what you're
5 pleading guilty to?
6 A No.
7 Q Do you have any questions about the
8 consequences of your guilty plea?
9 A No.
10 Q Mr. Meyers, if I accept what you tell me and
11 if I'm satisfied you're pleading guilty knowingly,
12 intelligently and voluntarily and if I find that you
13 understand everything going on here today, I will have
14 a great deal of difficulty believing at a later date
15 that you did not enter this guilty plea of your own
16 free will. In other words, no one is forcing you to
17 plead guilty, do you understand that?
18 A Yes.
19 Q At that point you would have the burden to
20 prove to me that it would be in the interest of justice
21 to allow you to withdraw your guilty plea before I
22 sentence you, do you understand that?
23 A Yes.
24 Q Do you believe you've had enough time to
25 discuss all these cases with your attorney, Mr.

1 Hesketh?
2 A Yes.
3 Q Has he shared with you the discovery the
4 prosecutor would use against you in these cases?
5 A Yes.
6 THE COURT: And Mr. Hesketh, you acknowledge
7 you received and fully reviewed all discovery in these
8 files with your client?
9 MR. HESKETH: Yes, sir.
10 Q Mr. Meyers, by pleading guilty you're giving
11 up certain guaranteed constitutional rights, this
12 includes the right to a jury trial, and as you know
13 today was the day to start selecting that jury, you
14 have the right to be presumed innocent by that jury,
15 the right to have the State prove your guilt beyond a
16 reasonable doubt, you would be able to testify to a
17 trial or remain silent, your silence could not be used
18 against you, Mr. Hesketh could cross examine State
19 witnesses and confront evidence and you would be able
20 to bring in your own witnesses and evidence in your own
21 defense, do you understand those rights?
22 A Yes.
23 Q Is anyone forcing you to give up those
24 rights?
25 A No.

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

1 Q Are you satisfied with the advice Mr. Hesketh
2 has given you on these files?
3 A Yes.
4 Q Has he answered all of your questions to your
5 satisfaction?
6 A Yes.
7 Q Has any other promises been made to you other
8 than what we've just discussed on the record?
9 A Yes -- oh, say that again?
10 Q Has anyone else promised you, like, something
11 better than what was just discussed?
12 A No.
13 Q Okay. And finally, are you pleading guilty
14 to the first degree felony murder because you're guilty
15 of that crime?
16 A Say that again?
17 Q Okay. Yes, there was some noise in the
18 background. Are you pleading to the first degree
19 felony murder because, in fact, you're guilty of that
20 crime?
21 A Yes.
22 Q And are you pleading guilty to first degree
23 armed robbery because you're guilty of that crime?
24 A Yes.
25 Q All right. I'm going to have Mr. Hesketh ask

1 you questions so the Court can receive a factual basis
2 for those guilty pleas.
3 THE COURT: Counsel?
4 MR. HESKETH: Thank you, Your Honor.
5 EXAMINATION BY MR. HESKETH:
6 Q Mr. Meyers, you are familiar with Indictment
7 14-02-232, correct?
8 A Yes.
9 Q And in that indictment you and Mr. Drew are
10 charged in Count 3 with felony murder, correct?
11 A Yes.
12 Q And on the 29th of April, 2011, you were, in
13 fact, in the City of Trenton, right?
14 A Yes.
15 Q And you were on Brunswick Avenue by the
16 Brunswick Pharmacy?
17 A Yes.
18 Q And you were with Mr. Drew, correct?
19 A Yes.
20 Q And Mr. Drew was the driver of the car?
21 A Yes.
22 Q And initially when you entered the store, was
23 your purpose in going into the store was to pass a
24 phony prescription for Percocets?
25 A Yes.

FILED, Clerk of the Appellate Division, March 15, 2023, **A-002045-22**

1 Q But once you entered the store you were armed
2 with a handgun, correct?
3 A Yes.
4 Q And during the course of you entering that
5 store, did your purpose change from passing the script
6 to actually attempting or deciding to commit an armed
7 robbery?
8 A Yes.
9 Q And at some point you did, in fact, attempt
10 to commit that armed robbery, correct?
11 A Yes.
12 Q And you pulled a gun out, right?
13 A Yes.
14 Q And you demanded that the pharmacist, Mr.
15 Arjun Reddy Dyapa, turn over some Percocets to you,
16 correct?
17 A Yes.
18 Q And during the course of that -- that attempt
19 to commit that robbery you did, in fact, cause the
20 death of Mr. Arjun Reddy Dyapa, right?
21 A Yes.
22 Q And it was during the course of that
23 attempted robbery, correct?
24 A Yes.
25 Q And the gun went off and it shot the

1 pharmacist and that led to his death, correct?
2 A Yes.
3 MR. GRILLO: The State is satisfied with the
4 factual basis, Judge.
5 MR. HESKETH: The second count, Your Honor,
6 is in regards to Indictment 11-08-0833.
7 Q Mr. Meyers, you are familiar with that case,
8 that was the Hamilton 7-Eleven armed robbery, correct?
9 A Yes.
10 Q And on that evening, May 7th, 2011, you were
11 in fact, in Hamilton, right?
12 A Yes.
13 Q And you entered the store, the 7-Eleven
14 store, armed with a handgun and your purpose was to
15 commit an armed robbery, correct?
16 A Yes.
17 Q And when you entered the store you were
18 wearing a black hoodie shirt which had some white
19 graphics on the front of the shirt, isn't that correct?
20 A Yes.
21 Q And in fact we saw that on the video, right?
22 A Yes.
23 Q And the person that you were in the store
24 with on that date was not Ajene Drew, correct?
25 A No.

FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

1 Q And you did, in fact, commit that armed
2 robbery and took some money from the store owner,
3 correct?
4 A Yes.
5 Q And you converted that money to your own use,
6 right?
7 A Yes.
8 EXAMINATION BY MR. GRILLO:
9 Q Just briefly, Mr. Meyers, just to clarify,
10 the color of the sweatshirt that you were wearing that
11 had the graphics on it, it was -- it was a dark color
12 even if it wasn't black, is that correct?
13 A Yes.
14 Q Okay. And the two individuals that appear in
15 that video, one of them has a handgun, is that correct?
16 A Yes.
17 Q Are you the individual with the handgun?
18 A Yes.
19 MR. GRILLO: The State has no further
20 questions, Your Honor, is satisfied with the factual
21 basis.
22 THE COURT: Mr. Meyers, do you have a copy of
23 the plea papers with you at counsel table?
24 THE WITNESS: Yes.
25 MR. HESKETH: What do you want to do with the

1 VOPs?
2 THE COURT: Oh, I'm sorry. You can continue.
3 EXAMINATION BY MR. HESKETH:
4 Q Okay. Mr. Meyers, you understand that there
5 was three indictments to which you were serving
6 probation on, correct?
7 A Yes.
8 Q And as a result of your guilty plea here,
9 your arrest and now subsequent guilty plea, you
10 acknowledge that you violated those probationary terms,
11 correct?
12 A Yes.
13 MR. GRILLO: The State is satisfied, Judge.
14 THE COURT: Okay. Thank you. I did forget
15 about the VOPs.
16 EXAMINATION BY THE COURT:
17 Q So now, Mr. Meyers, you have a copy of the
18 plea papers in front of you?
19 A Yes.
20 Q Is -- do you recognize what you're looking is
21 a copy of plea papers that Mr. Hesketh reviewed with
22 you?
23 A Yes.
24 Q And did he review -- we'll begin with the
25 plea form, all five pages of that plea form?

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

1 A Yes.
2 Q And did you yourself read the plea form to
3 yourself?
4 A Yes.
5 Q And as you read every page, did you sign all
6 by placing your initials, J.M., at the bottom right
7 corner of every page and signed your name on the last
8 page?
9 A Yes.
10 Q And are the circled yes or no answers
11 following each question your truthful responses?
12 A Yes.
13 Q And as Mr. Hesketh indicated, there's
14 supplemental plea forms indicating that once you're
15 released from State Prison you'll be under parole
16 supervision for five years --
17 A Yes.
18 Q -- knowing that, do you still wish to plead
19 guilty?
20 A Yes.
21 Q Do you believe you've entered this guilty
22 plea voluntarily?
23 A Yes.
24 Q Do you believe you've entered this guilty
25 plea with knowledge of the consequences including the

1 30 years -- 30 years in prison you're going to have to
2 serve before you're eligible for parole?
3 A Yes.
4 Q Are you asking the Court to accept your plea
5 of guilty to first degree felony murder, first degree
6 armed robbery and the three VOPs?
7 A Yes.
8 THE COURT: The Court finds the defendant,
9 Jamar Myers, has provided an adequate factual basis to
10 accept his guilty plea to Count 3 of Indictment 14-02-
11 232, felony murder in the first degree. Likewise, I
12 find he has provided a factual basis to accept his
13 guilty plea to Count 1 of Indictment 11-08-833, armed
14 robbery in the first degree and similarly find because
15 of these guilty pleas he violated the terms of his
16 probation in these three matters including 08-03-0231,
17 09-04-0439 and finally 10-01-0100. I find the
18 defendant has entered these guilty pleas knowingly,
19 intelligently and voluntarily and not as a result of
20 any threats or any promises not disclosed on the
21 record. Defendant has entered these pleas after
22 consulting with his attorney, Edward Hesketh, and upon
23 the advice of competent counsel with who this defendant
24 has admitted he is satisfied with. As a result I find
25 the defendant understands the nature of the charges and

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

1 consequences of his plea. I find the defendant has
2 been very alert and comprehending throughout this
3 entire proceeding as illustrated by the Court's
4 colloquy with him. I find the defendant is not under
5 the influence of any alcohol, drugs or medication which
6 could have interfered with his ability to think clearly
7 and understand these proceedings. I find the defendant
8 has knowingly, intelligently and voluntarily waived his
9 constitutionally guaranteed rights and signed the plea
10 form which the Court incorporates into its findings. I
11 find the defendant has not been threatened or coerced
12 in pleading guilty, that he understands the range of
13 sentence that may be imposed, including the 30-year --
14 year period of parole ineligibility. I therefore
15 accept defendant guilty pleas and set this matter down
16 for sentencing.
17 Are counsel available Friday, February 3rd in
18 the afternoon?
19 Mr. Grillo, do you believe there'll be any
20 family members of the deceased that will be addressing
21 the Court?
22 MR. GRILLO: I do, Judge. I think for now we
23 can set it for that day. I think that's enough time
24 that they can make themselves available. If for some
25 reason someone who wants to be here can't make it that

1 day I'll just request an adjournment from the Court.
2 THE COURT: All right. See I'm thinking I'm
3 going to set it down for 3 p.m. and that'll be the only
4 matter I'm going to hear, whatever other matters will
5 be taken care of.
6 MR. GRILLO: Okay. Thank you, Judge.
7 THE COURT: So I'm suggesting, Mr. Hesketh,
8 Friday, February 3rd at 3 p.m. Obviously, Mr. Myers'
9 family members certainly may want to attend and they
10 certainly have the opportunity to address the Court. I
11 don't think there's any need for any sentencing memos
12 because I think the plea is going to be rather
13 straightforward.
14 And Mr. Grillo, are you hopeful that by
15 February 3rd you'll know what the Commonwealth of
16 Pennsylvania is doing with their charges?
17 MR. GRILLO: Yes, Judge. We're going to
18 continue to pursue some sort of guarantee from them and
19 as soon as we have one we'll advise the Court and Mr.
20 Hesketh.
21 THE COURT: Yes, because obviously I prefer
22 not sentencing him until we know that there's no longer
23 in effect a contingent play.
24 MR. GRILLO: Correct.
25 THE COURT: You're available?

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, March 15, 2023, A-002045-22

1 MR. HESKETH: Very good. No, that's good,
2 Judge. That's even better.
3 THE COURT: Okay. So thank you, counsel. I
4 know you worked very hard. We were all prepared to
5 start selecting the jury now but I will see you all on
6 February 3rd. Thank you, counsel.
7 MR. GRILLO: Thank you, Judge.
8 * * * * *
9 **CERTIFICATION**
10
11 I, MYRIAM LOPEZ, the assigned transcriber, do
12 hereby certify the foregoing transcript of proceedings
13 on CD, playback number 9:46:11 to 12:34:32, is prepared
14 in full compliance with the current Transcript Format
15 for Judicial Proceedings and is a true and accurate
16 compressed transcript of the proceedings as recorded,
17 and to the best of my ability.
18
19
20
21 /s/ Myriam Lopez
22 MYRIAM LOPEZ AOC # 677
23 J&J COURT TRANSCRIBERS, INC. DATE: February 16, 2018
24
25

New Jersey Judiciary
Plea Form

County MERCER
Prosecutor File Number 12-0698
11-1409

Defendant's Name: JAMAR MYERS
before Judge: BILLMEIER

List the charges to which you are pleading guilty:

Ind./Acc./Comp.#	Count	Nature of Offense	Degree	Statutory Maximum	Time	Fine	VCCO Assmt*
14-02-232	3	FELONY MURDER	1st	Max	LIFE	200	100.00
11-08-833	1	ARMED ROBBERY	1st	Max	20yrs	200	100.00
08-03-0231				Max			
09-04-0439		VOPS		Max			
10-01-0106				Max			
Your total exposure as ~~the~~ result of this plea is:				**Total**	LIFE	400	200.00

Please Circle Appropriate Answer

2. **a.** Did you commit the offense(s) to which you are pleading guilty? [Yes] [No]

b. Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)? [Yes] [No]

3. Do you understand what the charges mean? [Yes] [No]

4. Do you understand that by pleading guilty you are giving up certain rights? Among them are:

a. The right to a jury trial in which the State must prove you guilty beyond a reasonable doubt? [Yes] [No]

b. The right to remain silent? [Yes] [No]

c. The right to confront the witnesses against you? [Yes] [No]

d. Do you understand that by pleading **you are not waiving** your right to appeal (1) the denial of a motion to suppress physical evidence (*R.* 3:5-7(d)) ~~or (2) the denial~~ of ~~acceptance into a pretrial intervention program (PTI) (*R.* 3:28(g))~~? [Yes] [No]

e. Do you further understand that by pleading guilty **you are waiving** your right to appeal the denial of all other pretrial motions except the following: [Yes] [No]
404 B DECISION IN 14-02-232; MOTION TO SUPPRESS PHYSICAL EVIDENCE IN 11-08-833

* Victims of Crime Compensation Office Assessment

5. Do you understand that if you plead guilty:

a. You will have a criminal record? [Yes] [No]

b. Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Victims of Crime Compensation Agency Assessment? [Yes] [No]

c. You must pay a minimum Victims of Crime Compensation Agency assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive. $25 if offense occurred before January 1, 1986.) [Yes] [No]

d. If the offense occurred on or after February 1, 1993 but was before March 13, 1995, and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to $2.00 for each occasion when a payment or installment payment is made? [Yes] [No]

e. If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction? [Yes] [No]

f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation? [Yes] [No]

g. If the crime occurred on or after January 9, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of $30? [Yes] [No]

h. You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing? [Yes] [No]

i. Computer Crime Prevention Fund Penalty, N.J.S.A. 2C:43-3.8 (L. 2009, c. 143). If the crime involves a violation of N.J.S.A. 2C:24-4b(5)(b) (knowingly possessing or knowingly viewing child pornography, N.J.S.A. 2C:34-3 (selling, distributing or exhibiting obscene material to a person under age 18) or an offense involving computer criminal activity in violation of any provision of Title 2C, chapter 20, you will be assessed a mandatory penalty as listed below for each offense for which you pled guilty? [Yes] [No]

N/A

(1) $2,000 in the case of a 1st degree crime
(2) $1,000 in the case of a 2nd degree crime
(3) $ 750 in the case of a 3rd degree crime
(4) $ 500 in the case of a 4th degree crime
(5) $ 250 in the case of a disorderly persons or petty disorderly persons offense

Total CCPF Penalty $ ______________

6. Do you understand that **the court could**, in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed? — **[Yes]** (circled) [No]

7. Did you enter a plea of guilty to any charges **that require** a mandatory period of parole ineligibility or a mandatory extended term? — **[Yes]** (circled) [No]
   a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is 30 years and 0 months (fill in the number of years/months) and the maximum period of parole ineligibility can be 30 years and 0 months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.

   b. If you are pleading guilty to such a charge, the minimum mandatory extended term is _____ years and _____ months (fill in the number of years/months) and the maximum mandatory extended term can be _____ years and _____ months (fill in the number of years/months).

8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? — **[Yes]** (circled) [No]

9. Are you presently on probation or parole? — **[Yes]** (circled) [No]
   a. Do you realize that a guilty plea may result in a violation of your probation or parole? — **[Yes]** (circled) [No] [NA]

10. Are you presently serving a custodial sentence on another charge? — [Yes] **[No]** (circled)
    a. Do you understand that a guilty plea may affect your parole eligibility? — [Yes] [No] **[NA]** (circled)

11. Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? — [Yes] [No] [NA]

12. List any charges the prosecutor has agreed to recommend for dismissal:

Ind./Acc./Compl.#	Count	Nature of Offense and Degree
14-02-232		ALL REMAINING COUNTS OF INDICTMENT
11-08-833		ALL REMAINING COUNTS OF INDICTMENT
11-08-0657		ALL COUNTS

13. Specify any sentence the prosecutor has agreed to recommend:
ON 14-02-232 30 YEARS NO PAROLE ELIGIBILITY FOR 30 YEARS, COUNT 3. ON 11-08-833 12 YEARS SUBJECT TO NERA ON COUNT 1, CONCURRENT TO SENTENCE ON 14-02-232. DEFENDANT RESERVES RIGHT TO WITHDRAW PLEA IF CURRENT PENNSYLVANIA CHARGES ARE NOT RUN CONCURRENT TO THIS PLEA. STATE DOES NOT OPPOSE. ALL OPEN VOP'S TIME SERVED CONCURRENT

14. Has the prosecutor promised that he or she will **NOT**:
  a. Speak at sentencing? [Yes] [No] (No circled)
  b. Seek an extended term of confinement? [Yes] [No] (Yes circled)
  c. Seek a stipulation of parole ineligibility? [Yes] [No] (No circled)

15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? [Yes] [No] [NA] (Yes circled)

16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [Yes] [No] [NA] (NA circled)

17. a. Are you a citizen of the United States? BORN IN TRENTON NJ [Yes] [No] (Yes circled)

If you have answered "No" to this question, you must answer Questions 17b – 17f. If you have answered "Yes" to this question, proceed to Question 18

  b. Do you understand that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or stop you from being able to legally enter or re-enter the United States? [Yes] [No]

  c. Do you understand that you have the right to seek individualized advice from an attorney about the effect your guilty plea will have on your immigration status? [Yes] [No]

  d. Have you discussed with an attorney the potential immigration consequences of your plea? If the answer is "No," proceed to question 17e. If the answer is "Yes," proceed to question 17f. [Yes] [No]

  e. Would you like the opportunity to do so? [Yes] [No]

  f. Having been advised of the possible immigration consequences and of your right to seek individualized legal advice on your immigration consequences, do you still wish to plead guilty? [Yes] [No]

18. a. Do you understand that pursuant to the rules of the Interstate Compact for Adult Offender Supervision if you are residing outside the State of New Jersey at the time of sentencing that return to your residence may be delayed pending acceptance of the transfer of your supervision by your state of residence? [Yes] [No] (Yes circled)

  b. Do you also understand that pursuant to the same Interstate Compact transfer of your supervision to another state may be denied or restricted by that state at any time after sentencing if that state determines you are required to register as a sex offender in that state or if New Jersey has required you to register as a sex offender? [Yes] [No] (Yes circled)

19. Have you discussed with your attorney the legal doctrine of merger? [Yes] [No] [NA] (NA circled)

20. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [Yes] [No] (circled) [NA]

21. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:
STATE ACTIVELY REACHING OUT TO PA AUTHORITIES TO ENCOURAGE PA TO ALLOW DEFENDANT TO PLEAD GUILTY TO ARMED ROBBERY THERE AND TO BE SENTENCED CONCURRENTLY.

22. Have any promises other than those mentioned on this form, or any threats, been made in order to cause you to plead guilty? [Yes] [No] (circled)

23. a. Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? [Yes] (circled) [No]

b. Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? [Yes] (circled) [No]

c. Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? [Yes] (circled) [No]

24. Are you satisfied with the advice you have received from your lawyer? [Yes] (circled) [No]

25. Do you have any questions concerning this plea? [Yes] [No] (circled)

Date 11/29/16 Defendant [signature]

Defense Attorney [signature]

Prosecutor [signature]

[ ] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

SUPREME COURT OF NEW JERSEY

A-39 September Term 2020

A-40 September Term 2020

085146 and 082858

State of New Jersey,

Plaintiff-Appellant,

v.

Peter Nyema, a/k/a
Pete Dinah, Kareem T. Jeffries,
Hne Nyema, and Pete Nyme,

Defendant-Respondent.

State of New Jersey,

Plaintiff-Respondent,

v.

Jamar J. Myers,

Defendant-Appellant.

State v. Peter Nyema (A-39-20):
On certification to the Superior Court,
Appellate Division, whose opinion is reported at
465 N.J. Super. 181 (App. Div. 2020).

State v. Jamar J. Myers (A-40-20):
On certification to the Superior Court,
Appellate Division.

Argued	Decided
October 25, 2021	January 25, 2022

Michael D. Grillo, Assistant Prosecutor, argued the cause for appellant in State v. Nyema (A-39-20) and respondent in State v. Myers (A-40-20) (Angelo J. Onofri, Mercer County Prosecutor, attorney; Randolph E. Mershon, III, Assistant Prosecutor, of counsel and on the briefs, and Laura Sunyak, Assistant Prosecutor, on the briefs).

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for respondent in State v. Nyema (A-39-20) (Joseph E. Krakora, Public Defender, attorney; Alyssa Aiello, of counsel and on the briefs).

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant in State v. Myers (A-40-20) (Joseph E. Krakora, Public Defender, attorney; Tamar Y. Lerer, of counsel and on the briefs).

Steven A. Yomtov, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey in State v. Nyema (A-39-20) and in State v. Myers (A-40-20) (Andrew J. Bruck, Acting Attorney General, attorney; Carol M. Henderson, Assistant Attorney General, of counsel, and Steven A. Yomtov, of counsel and on the briefs).

Alexander Shalom argued the case for amicus curiae 66 Black ministers and other clergy members in State v. Nyema (A-39-20) and in State v. Myers (A-40-20) (American Civil Liberties Union of New Jersey Foundation, attorneys; Alexander Shalom, Jeanne LoCicero, and Karen Thompson, on the briefs).

Raymond Brown argued the cause for amici curiae Latino Leadership Alliance of New Jersey and National Coalition of Latino Officers in State v. Nyema (A-39-20) and State v. Myers (A-40-20) (Pashman Stein Walder

Hayden, attorneys; CJ Griffin and Darcy Baboulis-Gyscek, on the briefs).

Robert J. DeGroot argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey in State v. Nyema (A-39-20) and State v. Myers (A-40-20) (Oleg Nekritin, on the briefs).

Joseph M. Mazraani submitted a brief on behalf of amicus curiae Kristin Henning of the Georgetown Law Juvenile Justice Clinic & Initiative in State v. Nyema (A-39-20) and State v. Myers (A-40-20) (Mazraani & Liguori, and Georgetown Juvenile Justice Clinic & Initiative, attorneys; Joseph M. Mazraani, and Kristin Henning, of the District of Columbia bar, admitted pro hac vice, on the briefs).

Jonathan Romberg submitted a brief on behalf of amicus curiae Seton Hall University School of Law Center for Social Justice in State v. Myers (A-40-20) (Seton Hall University Scott of Law Center for Social Justice, attorneys; Jonathan Romberg, of counsel and on the brief).

JUSTICE PIERRE-LOUIS delivered the opinion of the Court.

In this case, we must determine whether reasonable and articulable suspicion existed when a police officer conducted an investigatory stop of the vehicle in which defendants were riding. After the robbery of a 7-Eleven store in Hamilton, police dispatch alerted officers that the suspects were two Black males, one armed with a gun. Sergeant Mark Horan heard the radio transmission and made his way to the scene. While en route, Sergeant Horan

Da224

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

State v. Peter Nyema (A-39-20) (085146)
State v. Jamar J. Myers (A-40-20) (082858)

Argued October 25, 2021 -- Decided January 25, 2022

PIERRE-LOUIS, J., writing for a unanimous Court.

In this case, the Court considers whether reasonable and articulable suspicion existed when a police officer conducted an investigatory stop of the vehicle in which defendants Peter Nyema and Jamar Myers were riding with co-defendant Tyrone Miller.

Around midnight on May 7, 2011, a 7-Eleven was robbed. At approximately 12:15 a.m., Sergeant Mark Horan of the Hamilton Township Police Department received a transmission about the armed robbery, which "had just occurred." Horan testified that the dispatch described the suspects "as two Black males, one with a handgun." Horan activated the lights and sirens on his marked patrol car and drove towards the 7-Eleven.

Approximately three-quarters of a mile from the 7-Eleven, Horan saw a car approaching in the oncoming traffic lane. Using the spotlight mounted to his police vehicle to illuminate the inside of the car, he observed that the occupants were a man and a woman and let them pass. Sergeant Horan testified that as he continued on, a second set of headlights approached. He illuminated the inside of the vehicle and observed three Black males; "[t]he description of the suspects was two Black males so at that point I decided to issue a motor vehicle stop on the second vehicle." Horan later explained that he was also struck by the lack of reaction to the spotlight by the occupants of the car, and that he "took into consideration the short distance from the scene, as well as the short amount of time from the call" as he made the stop.

Upon stopping the vehicle, Sergeant Horan radioed headquarters with the license plate number and a description of the car, and two more officers arrived. Before he approached the vehicle, Horan learned from one of the other officers that the robbery suspects had been wearing dark or black clothing or jackets. As he approached, Horan observed "some dark jackets" on the unoccupied rear passenger seat and on the floor of the vehicle. Horan spoke with the driver, who was later identified as Miller. Nyema was sitting in the passenger seat and Myers was in the rear passenger-side seat. The dispatcher advised Horan that the vehicle had been reported stolen. All three occupants were placed under arrest.

More officers arrived on the scene, and while several officers secured the arrestees, others assisted Horan in searching for a weapon. First, Horan retrieved the clothing he had observed from the backseat of the vehicle. Then, he and the other officers searched other parts of the vehicle, locating additional clothing in the trunk and a black semi-automatic handgun under the hood. Searches of the men themselves yielded just under $600 cash. Approximately $600 was reported stolen from the 7-Eleven. The vehicle was then impounded, and police transported the three men to the police station.

Miller pled guilty to two weapons offenses and agreed to testify against Nyema and Myers, who jointly moved to suppress the physical evidence seized from the stop. The trial court granted the motion in part as to the items seized from the trunk and the hood. But the court found that the initial stop was supported by reasonable and articulable suspicion, that the retrieval of clothing from the interior of the vehicle was permitted under the plain view exception to the warrant requirement, and that the money was lawfully seized incident to defendants' arrest. As to the robbery of the 7-11, both Myers and Nyema pled guilty to first-degree robbery.

Both defendants appealed from the partial denial of their motion to suppress. In Myers's case, the Appellate Division affirmed. In Nyema's case, the Appellate Division held that the stop was not based on reasonable and articulable suspicion. 465 N.J. Super. 181, 185 (App. Div. 2020). Accordingly, Nyema's conviction was reversed, his sentence vacated, and the matter remanded for further proceedings. Ibid.

The Court granted certification in Nyema. 245 N.J. 256 (2021). On reconsideration, it granted certification in Myers "limited to the issue of whether the police officer had reasonable articulable suspicion to stop the car." 245 N.J. 250, 251 (2021).

HELD: The only information the officer possessed at the time of the stop was the race and sex of the suspects, with no further descriptors. That information, which effectively placed every single Black male in the area under the veil of suspicion, was insufficient to justify the stop of the vehicle and therefore does not withstand constitutional scrutiny.

1. Searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and are invalid unless they fall within one of the few well-delineated exceptions to the warrant requirement. The exception at issue in this case is an investigative stop, a procedure that involves a relatively brief detention by police during which a person's movement is restricted. An investigative stop or detention does not offend the Federal or State Constitution, and no warrant is needed, if it is based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity. (pp. 21-22)

2. Although reasonable suspicion is a less demanding standard than probable cause, neither inarticulate hunches nor an arresting officer's subjective good faith suffices.

Determining whether reasonable and articulable suspicion exists for an investigatory stop is a highly fact-intensive inquiry that demands evaluation of the totality of circumstances surrounding the police-citizen encounter. In many cases, the reasonable suspicion inquiry begins with the description police obtained regarding a person involved in criminal activity and whether that information was sufficient to initiate an investigatory detention. In State v. Shaw, 213 N.J. 398 (2012), and State v. Caldwell, 158 N.J. 452 (1999), the Court determined that police lacked reasonable suspicion to conduct an evidentiary stop based on descriptions limited to the race and sex of the suspect. The Court reviews those cases in detail and notes that even inquiries or investigative techniques that do not qualify as searches and seizures must still comport with the Equal Protection Clause. And New Jersey jurisprudence is well-settled that seemingly furtive movements, without more, are insufficient to constitute reasonable and articulable suspicion. The totality of the circumstances of the encounter must be considered in a fact-sensitive analysis to determine whether officers objectively possessed reasonable and articulable suspicion to conduct an investigatory stop. (pp. 23-27)

3. Applying those principles, the Court does not find that the information Sergeant Horan possessed at the time of the motor-vehicle stop constituted reasonable and articulable suspicion. Certainly, race and sex -- when taken together with other, discrete factors -- can support reasonable and articulable suspicion. But here, the initial description did not provide any additional physical descriptions that would differentiate the two Black male suspects from any other Black men in New Jersey. And the radio dispatch indicated that the store was robbed by two Black men. Sergeant Horan testified that upon seeing three Black males in the vehicle, he inferred that the third was the getaway driver. While Sergeant Horan's inference was reasonable, the reality is that the ambiguous nature of the description could have resulted in Black men in any configuration and using any mode of transportation being stopped because the only descriptors of the suspects were race and sex. Sergeant Horan saw the clothing and learned the car had been reported stolen after the stop, but information acquired after a stop cannot retroactively serve as the basis for the stop. Defendants' non-reaction to the spotlight -- like nervous behavior that courts have reasonably found not to support reasonable suspicion -- did not justify the stop. And even considering the closeness of Sergeant Horan's encounter with defendants in terms of spatial and temporal proximity to the robbery does not add significantly to the analysis of whether the stop was lawful because the 7-Eleven was located on a roadway close to a major interstate highway and the record is unclear as to when the robbery actually occurred. The non-specific and non-individualized factors asserted here do not add up to a totality of circumstances analysis upon which reasonable suspicion can be found. Zero plus zero will always equal zero. (pp. 28-33)

AFFIRMED in Nyema; REVERSED and REMANDED in Myers.

CHIEF JUSTICE RABNER and JUSTICES ALBIN, PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE PIERRE-LOUIS's opinion.

used the mounted spotlight on his marked police car to illuminate the interior of passing vehicles in order to search for the robbery suspects. In the first vehicle Horan encountered, a man and a woman reacted with annoyance and alarm when Horan shone the spotlight into their car. When Horan came across a second vehicle, approximately three-quarters of a mile from the store, he illuminated the interior of the car with the spotlight and saw three Black males inside. According to Horan, the men did not react to the spotlight at all. Horan viewed that non-reaction as "odd" considering the reaction of the passengers in the first car. At that point, the only information Horan had about the robbery was that the suspects were two Black males, one with a gun, who fled the robbery on foot. Dispatch had not provided any additional identifiers.

Based on the race and sex of the occupants and their non-reaction to the spotlight, Sergeant Horan executed a motor vehicle stop of the car. After stopping the car, Horan learned that the vehicle had been reported stolen so defendants were placed under arrest. A search of the car revealed dark clothing -- clothes matching what the suspects were wearing during the robbery -- and a handgun hidden under the hood of the car.

Defendants Peter Nyema, Jamar Myers, and a third co-defendant were charged with a host of offenses related to the 7-Eleven robbery. Nyema and Myers jointly moved to suppress the items seized during the search of the

vehicle, arguing that the stop was unlawful because it was not based on reasonable suspicion. The trial court denied the motion to suppress and both Myers and Nyema eventually pled guilty to first-degree robbery.

In separate appeals, both men challenged the denial of the motion to suppress, resulting in opposite Appellate Division outcomes. In Myers's appeal, an Appellate Division panel affirmed the trial court's denial of the motion to suppress, ruling that the stop was supported by reasonable suspicion. In Nyema's appeal, a different Appellate Division panel reversed the trial court and vacated Nyema's conviction and sentence, finding that Sergeant Horan did not have reasonable suspicion to conduct the stop of the car.

We granted both defendants' petitions for certification on the question of whether reasonable and articulable suspicion existed to stop the car. We now reverse the Myers decision and affirm in Nyema. The only information the officer possessed at the time of the stop was the race and sex of the suspects, with no further descriptors. That information, which effectively placed every single Black male in the area under the veil of suspicion, was insufficient to justify the stop of the vehicle and therefore does not withstand constitutional scrutiny.

I.

We rely on the testimony developed at the evidentiary hearing on defendants' motion to suppress for the following summary.

Around midnight on May 7, 2011, a 7-Eleven in Hamilton, New Jersey was robbed. At approximately 12:15 a.m., Sergeant Mark Horan of the Hamilton Township Police Department received a transmission about the armed robbery, which "had just occurred." Horan testified that the dispatch described the suspects "as two Black males, one with a handgun."

Horan activated the lights and sirens on his marked patrol car and drove towards the 7-Eleven at a "relatively high speed" for one to two minutes, shutting off the lights and sirens as he drew closer. According to Sergeant Horan, traffic was light because it was late at night. Approximately three-quarters of a mile from the 7-Eleven, Horan saw a car approaching in the oncoming traffic lane. Using the spotlight mounted to his police vehicle to illuminate the inside of the car,[1] he observed that the occupants were a man and a woman and let them pass. Sergeant Horan testified as follows:

> I continued on. The second set of headlights approached me, I illuminated the inside of that vehicle and I observed three Black males, you know, that went past me.

[1] This was not a standard procedure sanctioned by the Hamilton Police Department, but a technique that Horan employed while searching for suspects at night.

> The description of the suspects was two Black males so at that point I decided to issue a motor vehicle stop on the second vehicle.

He would later explain that the man and the woman in the first vehicle reacted to the spotlight with "alarm or annoyance," and that the "driver shielded his eyes a little bit." In contrast, the occupants of the second vehicle, including defendants, showed no reaction and kept looking straight ahead. Horan testified that the occupants of the second vehicle "were all males, Black males. And I received no response from any of them that I could observe, no one looked at me, no one turned towards the car. It was as if I wasn't there." He explained that this non-reaction "struck [him] as odd." He further testified that it was his "experience that sometimes people who prefer not to be noticed tend to ignore the spotlight."

Upon witnessing the non-reaction of the vehicle's occupants, Horan activated his lights and executed a stop of the second vehicle. Horan testified that at the time of the stop,

> [t]he sex and race were consistent with that of the description. I had three occupants in the vehicle. The suspects were described at the time of the call as two. So I had, at least, that. I took into consideration the short distance from the scene, as well as the short amount of time from the call and all those things considered is what I took into consideration to effect the stop.

Upon stopping the vehicle, Sergeant Horan radioed headquarters with the license plate number and a description of the car -- a 2000 silver Toyota Corolla with Pennsylvania license plates.

Two more officers arrived just as Horan was exiting his patrol car. All three approached the vehicle with their weapons drawn. Horan ordered the driver to turn off the engine and told all occupants to place their hands on the roof. Before he approached the vehicle, Horan learned from one of the other officers that the robbery suspects had been wearing dark or black clothing or jackets. As he approached, Horan observed "some dark jackets" on the unoccupied rear passenger seat and on the floor of the vehicle.

Horan spoke with the driver, who was later identified as co-defendant Tyrone Miller, a/k/a Ajene Drew. Nyema was sitting in the passenger seat and Myers was in the rear passenger-side seat. The dispatcher asked Horan to confirm the license plate number and when he did, the dispatcher advised Horan that the vehicle had been reported stolen. All three occupants were then removed from the vehicle and placed under arrest.

More officers arrived on the scene, and while several officers secured the arrestees, others assisted Horan in searching for a weapon. First, Horan retrieved the clothing he had observed from the backseat of the vehicle. Then, he and the other officers searched other parts of the vehicle, locating additional

clothing in the trunk and a black semi-automatic handgun wrapped in a red bandana under the hood. Searches of the men themselves yielded just under $600 cash. Approximately $600 was reported stolen from the 7-Eleven robbery. The vehicle was then impounded, and police transported the three men to the police station.

II.

On August 23, 2011, a Mercer County grand jury charged Nyema, Myers, and Miller in a multiple count indictment.

All three men were charged with first-degree robbery, as well as theft, aggravated assault, terroristic threats, several weapons offenses, and theft by receiving stolen property. They were each also charged with conduct-specific counts related to the theft of the car or the arrest, and Miller was charged with possession of a firearm as a felon.

Miller pled guilty to two second-degree weapons offenses and agreed to testify against Nyema and Myers.

A.

Nyema and Myers jointly moved to suppress the physical evidence seized from the stop. During a three-day evidentiary hearing, the trial court heard testimony from Sergeant Horan; Nyema's father, who owned the vehicle and who testified that it had not been reported stolen; and Detective William

Mulryne, who testified that he had personally taken the stolen vehicle report from Nyema's father several days before the car stop.

The trial court granted the motion in part and denied it in part, suppressing the handgun found under the hood of the car but ruling that the clothing and money had been lawfully seized. The court reasoned that because the initial stop was supported by reasonable and articulable suspicion, the retrieval of the clothing from the interior of the vehicle was permitted under the plain view exception to the warrant requirement and the money was lawfully seized incident to defendants' arrest. However, the trial court found that the full warrantless search of the vehicle, including the trunk and hood, which yielded the handgun, could not be justified by exigent circumstances because the vehicle's occupants were already securely in custody and the vehicle was located in a residential neighborhood shortly after midnight.

Although the court found that defendants did not have a reasonable expectation of privacy in the vehicle because it had been reported stolen, the court explained that a lack of privacy interest was not a valid substitute for probable cause; rather, it was only one factor in determining whether exigent circumstances justified a warrantless search. The court concluded that the officers could have simply impounded the vehicle and searched it back at the police precinct or applied for a warrant while at the scene.

In upholding Horan's reasonable suspicion for the initial car stop, the court noted that the stop occurred close to the robbery in terms of both time and space; that Horan observed the vehicle approaching from the direction of the crime scene; that the vehicle's occupants "gave no response whatsoever to the lights shone on them, made no eye contact whatsoever"; and "[a]lso, to be quite honest, the racial makeup of the occupants of the vehicle, three Black males traveling away from the scene."

B.

Myers -- Guilty Plea and Sentencing

On November 29, 2016, Myers pled guilty to first-degree robbery of the 7-Eleven, reserving his right to appeal several evidentiary rulings, including the denial of his motion to suppress based on the stop. Myers also pled guilty to first-degree felony murder on an unrelated indictment[2] and entered guilty pleas to three violations of probation.

On July 7, 2017, Myers was sentenced to a term of thirty years for the unrelated felony murder, with no possibility of parole, and a concurrent term of twelve years, subject to the No Early Release Act (NERA), for the armed

[2] In February 2014, Myers was charged in a second indictment related to two offenses that occurred in Trenton on April 29, 2011 -- an attempted robbery of one pharmacy and the completed robbery of another pharmacy, during which the pharmacist was shot and killed.

robbery of the 7-Eleven. For the probation violations, Myers was sentenced to five years.

Myers appealed, arguing, among other things, that the joint motion to suppress should have been granted in its entirety because the initial stop was not based on reasonable suspicion and, furthermore, that the plain view exception to the warrant requirement did not justify the officers' entry into the vehicle.

The Appellate Division affirmed the trial court's rulings and Myers's conviction. Regarding the motion to suppress, the court noted that the trial court had specifically rejected Myers's argument that the stop was based solely on defendants' race and sex. Rather, the Appellate Division found that

> the trial court pointed out that the suspects were reported to be African-American and, therefore, there was a reasonable and particularized suspicion to conduct an investigatory stop of a vehicle with African-American men inside when that vehicle was seen a short distance from the 7-Eleven in the early morning when there were few other cars on the road.

The Appellate Division concluded that "those factual findings are supported by the evidence in the record" and that there was therefore no basis for reversal. The court also affirmed the trial court's ruling that seizure of the clothing from the backseat of the vehicle was justified by the plain view exception to the warrant requirement. This Court denied Myers's petition for

certification seeking review of the denial of his motion to suppress. 240 N.J. 22 (2019).

C.

Nyema -- Trial, Guilty Plea and Sentencing

On September 20, 2017, a jury trial proceeded in Nyema's case. After the State rested, Nyema entered an open guilty plea to first-degree robbery. Nyema's sentencing took place almost a year later on September 6, 2018, immediately after an unsuccessful motion to withdraw his guilty plea. The court sentenced Nyema to a custodial term of fifteen years, subject to NERA.

Like Myers, Nyema appealed the partial denial of the joint motion to suppress, arguing that police lacked reasonable suspicion to conduct the initial stop and that, even if the stop had been lawful, the officers' warrantless entry into the vehicle to seize clothing from the backseat was not justified by the plain view exception.

The Appellate Division held that the stop was not based on reasonable and articulable suspicion. State v. Nyema, 465 N.J. Super. 181, 185 (App. Div. 2020). Accordingly, Nyema's conviction was reversed, his sentence vacated, and the matter remanded for further proceedings. Ibid.

The Appellate Division rejected the trial court's conclusion that Nyema lacked a reasonable expectation of privacy in the vehicle because it had been

reported stolen. Id. at 189. In the court's view, although evidence had been presented to indicate that the vehicle had been reported stolen, no testimony indicated that the vehicle actually was stolen and, therefore, Nyema retained a reasonable expectation of privacy in his father's car. Id. at 189-90. The court then considered whether the stop was based on a reasonable and articulable suspicion. Id. at 190. The court summarized Sergeant Horan's testimony on why he stopped the vehicle as: "(1) a store had been robbed by two Black men; (2) the car was within three quarters of a mile from the store, traveling away from it; and (3) the three Black men in the car did not react to the spotlight he pointed into their vehicle." Id. at 191.

The court explained that "[t]he men's non-reaction to the light does not add much to a reasonable articulable suspicion" because Horan only observed them for a second or two as they drove by. Ibid. Furthermore, the court noted that the record "does not establish how much time passed between when the robbery occurred and the car was stopped"; therefore, it was unclear "whether Horan had a reasonable basis to assume the perpetrators were still in the area." Id. at 192.

The court found that "[k]nowledge of the race and gender of criminal suspects, without more, is insufficient suspicion to effectuate a seizure." Ibid. Because Horan's information amounted to little more than the race and sex of

the criminal suspects, it amounted only to a hunch, not to reasonable suspicion. Ibid. To hold otherwise "would mean that the police could have stopped all cars with two or more Black men within a three-quarters-of-a-mile radius of the 7-Eleven store." Ibid.

The State petitioned this Court for certification, arguing that the Nyema decision directly conflicted with Myers and improperly focused "solely upon the suspect's description."

This Court granted the State's petition for certification. 245 N.J. 256 (2021). Because the Appellate Division's published opinion in Nyema's case held that Horan did not have reasonable suspicion to stop the car based on the same exact set of facts in Myers's case, Myers filed a motion for reconsideration of his petition for certification. This Court granted Myers's motion for reconsideration, "limited to the issue of whether the police officer had reasonable articulable suspicion to stop the car." 245 N.J. 250, 251 (2021).

III.

A.

With regard to Myers, the State contends that the Appellate Division correctly upheld the trial court's finding that there was reasonable and

articulable suspicion to stop the vehicle based on the evidence in the record. The State urges this Court to affirm that holding.

Regarding Nyema, the State argues that the Appellate Division decision should be reversed and Nyema's conviction reinstated. The State contends that, in addition to the defendants' race and sex, the motion court found reasonable suspicion based on (1) the short duration between the initial robbery report and the stop; (2) the location and direction of the vehicle in relation to the 7-Eleven; (3) the presence of three individuals in the car, giving rise to the inference that the two robbers had been joined by a getaway driver; and (4) the occupants' non-reaction to the spotlight.

As for the time, the State argues that the Nyema decision was incorrect in finding that the State failed to present evidence establishing how much time elapsed between the robbery and the stop. To the contrary, the State notes that Sergeant Horan testified that he saw the defendants' vehicle about two or three minutes after receiving the report that a robbery had "just occurred." Regarding defendants' behavior when Sergeant Horan used the spotlight on the second vehicle, the State argues that Nyema erred by discounting the defendants' non-reaction to the spotlight, particularly because that response contrasted so starkly with the reaction of the occupants of the previous vehicle.

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

According to the State, "[t]he defendants' abnormal non-reaction suggested a calculated effort on the part of all three defendants to avoid detection."

B.

The Attorney General, appearing as amicus curiae, takes no position regarding whether the investigatory stop in this case should be upheld. The Attorney General appears for the limited purpose of reiterating that racial profiling, in all its forms, must be eliminated from policing decisions. The Attorney General asserts that consideration of a person's race or ethnicity -- in drawing an inference that an individual may be involved in criminal activity or in exercising police discretion with respect to how the officer will deal with that person -- will not be tolerated and is prohibited by Attorney General Law Enforcement Directive No. 2005-1, which established a statewide policy prohibiting the practice of "Racially-Influenced Policing." The Attorney General notes, however, that under Directive No. 2005-1, when race is a descriptive factor in connection with a "Be-On-The-Lookout" announcement, or a pre-existing investigation into a specific criminal activity, it may be deemed an objective identifier. The Attorney General emphasizes that the correct legal standard for adjudicating whether reasonable suspicion exists is the totality-of-the-circumstances test.

C.

Because defendants' arguments are substantially similar, we consider them together.

Myers argues that the stop was not supported by reasonable suspicion because "[t]he only similarities between the description of the suspects and the men are their race and gender." He emphasizes that the officer stopped a car occupied by three Black men based only on a report that two Black men had fled on foot after a nearby robbery. Myers argues that "there was no description of the suspects other than their race," and that "accept[ing] this meager description as constituting reasonable suspicion" would allow police to have stopped any number of Black men, whether in a car or on foot, within a three-quarter-mile radius of the crime scene.

Nyema takes the same position as Myers. Nyema argues that the Appellate Division decision in his case correctly concluded that reasonable suspicion did not exist. Analyzing the stop based on the totality of the circumstances, Nyema contends that both the proximity to the 7-Eleven and the defendants' non-reaction to the spotlight "provided zero basis for reasonable suspicion," leaving only a description of the two Black men fleeing on foot to establish reasonable suspicion for the stop.

D.

Several amici support defendants' positions.

Black Ministers and Other Clergy Members (collectively, Clergy members) argue that the other factors in this case -- proximity to the crime scene and the non-reaction to the spotlight -- fail to create reasonable and articulable suspicion. The Clergy members also contend that race-based stops cause tremendous harm and are unreasonable because they fail to meaningfully limit the number of people subjected to them. Furthermore, such stops involve an aggravated or uncomfortable response from Black motorists, which may result from a legitimate fear of potential violence from law enforcement. The Clergy members recommend that this Court create a prophylactic rule preventing police officers from effectuating stops where the only or predominant basis for the stop is that the stopped individuals match the race and gender of the suspects.

The Association of Criminal Defense Lawyers of New Jersey (ACDL) argues that this Court must affirm in Nyema and reverse in Myers because law enforcement impermissibly stopped the defendants on the basis of race. The ACDL reasons that racial profiling has been a historically pervasive problem and that investigative stops based on race are unconstitutional.

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

Amicus the Seton Hall University School of Law Center for Social Justice (the Center) argues that the suspects' non-reaction, location, and description provided no individualized basis for reasonable suspicion. Regarding location, the Center reasons that defendants' location provided no basis for individualized suspicion because the suspects could have driven in any direction away from the 7-Eleven and been anywhere within a fifty-mile radius of the store. The Center argues that the suspects' description provided no basis for reasonable suspicion other than identifying Black males, which was an impermissible basis for an investigatory stop.

In their joint amicus brief, the Latino Leadership Alliance of New Jersey (LLANJ) and the National Coalition of Latino Officers (NCLO) argue that the State failed to prove that police had reasonable suspicion to conduct an investigatory stop of the vehicle based on specific and articulable facts. Further, the LLANJ and NCLO contend that racial profiling significantly undermines trust in the criminal justice system and makes the state less safe for everyone.

Amicus Kristin Henning, Director of the Georgetown Law Juvenile Justice Clinic & Initiative, argues that there was no rational basis to believe that the men's non-reaction to the officer shining the light into the car had any bearing on suspicion. Furthermore, Henning contends that implicit racial bias

thrives when officers rely on vague, race-based descriptions. In this case, the description relied solely on race and sex, which is insufficient to constitute reasonable and articulable suspicion. Henning argues that race-based over-policing weakens constitutional protections and harms individuals, communities, and public safety.

IV.

A.

Our standard of review on a motion to suppress is deferential -- we 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. Ahmad, 246 N.J. 592, 609 (2021) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). This Court defers to those findings in recognition of the trial court's "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). A trial court's legal conclusions, however, and its view of "the consequences that flow from established facts," are reviewed de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

B.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in almost identical language,

protect against unreasonable searches and seizures. Under both Constitutions, "searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." Elders, 192 N.J. at 246 (citations omitted). Consequently, "the State bears the burden of proving by a preponderance of the evidence that [the] warrantless search or seizure 'fell within one of the few well-delineated exceptions to the warrant requirement.'" Ibid. (quoting State v. Pineiro, 181 N.J. 13, 19-20 (2004)).

The exception at issue in this case is an investigative stop, a procedure that involves a relatively brief detention by police during which a person's movement is restricted. See State v. Rosario, 229 N.J. 263, 272 (2017) (describing an investigative stop as a police encounter during which an objectively reasonable person would not feel free to leave). When police stop a motor vehicle, the stop constitutes a seizure of persons, no matter how brief or limited. State v. Scriven, 226 N.J. 20, 33 (2016). An investigative stop or detention, however, does not offend the Federal or State Constitution, and no warrant is needed, "if it is based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." State v. Rodriguez, 172 N.J. 117, 126 (2002) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

Although reasonable suspicion is a less demanding standard than probable cause, "[n]either 'inarticulate hunches' nor an arresting officer's subjective good faith can justify infringement of a citizen's constitutionally guaranteed rights." State v. Stovall, 170 N.J. 346, 372 (2002) (Coleman, J., concurring in part and dissenting in part) (quoting State v. Arthur, 149 N.J. 1, 7-8 (1997)); accord State v. Alessi, 240 N.J. 501, 518 (2020). Determining whether reasonable and articulable suspicion exists for an investigatory stop is a highly fact-intensive inquiry that demands evaluation of "the totality of circumstances surrounding the police-citizen encounter, balancing the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions." State v. Privott, 203 N.J. 16, 25-26 (2010) (quoting State v. Davis, 104 N.J. 490, 504 (1986)).

In many cases, the reasonable suspicion inquiry begins with the description police obtained regarding a person involved in criminal activity and whether that information was sufficient to initiate an investigatory detention. In State v. Shaw, this Court determined that the police lacked reasonable suspicion to conduct an investigatory stop when law enforcement arrived at a multi-unit apartment building to execute an arrest warrant for a Black, male fugitive. 213 N.J. 398, 401, 403 (2012). There, the police saw the

defendant, also a Black male, exit the building with a friend and immediately separate, seemingly because he saw the officers. Id. at 403. "[T]he only features that [the testifying officer] could say that [the defendant] shared in common with the targeted fugitive were that both were Black and both were men." Ibid. That commonality was insufficient to justify the stop, even in conjunction with the officer's belief that the two men split up to avoid police attention. See id. at 411-12.

In State v. Caldwell, police acting on a tip from an informant conducted an investigatory stop of the defendant based on a description that the individual sought was a Black man standing in front of a building. 158 N.J. 452, 454-55 (1999). In invalidating the stop, this Court found that the "description of the suspect . . . was clearly inadequate" and explained that "police must have a sufficiently detailed description of the person to be able to identify that person as the suspect named by the informant." Id. at 460. The Court concluded that "[w]ithout such a requirement, police could theoretically conduct wide-ranging seizures on the basis of vague general descriptions." Ibid. The Court further noted that the tip lacked physical descriptors such as "the individual's height, weight, or the clothing he was wearing," and it included "no distinguishing characteristics that would have assisted [the officer] in making a positive identification of the suspect." Ibid.

In his concurring opinion, Justice Handler pointed out that "[r]ace alone is not a specific and articulable fact sufficient to establish the reasonable, particularized suspicion needed for an investigatory stop of a defendant. Adding gender to race does not augment the description of the suspect so that he could fairly be picked out by officers intending to investigate." Id. at 468 (Handler, J., concurring). In Justice Handler's view, the minimal description that consisted simply of the race and sex of the individual was "descriptive of nothing" in the constitutional context. Ibid.

New Jersey courts, moreover, have noted that even inquiries or investigative techniques that do not qualify as searches and seizures and therefore do not require reasonable and articulable suspicion must still comport with the Equal Protection Clause. See, e.g., State v. Maryland, 167 N.J. 471, 484 (2001) ("[T]he questioning of [a] defendant as part of a field inquiry is not sustainable if the officers approached him and his companions solely because of their race and age."); State v. Segars, 172 N.J. 481, 493 (2002) ("[I]f race is the sole motivation underlying the use of a M[obile] D[ata] T[erminal] [in checking the status of a driver's license], it is illegal . . . .").

Indeed, in 2005, the Attorney General issued Law Enforcement Directive 2005-1, which established a statewide policy prohibiting the practice of racially influenced policing. See Attorney General, Directive Establishing an

Official Statewide Policy Defining and Prohibiting the Practice of "Racially-Influenced Policing" (June 28, 2005) (Directive 2005-1). The Directive dictates that law enforcement officers are not to

> consider a person's race or ethnicity as a factor in drawing an inference or conclusion that the person may be involved in criminal activity, or as a factor in exercising police discretion as to how to stop or otherwise treat the person, except when responding to a suspect-specific or investigation-specific "Be on the lookout" (B.O.LO.) situation . . . .

The Directive further emphasizes that it does not prohibit officers "from taking into account a person's race or ethnicity when race or ethnicity is used to describe physical characteristics that identify a particular individual . . . being sought by a law enforcement agency in furtherance of a specific investigation or prosecution." Ibid.

In addition to the race and sex of the suspect, our courts have considered whether other factors such as nervous behavior, furtive movements, or other actions form the basis for reasonable and articulable suspicion. Our jurisprudence is well-settled that seemingly furtive movements, without more, are insufficient to constitute reasonable and articulable suspicion. See Rosario, 229 N.J. at 277 ("Nervousness and excited movements are common responses to unanticipated encounters with police officers on the road . . . ."); State v. Lund, 119 N.J. 35, 47 (1990) ("[M]ere furtive gestures of an occupant

of an automobile do not give rise to an articulable suspicion suggesting criminal activity." (quoting State v. Schlosser, 774 P.2d 1132, 1137 (Utah 1989))).

Similarly, when circumstances are not otherwise suspicious, "[a] person's failure to make eye contact with the police does not change that." State v. Stampone, 341 N.J. Super. 247, 252 (App. Div. 2001); see also United States v. Foster, 824 F.3d 84, 93 (4th Cir. 2016) (noting that lack of eye contact is an "ambiguous indicator" that "may still contribute to a finding of reasonable suspicion" but that courts are "hesitant" to weigh heavily "because it is no more likely to be an indicator of suspiciousness than a show of respect and an attempt to avoid confrontation." (quotation omitted)); United States v. Hernandez-Alvarado, 891 F.2d 1414, 1419 n.6 (9th Cir. 1989) ("[A]voidance of eye contact has been deemed an inappropriate factor to consider unless special circumstances make innocent avoidance of eye contact improbable.") (alteration and quotation omitted); United States v. Smith, 799 F.2d 704, 707 (11th Cir. 1986) (finding the defendant-driver's failure to look at a patrol car to be "fully consistent with cautious driving" that "in no way gives rise to a reasonable suspicion of illegal activity either alone or in combination with the other circumstances surrounding the stop").

In sum, the totality of the circumstances of the encounter must be considered in a very fact-sensitive analysis to determine whether officers objectively possessed reasonable and articulable suspicion to conduct an investigatory stop. State v. Gamble, 218 N.J. 412, 431 (2014); Pineiro, 181 N.J. at 22.

V.

Applying those principles to the present case and taking into account the totality of the circumstances, we do not find that the information Sergeant Horan possessed at the time of the motor-vehicle stop constituted reasonable and articulable suspicion.

Sergeant Horan testified that he "believe[d] that the entirety of the initial dispatch" stated that there were "two suspects described as Black males, one with a handgun." Certainly, race and sex -- when taken together with other, discrete factors -- can support reasonable and articulable suspicion. But here, the initial description did not provide any additional physical descriptions such as the suspects' approximate heights, weights, ages, clothing worn, mode of transportation, or any other identifying feature that would differentiate the two Black male suspects from any other Black men in New Jersey. That vague description, quite frankly, was "descriptive of nothing." See Caldwell, 158 N.J. at 468 (Handler, J., concurring). If that description alone were sufficient

to allow police to conduct an investigatory stop of defendants' vehicle, then law enforcement officers would have been permitted to stop every Black man within a reasonable radius of the robbery. Such a generic description that encompasses each and every man belonging to a particular race cannot, without more, meet the constitutional threshold of individualized reasonable suspicion.

And the radio dispatch indicated that the store was robbed by <u>two</u> Black men. Sergeant Horan testified that upon seeing <u>three</u> Black males in the vehicle, he inferred that the third was the getaway driver. While Sergeant Horan's inference was reasonable, with the dearth of information available at the time regarding the suspects, it could easily be argued that police would have also been able to stop a single Black man in a car, or on foot, based on the assumption that the robbery suspects split up after the crime. The reality is that the ambiguous nature of the description could have resulted in Black men in any configuration and using any mode of transportation being stopped because the only descriptors of the suspects were race and sex.

Even Sergeant Horan testified that the only information he could confirm based on the initial report was the race and sex of the vehicle's occupants during the following exchange with the prosecutor:

> PROSECUTOR: And when you walked up, were you able to confirm any other part of the description in regard to the transmissions that you received from dispatch?
>
> SERGEANT HORAN: Other than all three occupants being male, Black and the clothing, there was nothing else to confirm.

Although Sergeant Horan mentioned the clothing, he testified that as he approached the vehicle after executing the stop, "[a]n officer at the scene relayed information that the suspects were wearing dark or black clothing or jackets." Information acquired after a stop cannot retroactively serve as the basis for the stop. For constitutional purposes, what matters is the information Horan possessed when he activated his overhead lights and pulled the car over. At that point, as discussed, he did not have a description of the clothing worn by the robbery suspects. He also did not know that the car had been reported stolen. All he knew was that the suspects were Black men.

That brings us to the other factors that the State argues contribute to a finding of reasonable suspicion based on the totality of the circumstances. Sergeant Horan testified that when he shined the spotlight on defendants' car and illuminated the interior, the three men did not react at all. He recalled that, as he observed defendants for a second or two, "[a]ll three heads remained straight ahead, focused on their path. No squinting, ducking,

shielding their eyes, which is, in my experience, uncommon." The State argued that Sergeant Horan's use of his patrol car's spotlight and defendants' behavior in response is critical to our analysis. The State even conceded at oral argument that without defendants' non-reaction to the spotlight, it would be very difficult to argue that reasonable suspicion existed prior to the stop.

As this Court and many other courts have recognized, nervous behavior or lack of eye contact with police cannot drive the reasonable suspicion analysis given the wide range of behavior exhibited by many different people for varying reasons while in the presence of police. See Rosario, 229 N.J. at 277. In some cases, a defendant's alarmed reaction is asserted as justification for a stop, but in other cases, a defendant's non-reaction is argued to form the basis for reasonable suspicion. See, e.g., United States v. Escamilla, 560 F.2d 1229, 1233 (5th Cir. 1977) (explaining that the defendants' decision not to "acknowledge the officers' presence" cannot play any role in reasonable suspicion, in part because it would conflict with the court's previous holding that repeated glances at officers were suspicious and "would put the officers in a classic 'heads I win, tails you lose' position"); cf. United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (noting that law enforcement profiles of drug couriers have a "chameleon-like way of adapting to any particular set of observations" (quotation omitted)). In short, whatever

individuals may do -- whether they do nothing, something, or anything in between -- the behavior can be argued to be suspicious.

Thus, as with race and sex, a suspect's conduct can be a factor, but when the conduct in question is an ambiguous indicator of involvement in criminal activity and subject to many different interpretations, that conduct cannot alone form the basis for reasonable suspicion.

Even considering the closeness of Sergeant Horan's encounter with defendants in terms of spatial and temporal proximity to the robbery does not add significantly to the analysis of whether the stop was lawful. Horan was approximately three-quarters of a mile from the 7-Eleven when he spotted defendants' vehicle traveling away from the store and executed the stop. The record is unclear as to precisely when the robbery occurred. Sergeant Horan testified that he heard the radio dispatch regarding the robbery "just around midnight" or "a quarter after midnight" when dispatch indicated that the robbery "just happened." Horan then testified that he encountered defendants' vehicle approximately three minutes after receiving the dispatch.

The State argues that the timing of the robbery is clear because dispatch used the term "just" in describing when the robbery occurred. Certainly, at some point after the robbery someone in the 7-Eleven called 9-1-1, but we do not know when that was in relation to when the robbery occurred and when

dispatch alerted police. In this case, a matter of minutes makes a difference given the area in which the suspects could reasonably be expected to be after the commission of the robbery. Again, proximity in terms of time and place can certainly be factors in determining whether reasonable suspicion existed. On this record, however, where the 7-Eleven was located on a roadway close to a major interstate highway and the record is unclear as to when the robbery actually occurred, the asserted proximity in time and place is not sufficient to support the finding of reasonable suspicion.

Finally, we note that the non-specific and non-individualized factors asserted here do not add up to a totality of circumstances analysis upon which reasonable suspicion can be found. "Zero plus zero will always equal zero. To conclude otherwise is to lend significance to 'circumstances [which] describe a very large category of presumably innocent travelers' and subject them to 'virtually random seizures.'" State v. Morgan, 539 N.W.2d 887, 897 (Wis. 1995) (Abrahamson, J., dissenting) (alteration in original) (quoting Reid v. Georgia, 448 U.S. 438, 441 (1980)).

In this case, Sergeant Horan, with his years of experience, had a hunch. That, however, is not the standard. The information Horan possessed did not amount to objectively reasonable and articulable suspicion, so the motion to suppress should have been granted.

VI.

For the foregoing reasons, the decision in State v. Nyema is affirmed. The decision in State v. Myers is reversed, Myers's conviction is vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES ALBIN, PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE PIERRE-LOUIS's opinion.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION MERCER COUNTY

CRIMINAL

STATE OF NEW JERSEY

VS.

Jamar Myers

DEFENDANT

Pros. File No. 11-1409-01

MOTION FOR DISMISSAL OF INDICTMENT

The Mercer County Prosecutor respectfully moves for the dismissal of Indictment

Number 11-08-0833-I charging the defendant, in the above captioned case with

1. Robbery (first degree), N.J.S.A. 2C:15-1; 2C:2-6
2. Theft by Unlawful Taking (third degree), N.J.S.A. 2C:20-3a
3. Aggravated Assault (fourth degree), N.J.S.A. 2C:12-1b(1); 2C:2-6
4. Terroristic Threats (third degree), N.J.S.A. 2C:12-3a; 2C:2-6
5. Possession of a Firearm for an Unlawful Purpose (second degree), N.J.S.A. 2C:39-4a; 2C:2-6
6. Unlawful Possession of a Handgun (second degree), N.J.S.A. 2C:39-5b; 2C:2-6
7. Possession of a Defaced Firearm (fourth degree), N.J.S.A. 2C:39-4d; 2C:2-6
8. Theft by Receiving Stolen Property (third degree), N.J.S.A. 2C:20-7a; 2C:2-6
10. Unlawful Taking of a Means of Conveyance (fourth degree), N.J.S.A. 2C:20-10d; 2C:2-6

Upon the following grounds:

There is insufficient evidence upon which to predicate successful prosecution.

/s/ Angelo J. Onofri

MERCER COUNTY PROSECUTOR

IT IS SO ORDERED on this 25TH day of February, 2022

/S/ Janetta D. Marbrey A.J.S.C.

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

FILED, Clerk of the Appellate Division, April 13, 2023, **A-002045-22**

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CRIMINAL PART
MERCER COUNTY, NEW JERSEY
INDICTMENT NO. 11-08-00833-I
CASE NO. 11-1409
INDICTMENT NO. 14-02-00232-I
CASE NO. 12-698
A.D. #A-002045-22T5

STATE OF NEW JERSEY	)	TRANSCRIPT
	)	
v.	)	OF
	)	
JAMAR MYERS,	)	MOTION HEARING
	)	
Defendant.	)	

Place: Mercer County Criminal Courthouse
400 South Warren Street
Trenton, NJ 08608

Date: March 3, 2023

BEFORE:

THE HON. PETER E. WARSHAW, JR., J.S.C.

TRANSCRIPT ORDERED BY:

CAROLYN BOSTIC, ESQ. (Office of the Public Defender)

APPEARANCES:

RACHEL COOK, Assistant Prosecutor, Mercer County
Attorney for the State

JESSICA LYONS, ESQ. (Office of the Public Defender)
Attorney for the Defendant

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Audio Operator, Bell Provost

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22

1 Public Defender, Jessica Lyons.
2 What Mr. Myers seeks to do is withdraw a
3 guilty plea that he entered before the Honorable Robert
4 Billmeier on or about November 29 of 2016. And on that
5 date Mr. Myers appeared with counsel before Judge
6 Billmeier and generally speaking, he entered a guilty
7 plea as follows. He pled guilty to Count 3 of
8 Indictment Number -- what was that?
9 UNIDENTIFIED SPEAKER: That was my cell.
10 Sorry.
11 THE COURT: Okay, no more of that.
12 He pled guilty to Count 3 of Indictment
13 Number 14-02-232 which charged him with first degree
14 felony murder. He also pled guilty to Count 1 of
15 Indictment Number 11-08-833, which charged him with
16 armed robbery in the first degree. There were also
17 guilty pleas to violations of probation on Indictment
18 Numbers 08-03-231, 09-04-439 and 10-01-0100.
19 And subsequent to the guilty plea being
20 accepted by the Court, the defendant was sentenced
21 consistent with the plea agreement and there was later
22 an appeal of the conviction in the armed robbery case
23 that resulted in a Supreme Court decision, 249 N.J.
24 509, State v. Nyema and Myers. And the matter is now
25 before the Court for a motion to withdraw the guilty

1 plea that was entered before Judge Billmeier in
2 November of 2016, is that a nutshell version of where
3 we stand today?
4 MS. LYONS: Yes.
5 THE COURT: Okay. And so the record is
6 clear, the pleadings in this matter were submitted by
7 the defendant in a self-represented capacity. Mr.
8 Myers submitted his own paperwork in connection with
9 this. And the defense through Ms. Lyons has chosen not
10 to submit anything in writing herself and the State has
11 made a similar choice. The Court agreed that it would
12 entertain oral argument in this matter even though it
13 was a motion filed by a self-represented defendant but
14 Ms. Lyons is going to handle the argument for him.
15 And, Ms. Lyons, if you're ready, I'll hear
16 your position now.
17 MS. LYONS: Thank you, Judge. And, Judge,
18 just to go a little bit deeper into the procedural
19 history --
20 THE COURT: Of course.
21 MS. LYONS: -- yes, 14-02-232 is what I'd
22 refer to as the murder/felony murder/robbery
23 superseding indictment. The Indictment 11-08-833 is
24 what I'll refer to as the robbery case. There was the
25 motion to suppress in that 11-08-833 robbery case,

THE COURT: Right. Right, okay. It was Mr. Hesketh, but the way you said things --

MS. LYONS: Yes.

THE COURT: -- and I know it wasn't, you know, deliberate.

MS. LYONS: No. And to be quite clear, none of us, meaning myself, Your Honor or Ms. Cook were the parties involved back then.

THE COURT: Right.

MS. LYONS: But I know that we are all experienced and can relate to things of similar nature happening in other cases that we've either overseen or handled ourselves. But the plea transcript is very clear that, you know, the colloquy went on in the morning that basically, this is your last chance to plea. So this was not an otherwise, you know, set up as a final disposition conference, set up as a possible plea negotiation, set up as a way where, you know, Mr. Myers was walking in thinking he was going to have more time to speak to the attorney or go through anything else.

And there's a long colloquy that goes on about discovery, about this, about that, about videos, about the 404(b) but needless to say, after the morning, you know, ends and that colloquy goes, an

opportunity is brought to Mr. Myers to have another conversation with Mr. Hesketh and Mr. Hesketh asks at that time to have a conversation.

Obviously, I'm not going to, you know, suggest what I think happened during that time but after however long those conversations took place, it was the afternoon when parties came back onto the record after this recess and that is when plea papers came forward. So obviously there were discussions off the record, there were discussions between Mr. Myers and Mr. Hesketh and, you know, that ended up being in what was the result of plea forms and even with respect to the plea forms that were submitted.

Obviously, this was and I'm sure at the time an interest to wrap everything up, right, which, again, is not out of the ordinary. So, we have both cases and a variety of violations of probation that were all being rolled in together and the plea form is signed on the same date. The plea is taken on all the cases including the violations and there is the preservation of the right to appeal the 404(b) decision ,as well as the motion to suppress and that is explicit in the plea forms.

And then the plea is also concurrent not only to the sentences amongst everything that's on here so

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 13, 2023, A-002045-22

1 And if properly suppressed at the trial level, would
2 there have been a different outcome? Would there have
3 been a different offer, you know, because of these
4 404(b) implications as it relates to the homicide case?
5 Coupled with that is also a realistic fear
6 that I will say had to do with threats that Mr. Myers
7 was feeling, was receiving and what he thought he
8 wanted to do because he thought he had no other choice
9 but to protect his family. He received letters both
10 during and since making an assertion of innocence post
11 conviction and at the time he pled because he was under
12 the threat and duress of his co-defendant being told
13 that if you don't take the weight for this, if you
14 don't, you know, say this, then I'm going to come after
15 you and your family.
16 You know, and at first maybe there were
17 certain anonymous threats that came through but it
18 became very clear who was driving these threats to Mr.
19 Myers and his family. You know, we know where your
20 family lives and that, you know, if he wasn't going to
21 take the charges, that his family would be killed.
22 Then the timing of this, I think, shows how
23 viable those threats were and how that impinged on Mr.
24 Myers' thought process at the time of plea because
25 post-conviction, you know, during the appeal process

1 when the robbery charge gets vacated and the State
2 dismisses and Mr. Myers, you know, is still serving
3 time on the homicide is when Mr. Myers starts saying
4 well, wait a minute, I'm innocent. This is what was
5 happening and finally spoke up and broke that code of
6 silence.
7 And then shortly thereafter within like a
8 month later his mother and brother who are present here
9 in court are then subject as victims to a horrific home
10 invasion and shooting which clearly, I mean thankfully
11 allowed their lives to be not taken, it's only by the
12 graces of God that they are both here today to be able
13 to sit here in this court and support Jamar but are
14 severely injured, his brother especially based on
15 charges that Pete Nyema, his co-defendant, is currently
16 charged with and is sitting being detained on in this
17 very county.
18 So, the fact that even though Mr. Myers still
19 sits serving the 30-year sentence on the homicide, even
20 though there's no real reason for Mr. Nyema to think
21 that Mr. Myers at this point in time is going to have
22 his conviction vacated, is going to get out of jail, is
23 going to stop serving the 30-year sentence, his co-
24 defendant acts on that threat to make sure that Mr.
25 Myers knows you better stay the course and you better

1 some reasons already with respect to how that went
2 about and why. He has made it in his own pro se papers
3 and so I think that that is definitely something that
4 is for the Court to consider.
5 And then in terms of -- I would also say with
6 respect to being misinformed or having a different
7 understanding of what a material element is of plea
8 negotiation, you know, it was his reliance on
9 conversations that he had with his attorney. In
10 addition to Slater I would ask the Court to rely on
11 State v. Kovack, K-o-v-a-c-k, 91 N.J. 476. And also in
12 terms of just plea bargaining in general that obviously
13 our intended purpose is that, you know, it be fairly
14 construed on both sides and that the results must not
15 disappoint the reasonable expectations of either, and
16 that's State v. Thomas. And that is what Mr. Myers'
17 understanding was of the plea.
18 And for all those reasons, you know, again,
19 like I said, Judge, not that one is more important than
20 the other, Mr. Myers continues to be in a very
21 difficult spot. I think one of any of the reasons is
22 enough in and of itself to take back his plea but when
23 you're taking all three totally in the totality of the
24 circumstances, the posture of the threat and duress
25 from the co-defendant and especially conversations that

1 he had with counsel and what his understanding of the
2 plea, it is quite clear that he did not fully
3 understand the terms and for a variety of reasons he
4 should be allowed -- the pro se motion should be
5 granted and his plea should be vacated.
6 THE COURT: Okay, thank you very much, Ms.
7 Lyons.
8 Ms. Cook, please.
9 MS. COOK: Thank you, Your Honor. The
10 defense certainly raises some serious concerns
11 regarding retaliations and threats that may have been
12 made to Mr. Myers after he entered this guilty plea as
13 well as after sentencing in this case and the State
14 certainly is concerned about the crimes that were
15 committed against his family and we are actively
16 involved in investigating that case to try and figure
17 out what happened.
18 That being said, Your Honor, what is before
19 the Court today is the defendant's motion to withdraw
20 his guilty plea and while there are a number of factors
21 subjectively that entered into his mind when he was
22 weighing whether or not to go to trial including the
23 possibility that he could be found guilty of murder in
24 the first degree. He could be found guilty on another
25 file for robbery, he could be found guilty in

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 13, 2023, A-002045-22

1 much larger than the 30 with a 30 that he received in
2 this case. And as discussed, he also ended up being
3 able to roll up Pennsylvania charges also for a robbery
4 that he faced significant exposure for.
5 Additionally, Judge, the other factor for the
6 Court to consider is whether the withdrawal in this
7 case would be of unfair prejudice to the State or be an
8 unfair advantage to the accused and this case, the
9 murder case is one of the most serious cases that a
10 Court can have. There's a person who died and that
11 case, a significant amount of time has passed that
12 would make it an unfair prejudice to the State to now
13 have to retry that case and begin that process all over
14 for that victim and that family.
15 So, lastly, Judge, if the Court, just to wrap
16 it up, if the Court were to look at the objective
17 factors as outlined in Slater, the motion for
18 withdrawal of the guilty plea in the defendant's case,
19 it just can't be sustained. Now, he may have some
20 factors that other motions would be appropriate for but
21 for a withdrawal of his guilty plea, it's just
22 insufficient, Judge. So, that's the State's position.
23 THE COURT: Thank you, Ms. Cook.
24 Do you need --
25 MS. LYONS: Judge, can I just briefly?

1 THE COURT: Of course. Of course. Of course
2 you can.
3 MS. LYONS: The only thing I want to make
4 clear is as it relates to the Slater factors, you know,
5 for reasons I've already stated, Mr. Myers has, in my
6 opinion, made the colorable claim of innocence.
7 As to the nature and the strength of the
8 reasons and the fair and just reasons and those other
9 Slater prongs, that is what I am arguing when I rely
10 heavily on his -- yes, I understand the State's
11 subjective reasoning qualification of Mr. Myers. But
12 the nature and the strength of his reasonings for
13 withdrawal is everything that I said as it relates to
14 those elements of fear, duress and conversations that
15 he had with his prior counsel.
16 And, again, you know, I won't go through the
17 lack of knowledge and what I would view as a not
18 knowingly and voluntarily given plea but quite
19 honestly, yes, that is what we have is his subjective
20 reasoning but that is what is in his mind at the time
21 that he pled. That has to count for something because
22 that is his thought process as to what he was doing
23 when he did weigh as the State correctly points out
24 weighing his options.
25 And, again, it is not a coincidence that this

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 13, 2023, A-002045-22

1 upon my family and the fact that I stated that my
2 family was threatened and I received that threat while
3 I was charged with this crime is one of my plausible
4 reasons of colorable innocence.
5 Not only that, but the fact that evidence
6 that was from the robbery case, that had no bearing on
7 my guilt or innocence in the homicide case. The
8 clothing that was allowed in from the robbery that was
9 later suppressed by the Supreme Court because it was
10 illegally, unconstitutionally obtained by the State and
11 it was allowed under 404(b) into my homicide trial
12 which would have left me without the ability of having
13 a fair trial under my Sixth Amendment right. So that's
14 why I state pertain to the colorable claim.
15 Now, to the nature and the strength of that
16 claim, I also believe those fall under the nature and
17 strength of my claim and my reasons of why I pled
18 guilty and why I feel I have grounds under State v.
19 Slater. Not only that, when the State says under the
20 fourth prong of if it would hamper the State's case,
21 reading from what I actually wrote, the passage of time
22 has not and cannot hamper the State's ability to
23 present important evidence.
24 The defendant -- I sat in Mercer County
25 Corrections for seven years awaiting trial which gave

1 the State seven years to obtain any and all possible
2 evidence it could find.
3 Furthermore, within those seven years the
4 State had not found any credible evidence, they found
5 the physical evidence. The only thing the State has is
6 four individuals who claim I confessed -- two
7 individuals within the jailhouse who claim I confessed
8 to them, and two other individuals, one Jerome Comb
9 (phonetic) who came out three years later after the
10 crime was committed once he caught a drug and weapons
11 possession case and claimed I confessed to him although
12 some of his facts that he claimed was contradicted to
13 the evidence of the actual case when he claimed that I
14 confessed to him that I robbed the pharmacy for pills.
15 And it was a known fact that the employees and victims
16 of the pharmacy said the suspect got away with nothing.
17 Now, the State's star witness, Aigin Drove
18 (phonetic), has made four (indiscernible) statements.
19 The only thing the State did have was the four
20 witnesses. At any given time they could subpoena those
21 witnesses and get them to court so there's nothing that
22 hampers the State from obtaining any evidence 13 years
23 later from when the time the crime happened because
24 there's only four witnesses who claim I confessed to
25 them and one who claimed I played a part of the crime

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 13, 2023, A-002045-22

1 would commonly know it he appeared before Judge
2 Billmeier. The record will reflect that the Court has
3 received what's a 30-page transcript in this matter.
4 Pages 1 through 12 of the plea transcript which is
5 fully a part of this record reflect what occurred with
6 Judge Billmeier, Mr. Myers and counsel on the morning
7 of November 29, 2016. The two assistant prosecutors
8 were there, the attorney for Mr. Myers who was Edward
9 Hesketh, a very experienced criminal defense lawyer,
10 was there with Mr. Myers.
11 Judge Billmeier began by indicating to Mr.
12 Myers that he had been in jail since around May of
13 2011, more than five-and-a-half years at the time. The
14 judge indicated that he had cleared his calendar for
15 December and that it was essentially trying for the
16 trial to start. Judge Billmeier noted that there were
17 some motions that were going to be addressed prior to
18 jury selection but he also indicated that any
19 opportunity to resolve the case by way of guilty plea
20 was going to go away once they started the proceedings.
21 And Mr. Hesketh was joined by his co-counsel,
22 Mr. Garzio. Judge Billmeier recognized that counsel
23 had been working very hard to try to resolve the case
24 and the Court indicated that they were going to move
25 forward with the trial and the judge assured Mr. Myers

1 that the jury would make the ultimate determination and
2 assured him as well that he was going to get a fair
3 trial.
4 The Court went over what the defendant's
5 exposure was in the various cases that he had and
6 talked to him a little bit about what his exposure was.
7 There appears to be agreement that Mr. Myers would
8 qualify as a persistent offender and the State
9 indicated its intention to move for an extended term if
10 he got convicted.
11 Judge Billmeier asked the State to place the
12 final plea offer on the record and the State did place
13 the final plea offer on the record and the State
14 indicated its intention to seek consecutive sentences
15 should there be convictions at trial.
16 Mr. Hesketh also spoke and he spoke about his
17 ability to review the defendant's discovery with him
18 and he also talked to him about other things including
19 video-related transcript. The Court referenced some of
20 these issues and asked the prosecutor to be specific
21 about what it is that the State intended to use
22 concerning some of this video evidence. And the judge
23 also referenced that videos were shown during the
24 course of the pretrial hearing.
25 The defendant had the ability to review those

FILED, Clerk of the Appellate Division, April 13, 2023, A-002045-22

1 received or the transcript I received reflects that the
2 first 12 pages occurred -- show what happened during
3 the time period when the Court was contemplating
4 calling up the jury to get ready. The defendant and
5 counsel requested some time to talk. They were given
6 that time.
7 I think what I was saying when the phone went
8 off a moment ago was defense counsel has pointed out
9 that the Court and counsel were fairly experienced with
10 these and what happened there is hardly uncommon. It's
11 very common for cases to resolve at the last minute,
12 sometimes with the jury is sitting downstairs,
13 sometimes with a jury ready to come in in a day or so.
14 But the last-minute resolution that all parties agree
15 is fair and in the interest of justice is not an
16 uncommon thing.
17 Defense counsel requested and received the
18 opportunity to meet privately with his client and they
19 came back in the afternoon. And I know it's the
20 afternoon because the transcript reflects the Court
21 saying good afternoon to everybody. And by that point
22 the plea papers had been completed and the Court was
23 prepared to accept the plea.
24 And I'd like to take a moment and go through
25 the plea papers. Again, they're part of the record

1 here. But it is important for me to discuss in general
2 terms what the plea papers show.
3 The plea papers show, as I said earlier, that
4 the defendant would be pleading guilty to Count 3 of
5 one indictment which charged him with felony murder, he
6 would be pleading guilty to Count 1 of a second
7 indictment which charged him with first degree armed
8 robbery. There's an acknowledgment here completed into
9 the form that he was looking at life as the maximum
10 sentence on the murder charge and 20 years as a maximum
11 sentence on the armed robbery charge. Without
12 specificity it notes also that Mr. Myers was going to
13 plead guilty to three violations of probation.
14 The plea form and its standard answers
15 contains the defendant's acknowledgment that he was
16 pleading guilty because he committed the offenses, he
17 understood that he had to give a factual basis, he
18 understood what the charges meant and he understood
19 that he was giving up the right to a jury trial during
20 which the State had to prove his guilt beyond a
21 reasonable doubt, the right to remain silent and the
22 right to confront witnesses against you.
23 Now, Question 4(d) contains a question that
24 relates to whether the defendant is or is not waiving
25 any right to appeal and the defendant expressly

FILED, Clerk of the Appellate Division, April 13, 2023, A-002045-22

1 Court's role in accepting the plea, understood that the
2 Court was not bound by the State's recommendation and
3 the Court had the right to reject the plea.
4 Mr. Myers signed the form. He initialed it
5 on each page. He also completed the supplemental plea
6 form for No Early Release Act cases as regards both the
7 felony murder charge and the robbery charge. So it's
8 important for the Court to note the plea agreement and
9 what the plea agreement says.
10 The Court has also had the opportunity to
11 review the plea itself which is contained on Page 13
12 through Page 30 of the transcript which has been
13 submitted to the Court by Mr. Myers, I believe. And,
14 again, I know that this is part of the record but it's
15 important for the Court to note it.
16 Mr. Myers after being sworn noted that he
17 didn't have any difficulty hearing, seeing or reading
18 English, that he was 31 years old at the time, that he
19 had graduated from high school and had some college
20 education as well, that he was not under the influence,
21 that nothing was affecting his ability to think clearly
22 or understanding what was happening.
23 The judge explained how he was going to
24 proceed in taking the plea and admonished the defendant
25 that he was not trying to lead him into saying anything

1 that wasn't true or that anything that anybody else
2 wanted him to say and he understood that. And Judge
3 Billmeier also said if you feel you're being forced
4 into an answer or being forced to say something which
5 is not true by the way I or any attorney asks you a
6 question, let me know before you respond. Do you
7 understand that? And the defendant answered yes.
8 He asked the prosecutor to place the
9 agreement on the record. The prosecutor did that.
10 There were a number of things placed on the record most
11 of which is what I referenced in Paragraph 13 and 21 as
12 to what the sentence recommendation was and what
13 happened if they couldn't resolve the Pennsylvania
14 matter.
15 The Court then asked defense counsel to
16 confirm that the plea agreement was specifically what
17 had been negotiated and at Page 16 of the transcript
18 Mr. Hesketh acknowledged that it was the agreement that
19 had been negotiated and he highlighted for the Court
20 that Mr. Myers was reserving his right to appeal the
21 404(b) decision in the homicide case and the motion to
22 suppress physical evidence in what he characterized as
23 the Hamilton armed robbery case. But he said that
24 other than that, that's what the deal was. And the
25 Court acknowledged that Mr. Myers had the opportunity

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**
FILED, Clerk of the Appellate Division, April 13, 2023, **A-002045-22**

1 that was the proceeding in terms of broad summary. But
2 as I indicate, both the plea form and the plea colloquy
3 transcript are preserved as a part of this record.
4 Judge Billmeier ultimately did sentence Mr.
5 Myers consistent with the plea agreement here. I think
6 it was on or about July 7 of 2017. Again, in broad
7 summary form, he got a 30-year sentence with a 30-year
8 stipulation on the murder charge, he got a 12-year
9 sentence subject to the No Early Release Act on the
10 robbery charge. These sentences were concurrent to one
11 another. The mandatory parole supervision was ordered.
12 All mandatory fines and penalties were ordered.
13 The defendant appealed the robbery case and
14 there was a very interesting procedural history as
15 regards the co-defendant in the appeal of the robbery
16 case. I don't need to go into that now other than to
17 say that the Supreme Court reversed the conviction in a
18 lengthy opinion. The opinion is found at 249 N.J. 509
19 and that conviction was reversed by the Supreme Court
20 in January of 2022.
21 As best I can tell, and I ask Ms. Lyons to
22 correct me if I'm wrong on this, there was no direct
23 appeal of the murder case. There was, however, a post-
24 conviction relief application that was filed in that
25 matter and it was denied by Judge Pereksta. I have the

1 order here. I just seem to have misplaced that in with
2 all of my other paperwork. Give me just a minute. It
3 was denied by Judge Pereksta or, I'm sorry, dismissed
4 by Judge Pereksta on February 7 of 2022. And that
5 matter involved Mr. Myers being represented by counsel,
6 Michael Pastacaldi, P-a-s-t-a-c-a-l-d-i.
7 And that is what brings us to this matter
8 today. It is an application filed by the defendant in
9 his self-represented capacity to get his guilty plea
10 back on the murder charge. It's an application to
11 vacate the entirety of the guilty plea charge.
12 Ms. Lyons articulates a number of broad
13 concerns here that she says warrant this. First,
14 there's an assertion that the defendant feared not
15 being able to have a fair trial, that he believed he
16 couldn't prove his innocence in the face of the
17 evidence that was being admitted and underlying motions
18 not being resolved in his favor. There is also an
19 assertion that he had a realistic fear which had to do
20 with threats that he was receiving, letters received by
21 him during the time period when he was asserting his
22 innocence, threats from a co-defendant to get him and
23 his family, threats that his family would be killed.
24 And in support of these reasons, it is
25 asserted that the defendant's mother and brother

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 13, 2023, A-002045-22

1 representations during a plea proceeding and the trial
2 court's findings during the plea proceeding generally
3 speaking create a formidable barrier that a defendant
4 must overcome in any subsequent proceeding. It can't
5 be something that is a whimsical change of mind.
6 That's not an adequate basis to set aside the plea.
7 And this Court notes that it goes without saying at
8 this point that I was not the judge who took the plea
9 and I had no ability to make observations regarding his
10 demeanor and candor at the time of the plea proceeding
11 but Judge Billmeier did and he did everything in an
12 appropriate way.
13 The burden is on the defendant to present the
14 plausible basis for his request. And Slater delineates
15 four separate factors. Number 1 is the factor that the
16 defendant has asserted a colorable claim of innocence.
17 There, it must not be just a bare assertion of
18 innocence. That's insufficient to justify withdrawal
19 of a plea. The defendant must present specific
20 credible facts and where possible, point the facts in
21 the record that buttresses his claim.
22 When evaluating a defendant's claim of
23 innocence, Courts may look to evidence that was
24 available to the prosecutor and to the defendant
25 through the discovery practices at the time that the

1 defendant created or entered into his plea. It's not
2 the Court's obligation to conduct a mini trial though.
3 The Court needs to look at the defendant's assertion of
4 innocence and see whether it is more than a blanket
5 bald statement that rests instead on particular
6 plausible facts.
7 Defendant says some interesting things here.
8 He asserts that he was afraid of not being able to have
9 a fair trial. He asserts that he couldn't prove his
10 innocence. He asserts that motions had not been
11 resolved in his favor which caused him to look at his
12 chances of success before a jury a certain way. And he
13 also was influenced by external factors that related to
14 letters that were received during the time period when
15 he maintained his innocence and threat from the co-
16 defendant to get him and his family. He articulates a
17 concern that his family would be killed.
18 These arguments are largely advanced to the
19 Court in oral argument. They're not part of the
20 defendant's pro se pleadings. In fact, those pleadings
21 are very sparse in terms of the information that's
22 there. He speaks in argument today through counsel,
23 letters that he's received and things that have
24 happened to his family. The Court doesn't have any of
25 that information here. There's nothing for the Court

1 It's important to note that during the plea
2 agreement he specifically delineated his obligation or
3 his right to appeal the 404(b) motion, to appeal the
4 motion to suppress. He did not ever appeal, it seems,
5 the underlying homicide case and waited until the
6 Supreme Court acted to raise this specific concern.
7 So, the Court notes that clearly the parties
8 contemplated retaining a lot of rights in terms of
9 appeals, in terms of dealing with what was going on in
10 Pennsylvania but there was never any discussion or
11 preservation of any rights to do anything regarding the
12 homicide conviction if the robbery conviction
13 ultimately got reversed. And clearly to appeal the
14 motion to suppress is to retain the right to
15 collaterally attack the robbery conviction and there
16 was never any effort to retain any right to undo the
17 murder conviction if the robbery conviction was somehow
18 reversed. So I don't think that the nature and
19 strength of the defendant's reasons for withdrawal are
20 persuasive.
21 The things that the defendant says about not
22 being able to get a fair trial, that's a subjective
23 belief that was not articulated to Judge Billmeier. If
24 that was a fear or concern that he had, he didn't share
25 it. In fact, at the beginning of the day on November

1 29, 2016 Judge Billmeier went out of his way to assure
2 the defendant that he would be given a fair trial.
3 The issue of the threats that the defendant
4 asserts he has received, that is something which is
5 simply asserted at this point. It's not proven in any
6 reliable way. There's no separate certification.
7 There's no additional proof of any threats. Now, maybe
8 that proof doesn't exist, maybe it is only verbal,
9 maybe there is nothing in writing. I don't know any of
10 that, but none of that was brought to the Court and the
11 Court cannot look at it as something that is made so
12 simply by somebody saying that it is so. And Ms. Lyons
13 argues in detail what the defendant's views were and
14 what his perceptions are but those don't prove what
15 needs to be proven under these factors as far as I'm
16 concerned.
17 The trial court Judge Billmeier accepted a
18 plea in this agreement and the existence of a plea
19 bargain is a factor which the Court is required to
20 consider under <u>Slater</u>. The judge made the finding that
21 the plea was entered into in a knowing, intelligent and
22 voluntary way, there was an adequate factual basis for
23 the guilty plea. There was no evidence that the
24 defendant had been forced, threatened or coerced and we
25 all know Judge Billmeier never would have accepted the

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 13, 2023, A-002045-22

1 Myers cannot pursue certain additional remedies.
2 He certainly has ever right to appeal this
3 decision of mine and I encourage him to do so if he
4 disagrees with it. He has other rights relating to
5 pursuing a post-conviction relief application if he
6 wants to. He has every right to do those things and he
7 should do what is right for him. But the motion that
8 is before the Court today is denied for the reasons I
9 have asserted on the record. And I will get an order
10 into the portal today.
11 MS. LYONS: Thank you.
12 THE COURT: Thank you, everybody.
13 MS. COOK: Thank you, Judge.
14 * * * * *
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CERTIFICATION

I, MARY POLITO, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CD, playback number 2:32 to 3:49, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

/s/ Mary Polito
MARY POLITO AOC #573
J&J COURT TRANSCRIBERS, INC. DATE: April 13, 2023

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

FILED, Clerk of the Appellate Division, April 23, 2024, **A-002045-22**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A.D. #A-002045-22-T05

STATE OF NEW JERSEY	)	
	)	TRANSCRIPT
v.	)	
	)	OF
JAMAR MYERS,	)	
	)	SOA
Defendant.	)	

Place: Hughes Justice Complex
8th Floor, North Wing
Trenton, New Jersey

Date: March 19, 2024

B E F O R E:

THE HON. LISA ROSE, J.A.D.
THE HON. MORRIS SMITH, J.A.D.

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FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**
FILED, Clerk of the Appellate Division, April 23, 2024, **A-002045-22**

1 JUDGE ROSE: Just a minute to set up. While
2 we're doing that I'll introduce myself. I'm Judge
3 Rose, and to my right is Judge Smith. We're hearing
4 the excessive sentencing calendar today. Rest assured,
5 we're familiar with the files so please highlight for
6 us what you wish to argue. We're still going to need a
7 few more minutes. Just give me a moment.
8 Okay. I can see we're having technical
9 difficulties all around today. There we go. So, when
10 we're ready to put court on, yes, we're all set?
11 Okay .
12 All right. So, the first matter is State v.
13 Jamar Myers. A-2045-22. May I have the appearance of
14 counsel.
15 MS. GIFFORD: Alison Gifford, Assistant
16 Deputy Public Defender for Mr. Myers.
17 JUDGE ROSE: Good morning.
18 MS. REIN: Erin Rein, Assistant Prosecutor on
19 behalf of the State.
20 JUDGE SMITH: Good morning to you. All
21 right. Ms. Gifford, we'll hear from you first.
22 MS. GIFFORD: Good morning, Your Honors, and
23 may it please the court.
24 Jamar Myers was denied his right to withdraw
25 from a plea agreement pursuant to Rule 3:9-9 also known

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 23, 2024, A-002045-22

1 as the conditional plea rule, which permits withdrawal
2 when a defendant successfully appeals from a pretrial
3 ruling. That rule states, if the defendant prevails on
4 appeal, the defendant shall be afforded the right to
5 withdraw his or her plea.
6 In 2016, Mr. Myers entered into a global plea
7 agreement in which he agreed to plead guilty to a
8 felony murder charge in one indictment and an armed
9 robbery charge in another indictment. In exchange, the
10 State agreed to recommend 30 with 30 on the felony
11 murder, concurrent to a 12 NERA sentence on the armed
12 robbery.
13 Mr. Myers' plea was conditioned on his right
14 to appeal the denial of a 404(b) motion from the felony
15 murder case and a suppression motion from the armed
16 robbery case.
17 In 2022, the New Jersey Supreme Court
18 reversed the denial of Mr. Myers' suppression motion,
19 finding the police lacked reasonable suspicion to stop
20 a car he was a passenger in and all evidence found as a
21 result to the stop was, therefore, suppressed. That
22 was State v. Nyema.
23 The armed robbery indictment was subsequently
24 dismissed and Mr. Myers moved to withdraw from his
25 global plea agreement.

1 The court below erroneously denied Mr. Myers'
2 motion, concluding that the did not meet the
3 requirements for withdrawal under State v. Slater.
4 JUDGE ROSE: Right. Where's the support for
5 factor one?
6 MS. GIFFORD: Slater doesn't apply here
7 because when a defendant successfully appeals from a
8 pretrial motion, that plea withdrawal is governed by
9 Rule 3-9-3(f) the conditional plea rule, not by State
10 v. Slater.
11 JUDGE ROSE: Right. So, the reversal was as
12 to the armed robbery indictment not as to felony
13 murder. Didn't he get the least on the felony -- he
14 pled to 30 with 30 didn't he?
15 MS. GIFFORD: Right, but this is all part of
16 a global plea agreement, and so, this --
17 JUDGE ROSE: But what can he get better than
18 a 30 with 30?
19 MS. GIFFORD: He gets to go back to the
20 drawing board because when a defendant successfully
21 appeals from a pretrial ruling, the bargaining
22 positions of the parties are significantly different
23 and that's the rationale behind the conditional plea
24 rule and as this court held in State v. Dillaretto,
25 that rule applies where as here the defendant

FILED, Clerk of the Appellate Division, April 23, 2024, **A-002045-22**

1 simultaneously pleads to multiple indictments. And
2 that's because the rationale behind the conditional
3 plea rule is rooting in like the basic principles of
4 contract law that governs plea agreements.
5 So, here, for example, the negotiating
6 positions of the parties was significantly changed
7 after that armed robbery case is completely off the
8 table.
9 JUDGE ROSE: Right. So, what you're saying,
10 he wouldn't have led to felony murder, he would have
11 pled to something less than felony murder, because
12 there's two different, from what I understand, there's
13 two different indictments plus there were two other
14 indictments that were dismissed.
15 MS. GIFFORD: Yes.
16 JUDGE ROSE: And two VOPS's. So, there was a
17 huge package. I know that armed robbery is out, but
18 where are we going from 30 with 30? Where does it go
19 from there? He's going to have to plead to something
20 other than felony murder.
21 MS. GIFFORD: Well, in this case, with the
22 armed robbery indictment off the table, that actually
23 could impact his felony murder, the felony murder case
24 against him because the 404(b) evidence that was going
25 to come in, in the felony murder case, was tied to that

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 23, 2024, A-002045-22

1 armed robbery case that's now dismissed.
2 So, the strength of the State's case against
3 him, in that felony murder charge, is actually
4 significantly different now that that armed robbery
5 indictment is off the table.
6 And, so, here, the plea transcript actually
7 shows that he was ready to go to trial but the State
8 was saying, well, we're going to, if you go to trial
9 we're going to give you consecutive sentences on all
10 these charges. We're going to seek an extended term on
11 the armed robbery charge. We're going to put
12 everything consecutive. The judge said I'm going to
13 run everything consecutive so, Mr. Myers agreed to
14 plead guilty because of all of this exposure against
15 him.
16 Now, we have one indictment off the table, we
17 have the evidence in the armed robbery case
18 significantly lessened and so, his decision to plead
19 guilty, he now has the leverage, the bargaining
20 positions of the parties is significantly different and
21 Mr. Myers, under the conditional plea rule, has a right
22 to reconsider whether he wants to enter into that plea
23 agreement.
24 JUDGE ROSE: So, he's looking for a
25 negotiation not necessarily for trial. He's looking

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 23, 2024, A-002045-22

1 for a renegotiation for trial.
2 MS. GIFFORD: Yes, and, ultimately, it's Mr.
3 Myers decision whether he wants to go to trial on the
4 felony murder charge. He may very well want to do that
5 now that the evidence against him is different, due to
6 the dismissal of the armed robbery case.
7 JUDGE ROSE: Okay.
8 MS. GIFFORD: So, I think that's most of what
9 I wanted to touch upon. Basically, the conditional
10 plea rule here recognizes that it would be unfair to
11 bind Mr. Myers to a plea agreement after such a drastic
12 change in circumstances and so his decision to plead
13 guilty or go to trial, it's now up to him to decide how
14 he wants to move forward given that the circumstances
15 are significantly different.
16 So, Mr. Myers just respectfully requests that
17 this Court reverse the decision below so he can
18 exercise his right to withdraw from his plea agreement.
19 Thank you.
20 JUDGE ROSE: Thank you. Let me hear from the
21 prosecutor. Oh, I'm sorry, Judge Smith, did you have
22 any questions?
23 JUDGE SMITH: No, Judge.
24 JUDGE ROSE: Jump in because I --
25 JUDGE SMITH: I think this was very

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22
FILED, Clerk of the Appellate Division, April 23, 2024, A-002045-22

1 sufficient. Thank you.
2 JUDGE ROSE: Very well. Thank you.
3 MS. REIN: Good morning, Your Honors, may it
4 please the Court.
5 I do think counsel hit the nail on the head
6 when she said, plea negotiations are similar to
7 contract negotiations and one thing that the State
8 would like to highlight is that the defendant, the
9 appellant in this case, got the benefit of his bargain.
10 Counsel stated the facts very well when she stated
11 there were multiple different indictments, there were
12 different cases, even so far as this defendant had a
13 pending case in Bucks County that was intertwined with
14 his plea to run concurrent.
15 The defendant did get the benefit of the
16 bargain when he made that plea deal, he got the
17 minimum, 30/30. There's nothing manifestly unjust
18 about his sentence.
19 Additionally, although counsel argues that
20 bargaining positions have changed, the law hasn't. If
21 the defendant pled guilty to first degree murder,
22 again, he would still have to be sentenced to the
23 mandatory minimum 30/30. As such, we think that the
24 only party that would be prejudiced here is the State.
25 The reality is, it's been 13, almost 13

1 years, since this incident has happened.
2 JUDGE ROSE: Do you have your witnesses?
3 MS. REIN: I'm sorry, Your Honor.
4 JUDGE ROSE: Do you have your witnesses?
5 MS. REIN: The State does still have their
6 witnesses, however, it's still been 13 years. Memories
7 fade.
8 JUDGE ROSE: Well, how do we know that?
9 Anybody interview them?
10 MS. REIN: I do not know, Your Honor.
11 JUDGE ROSE: I didn't think you did, I'm
12 rhetorical.
13 MS. REIN: It's okay. And as such, we would
14 argue that it would be unfair prejudice to the State to
15 allow this defendant to withdraw his plea.
16 JUDGE ROSE: Okay. All right, thank you.
17 Any rebuttal? You don't have to.
18 MS. GIFFORD: No, Your Honor, I just wanted
19 to, I guess really wanted to reiterate that Mr. Myers
20 does have a right to go to trial if he so pleases as
21 part of having the conditional plea rule now that the
22 evidence against him is different, his sentencing
23 exposure is different. He may very well wish to
24 exercise that right and that's all tied into the
25 conditional plea rule and why he has a right to

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**
FILED, Clerk of the Appellate Division, April 23, 2024, **A-002045-22**

1 withdraw after he was successful on the suppression
2 motion.
3 JUDGE ROSE: Thank you very much.
4 * * * * *
5 **CERTIFICATION**
6 I, ELAINE HOWELL, the assigned transcriber,
7 do hereby certify the foregoing transcript of
8 proceedings on CD, playback number 10:02:56 to
9 10:11:14, is prepared in full compliance with the
10 current Transcript Format for Judicial Proceedings and
11 is a true and accurate non-compressed transcript of the
12 proceedings as recorded, and to the best of my ability.
13
14
15
16 /s/ Elaine Howell
17 ELAINE HOWELL AOC #189
18 J&J COURT TRANSCRIBERS, INC. DATE: April 17, 2024
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FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**
FILED, Clerk of the Appellate Division, March 27, 2024, **A-002045-22**

STATE OF NEW JERSEY
V
JAMAR MYERS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-002045-22
BEFORE: PART F
JUDGES: ROSE
SMITH

ORAL ARGUMENT DATE: MARCH 19, 2024

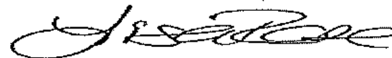
DECIDED DATE: MARCH 19, 2024

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT ON A SENTENCING CALENDAR PURSUANT TO R. 2:9-11, IT IS HEREBY ORDERED AS FOLLOWS:

Having considered the record and argument of counsel, we find that the court did not abuse its discretion in weighing the factors under State v. Slater, 198 N.J. 145 (2009), and thus we affirm the denial of defendant's motion to withdraw the guilty plea. State v. McDonald, 211 N.J. 4 (2012).

FOR THE COURT:



LISA ROSE, J.A.D.

MERCER 11-08-00833-I
14-02-00232-I

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Appellate Section
ALISON PERRONE
Deputy Public Defender
31 Clinton Street, 9th Floor, P.O. Box 46003
Newark, New Jersey 07101
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JENNIFER N. SELLITTI
Public Defender

March 28, 2024

Hon. Lisa Rose, J.A.D.
Hon. Morris G. Smith, J.A.D.

Re: State v. Jamar Myers
Docket No. A-2045-22

Honorable Judges:

Please accept this letter in lieu of a more formal brief in support of Jamar Myers's motion for reconsideration pursuant to Rule 2:11-6. Mr. Myers seeks reconsideration of this Court's decision affirming the denial of his motion to withdraw from his guilty plea.[1]

In affirming the decision below, this Court found that the trial court "did not abuse its discretion in weighing the factors under State v. Slater, 198 N.J.

[1] Pursuant to Rule 2:11-6(a), a copy of this Court's decision is annexed to this letter-brief.

145 (2009)." (Ma 1)[2] But Mr. Myers's withdrawal motion was not governed by Slater. Rather, it was governed by Rule 3:9-3(f) ("Conditional Pleas"), which requires that defendants be permitted to withdraw from their guilty pleas following successful appeals from pretrial rulings. See R. 3:9-3(f) ("If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea.") (emphasis added); see also State v. Diloreto, 362 N.J. Super. 600, 616 n.6 (App. Div. 2003) (acknowledging that the right to withdraw under the conditional plea rule applies when "the defendant simultaneously pleads to multiple indictments and the pre-plea motion relates to only one"). In other words, in the case of a conditional plea, the plea is just that – conditional.

Thus, while a defendant who files a motion to withdraw pursuant to Rule 3:9-3(e) (before sentencing) or Rule 3:21-1 (after sentencing) must meet the factors articulated in State v. Slater, 198 N.J. 145 (2009), a defendant who enters into a conditional plea and succeeds on appeal has a right to withdraw under Rule 3:9-3(f), and Slater provides no grounds for denying the withdrawal motion.

---

[2] Ma = appendix to this motion
Sa = SOA appendix
1T = plea transcript dated November 29, 2016
2T = sentencing transcript dated July 7, 2017
3T = motion transcript dated March 3, 2023

The conditional plea rule reflects the "basic principles of contract law" that govern plea agreements. State v. Means, 191 N.J. 610, 622 (2007); see also id. at 618 (noting that plea bargaining affords a "mutuality of advantage" to both defendant and the State). If the parties' bargaining positions changes – which is what happens when a defendant successfully appeals from a pretrial ruling – then the defendant has a right to reconsider his options and decide whether he still wishes to plead guilty or would prefer to go to trial.

Our courts have made clear that if "misinformation imparted to the defendant could have directly induced him to enter the plea, he should be allowed to withdraw from the bargain." State v. Taylor, 80 N.J. 353, 365 (1979). A defendant who pleads guilty based on an erroneously decided pretrial ruling has always pleaded guilty based on "misinformation," as the defendant did not have an accurate picture of the State's leverage against him when he agreed to plead guilty. The conditional plea rule recognizes that it would be "manifestly unjust to hold the defendant to his plea" after such a change in circumstances. State v. Kovack, 91 N.J. 476, 482 (1982) (citation omitted).

Applying the law above to Mr. Myers's case, he has a right to withdraw from his guilty plea under the conditional plea rule because he successfully appealed from the pretrial denial of his suppression motion. State v. Nyema,

249 N.J. 509 (2022). As background, in 2016, Mr. Myers entered into a global plea agreement in which he agreed to plead guilty to a felony murder charge in one indictment (Ind. 14-02-232) and an armed robbery charge in another indictment (Ind. 11-08-83). (Sa 16-22) In exchange, the State agreed to recommend a 30-year sentence with 30 years of parole ineligibility on the felony murder charge, concurrent to a 12-year NERA sentence on the armed robbery charge. (Sa 16)[3] Mr. Myers's plea was explicitly conditioned on his right to appeal the denial of a N.J.R.E. 404(b) motion from the felony murder case, and a suppression motion from the armed robbery case. (Sa 16, 18)[4]

In 2022, the New Jersey Supreme Court reversed the denial of Mr. Myers's suppression motion, finding that the police lacked reasonable suspicion to stop the car that Mr. Myers was a passenger in, and thus all

[3] The State also agreed to have Pennsylvania run pending charges out of Bucks County concurrent to Mr. Myers's New Jersey sentence. (1T 5-10 to 14, 14-16 to 15-24; 2T 4-23 to 5-20; Sa 18) Counsel's understanding is that the Pennsylvania charges were never pursued.

[4] While defendants seeking to appeal from pretrial rulings other than suppression of physical evidence or entry into pretrial intervention must preserve the right to appeal in the plea agreement (Sa 16), guilty pleas are always conditioned on the right to withdraw if a pretrial motion to suppress physical evidence was wrongly decided. Diloreto, 362 N.J. Super. at 615-16 (citing R. 3:5–7(d); R. 3:9–3(f)). Though not necessary, Myers explicitly conditioned his plea on the right to appeal from the denial of his suppression motion. (Sa 16)

evidence found as a result of the stop was suppressed. Nyema, 249 N.J. at 531-35. The armed robbery indictment was subsequently dismissed, and Mr. Myers moved to withdraw from his global plea agreement. (Sa 36, 38-44) Mr. Myers had a right to withdraw from his plea pursuant to Rule 3:9-3(f) and Diloreto, which states that the right to withdraw applies where, as here, "the defendant simultaneously pleads to multiple indictments and the pre-plea motion relates to only one." 362 N.J. Super. at 616 n.6.

It is not necessary for Mr. Myers to demonstrate why he may want to withdraw from his plea agreement, as the conditional plea rule states that a defendant in his circumstances "shall" be permitted to withdraw, regardless of the consequences. R. 3:9–3(f); see also Diloreto, 362 N.J. Super. at 616 (acknowledging that if a defendant "succeeds on the appeal, and there is other evidence to warrant prosecution, a defendant may choose not to withdraw a guilty plea if a favorable sentence recommendation was made as part of a negotiated disposition, or because charges dismissed incident to the negotiated plea would be resurrected upon withdrawal," but that "our plea preservation rules give the defendant the right to withdraw a guilty plea when the right to appeal survives the plea and defendant succeeds on appeal").

Notably, however, the State's leverage against Mr. Myers has changed such that he may wish to withdraw from his plea agreement and proceed to

trial on the felony murder indictment or attempt to negotiate a plea to a lesser charge in that indictment. On the day that he pleaded guilty, Mr. Myers was ready to go to trial, but he decided to plead guilty due to his sentencing exposure from a combination of the indictments against him. The State told Mr. Myers that if he went to trial on the felony murder indictment and was acquitted, it would seek an extended term on the armed robbery indictment, which would subject Mr. Myers to life in prison. (1T 4-11 to 25) The State also threatened to seek consecutive sentences on all pending indictments if Mr. Myers proceeded to trial. (1T 5-24 to 6-7)

Because Mr. Myers's armed robbery case has been dismissed, his sentencing exposure is significantly less than when he decided to plead guilty, as he is no longer facing a potential life sentence if he is acquitted of felony murder, nor is he facing the threat of consecutive sentences on the two indictments. The evidence against Mr. Myers in the felony murder case is also weaker, as the N.J.R.E. 404(b) evidence that was going to be introduced at his felony murder trial came from the dismissed armed robbery case. (3T 10-19 to 11-23) Put simply, the negotiating positions of the parties changed because of Mr. Myers's successful appeal. It is for this reason that the conditional plea rule permits defendants in Mr. Myers's position to withdraw from their plea agreements.

Mr. Myers respectfully requests that this Court reconsider its decision affirming the trial court's denial of his withdrawal motion under the inapplicable Slater standard.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY:__________________________
ALISON GIFFORD
Assistant Deputy Public Defender
Attorney ID: 310912019

Dated: March 28, 2024

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

FILED, Clerk of the Appellate Division, April 04, 2024, **A-002045-22, M-004001-23**

ORDER ON MOTION

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	DOCKET NO.: A-002045-22T5
STATE OF NEW JERSEY	MOTION NO.: M-004001-23
V	BEFORE: PART F
JAMAR MYERS	JUDGE(S): LISA ROSE MORRIS G. SMITH

MOTION FILED: 03/28/2024 BY: JAMAR MYERS
ANSWER(S) FILED: BY:

SUBMITTED TO COURT: April 04, 2024

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 4th day of April, 2024, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION FOR RECONSIDERATION GRANTED

SUPPLEMENTAL:

The motion for reconsideration is granted. Accordingly, this court's March 19, 2024 is vacated and the matter is transferred to the plenary calendar. The Clerk's Office to issue a scheduling order.

FOR THE COURT:

LISA ROSE, J.A.D.

11-08-00833-I
14-02-00232-I MERCER
DRV

CASE SUPPLEMENTAL REPORT

Printed: 10/17/2012 13:55

Trenton Police Department OCA: *11005402*

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Case Status: *PENDING-ACTIVE* Case Mng Status: *PENDING-ACTIVE* Occured: *04/29/2011*

Offense: *HOMICIDE-MURDER*

During this dive operation a number of 9mm rounds of ammunition were recovered as well as what appeared to be the internal hammer of a firearm. However, the firearm that was described by Mr. Drew was not recovered during this dive.

MONDAY JUNE 6, 2011

I was again contacted by Sergeant Crutchley who stated that the TEAMS Unit Central would be conducting a dive operation in the area near the entrance of Stacy Park in an attempt to locate the firearm believed to have been thrown into the rive by Jamar Myers. During this search Trooper Graeber was able to see a silver colored revolver with a wooden handle. Trooper Graebel believed this weapon matched the description provided to Sergeant Crutchley on Friday May 20, 2011. The handgun was located approximately 40 feet south and thirty feet west of a drainage pipe on the bank of the river. For more complete details refer to report submitted by the New Jersey State Police regarding this search.

Once the weapon was recovered it was processed and photographed by Detective Pacillo, of the Trenton Police Crime Scene Unit. Upon completion of the processing of the weapon it will be forwarded to the New Jersey State Police Ballistic Laboratory for ballistic analysis.

FRIDAY JUNE 24, 2011

Detective Sergeant Chris Doyle received a phone call from Investigator Fitzgerald of the Mercer County Department of Corrections who stated that Jamar Myers wanted to speak to someone about the Brunswick Pharmacy but not in the building. Upon hearing this Detective Sergeant Robert Rios prepared a writ requesting that Jamar Myers be turned over to the Trenton Police Department for questioning. After reviewing the writ Judge Ankowicz granted the request.

Arrangements were made and Jamar Myers was conveyed to Trenton Police Headquarter by Detective Crusen and myself. Mr. Myers was escorted to a third floor interview room in the Criminal Investigation Bureau that was equipped with a recorder that enabled us to capture both video and audio.

At approximately 1955 hours the interview with Jamar Myers began and Mr. Myers made it clear that he requested this interview and that he asked Correction Officer Morgan to put him in touch with someone who is investigating the Pharmacy Murder because he wanted to talk about it. Mr. Myers was provided with a Mercer County Rights Form, which he signed.

I then asked Mr. Myers what exactly he wanted to talk about and he stated that some people were coming to his house and bothering his family. Mr. Myers was not sure he knew who the people were and he believed that the people might have been either Detective Crusen or myself. We both assured Mr. Myers that we were at his residence one time when we executed the search warrant. Mr. Myers appeared to be satisfied with our answer and seemed to drop the subject. As the conversation continued Mr. Myers acknowledged that he has a problem with E Pills, meaning Ecasty Pills. I agreed with Mr. Myers that he has a number of problems and that his addiction to pills was one of his problems. At

ANGELO J. ONOFRI
ACTING MERCER COUNTY PROSECUTOR
MERCER COUNTY COURTHOUSE
BROAD AND MARKET STREETS
TRENTON, NEW JERSEY 08608
(609) 989-6305

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY

INDICTMENT NO. 11-08-0833
FILE NO. 11-1409

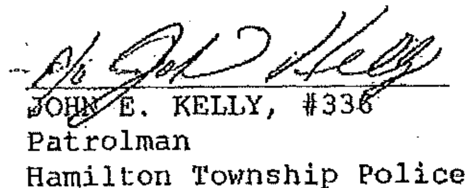
STATE OF NEW JERSEY Plaintiff v. JAMAR MYERS AND PETER NYEMA, Defendants	**CRIMINAL ACTION** CERTIFICATION

I, JOHN E. KELLY, Hamilton Township Police Department, Badge #336, being of full age, certify as follows:

1. I am a patrolman in the Hamilton Township Police Department.
2. I have been assigned to property and evidence room in the Hamilton Township Police Department since October 2013. As such, I am familiar with the facts of this case.
3. In August 2015, I was contacted by Detective Dean McCleese of the Mercer County Prosecutor's Office regarding in-car video recording from Hamilton Police

Department case number 11-18237, relating to an armed robbery involving Jamar Myers and Peter Nyema.

4. I checked the CAD system to determine which police vehicles were involved in that investigation.
5. I then checked the L3 in-car camera video recording system for all car numbers listed on the CAD report related to this investigation.
6. The L3 system indicated that a video may have been recorded by a police vehicle around the time of the armed robbery.
7. The L3 systems indicated that the video would need to be restored utilizing back-up disc #795.
8. I then checked our back-up disc inventory and was unable to locate disc #795.
9. I located an authorization form, dated October 19, 2012, to destroy back-up discs #1052 through #1461. Those discs were destroyed June 5, 2014.
10. Based on that document and my investigation, I believe back-up disc #795 was destroyed prior to October 19, 2012.



JOHN E. KELLY, #336
Patrolman
Hamilton Township Police

Dated: November 18, 2015

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS

STATE OF NEW JERSEY, Plaintiff, v. Jamar Myers AND Peter Nyema, Defendants.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY LAW DIVISION - CRIMINAL PART INDICTMENT NO. 11-08-0833 CRIMINAL ACTION
STATE OF NEW JERSEY, Plaintiff, v. Jamar Myers, Defendant.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY LAW DIVISION - CRIMINAL PART INDICTMENT NO. 14-02-0232 CRIMINAL ACTION OPINION REGARDING N.J.R.E. 404(B) EVIDENCE

FILED
SEP 30 2016
SUPERIOR COURT OF NJ
MERCER VICINAGE
CRIMINAL DIVISION

MICHAEL GRILLO, ESQ. AND MICHAEL NARDELLI, ESQ., ASSISTANT MERCER COUNTY PROSECUTORS, FOR THE STATE OF NEW JERSEY.

EDWARD J. HESKETH, ESQ. AND RONALD S. GARZIO, ESQ., FOR THE DEFENDANT, JAMAR MYERS.

STEVEN LEMBER, ESQ., FOR THE DEFENDANT, PETER NYEMA.

~~HONORABLE ROBERT C. BILLMEIER, J.S.C.~~

September 30, 2016

The State seeks to introduce the surveillance video evidence from the 7-Eleven robberies in Hamilton Township and Pennsylvania to identify Myers as the suspect in his trial for the Brunswick Avenue Pharmacy homicide in Trenton and as the suspect in the attempted robbery at the Vizzoni's Pharmacy in Hamilton Township under N.J.R.E. 404(b). The State also asserts Nyema was the second suspect with his face covered at the Hamilton Township 7-Eleven robbery as depicted on the surveillance video. Under a N.J.R.E 404(b)analysis, the State seeks to have not only Myer but also Nyema joined to the Myers homicide at the Brunswick Avenue Pharmacy and Myers attempted robbery at Vizzoni's Pharmacy joined for trial purposes.

The court finds the identity of individual(s) depicted by the four surveillance videos is unknown since in each case the suspect(s) has his face covered. Co-defendant Drew has entered into a negotiated plea with the State in consideration for his cooperation at co-defendants trials, ie. to testify that Myers is the masked suspect in the Brunswick Avenue Pharmacy and the Vizzoni's Pharmacy crimes since he drove Myers to both locations. In addition, Drew is expected to testify that approximately a week later, he drove Myers to the 7-Eleven store in Pennsylvania and is the individual shown in the video. Approximately an hour later, Drew will testify he drove both Myers and Nyema to the Hamilton Township 7-Eleven to commit the robbery at that location and Myers and Nyema are the masked persons identified in the surveillance video. The State will also produce evidence at defendants' trial that Myers, Nyema and Drew were stopped in an automobile that was speeding away from the Hamilton

Township 7-Eleven robbery. A search of the car produced cash and clothing worn by the suspects depicted in the video at the Hamilton Township 7-Eleven robbery and for one of the suspects shown at the Pennsylvania 7-Eleven robbery occurring one hour earlier. However, Drew's credibility will be subject to cross-examination to show he "gave up" his co-defendants in exchange for a generous plea bargain. Drew also has a history of changing his stories and has a prior criminal record. Drew's credibility will also be attacked for allegedly writing a letter to Myers asserting everything he told the police was a lie concerning the co-defendants involvement in these robberies.

The State contends because of Defendant Myers' left-handedness and distinctive gait showing a bowing of his right leg from his childhood surgery and distinct clothing worn by the suspect, he is clearly identifiable in the two 7-Eleven robbery video surveillances and this evidence is admissible pursuant to N.J.R.E. 404(b) to demonstrate Myers' identity in the pharmacy Indictment. In opposition, Defendants Myers and Nyema argue the State's proposed other-wrongs and/or acts evidence to prove their identity does not meet the admissibility requirements established by N.J.R.E. 404(b) as interpreted and applied by State v. Cofield, 127 N.J. 328 (1992), and its progeny.

I.

The New Jersey Supreme Court has declared that "[o]ther crimes evidence is considered highly prejudicial." State v. Vallejo, 198 N.J. 122, 133 (2009) (citing State v. Stevens, 115 N.J. 289, 309 (1989)). While evidence of past crimes or wrongs may be relevant, such evidence

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

A challenge to a suppression denial is, however, preserved by the express terms of R. 3:5-7(d). See, e.g., State v. Velez, 335 N.J. Super. 552 (App. Div. 2000), certif. dism'd 167 N.J. 624 (2001), so holding as to a claim of racial profiling as the basis for a traffic stop. Pretrial orders admitting confessions are, however, not comprehended by that rule. State v. Smith, 307 N.J. Super. 1 (App. Div. 1997), certif. den. 153 N.J. 216 (1998).

While other issues may be preserved by entry of a conditional plea pursuant to R. 3:9-3(f), a conditional plea will only preserve those issues that are the subject of the condition. See State v. Szemple, 332 N.J. Super. 322 (App. Div.), certif. den. 165 N.J. 604 (2000) (conditional plea preserving speedy trial claim did not preserve claim of denial of right of self-representation). See also State v. Smith, 307 N.J. at 8, noting the exception of R. 3:28-6(d) (pretrial intervention appeal).

A guilty plea in the municipal court will not constitute a waiver on de novo appeal of a challenge of the constitutionality of the applicable statute or ordinance. See Comment 4.2 on R. 3:10-2.

It has been held that an unimpeached guilty plea by defendant will bar his subsequent claim of malpractice against an attorney who represented him in connection with the criminal investigation leading up to the plea. See Alampi v. Russo, 345 N.J. Super. 360, 370-371 (App. Div. 2001).

3. Plea Cut-Off Date. See R. 3:9-3(g) and Comment on that rule.

4. Juvenile Defendants. A juvenile's guilty plea is subject to all the procedural requirements of this rule. State in the Interest of J.R., 244 N.J. Super. 630 (App. Div. 1990).

The court, however, has the discretion to refuse the plea in order to preserve the State's right to seek transfer pursuant to R. 5:22-2. State in Interest of G.W., 206 N.J. Super. 50 (App. Div.), certif. den. 102 N.J. 355 (1985).

A juvenile is excused from paying the mandatory fine under N.J.S. 2C:35-15(a) when the juvenile's guilty plea, with deferred disposition, results in a dismissal of the complaint. State in Interest of M.L., 436 N.J. Super. 636, 640 (Ch. Div. 2013). Note that the mandatory fine for juveniles adjudicated delinquent was eliminated by L. 2019, c. 363, §4.

See further as to juveniles, R. 5:21A and Comment thereon. With respect to withdrawal of a guilty plea, see R. 3:9-3(d) and R. 3:21-1 and Comments thereon.

3:9-3. Plea Discussions; Agreements; Withdrawals

(a) Plea Discussions Generally. The prosecutor and defense counsel may engage in discussions relating to pleas and sentences and shall engage in discussions about such matters as will promote a fair and expeditious disposition of the case, but except as hereinafter authorized the judge shall take no part in such discussions.

(b) Entry of Plea. When the prosecutor and defense counsel reach an agreement concerning the offense or offenses to which a defendant will plead on condition that other charges pending against the defendant will be dismissed or an agreement concerning the sentence that the prosecutor will recommend, or when pursuant to paragraph (c) the defendant pleads guilty based on indications by the court of the maximum sentence to be imposed, such agreement and such indications shall be placed on the record in open court at the time the plea is entered.

(c) Disclosure to Court. On request of the prosecutor and defense counsel, the court in the presence of both counsel may permit the disclosure to it of the tentative agreement and the reasons therefor in advance of the time for tender of the plea or, if no tentative agreement has been reached, the status of negotiations toward a plea agreement. The court may then indicate to the prosecutor and defense counsel whether it will concur in the tentative agreement or, if no tentative agreement has been reached and with the consent of both counsel, the maximum sentence it would impose in the event the defendant enters a plea of guilty, assuming, however, in both cases that the information in the presentence report at the time of sentence is as has been represented to the court at the time of the disclosure and supports its determination that the interests of justice would be served thereby. If the agreement is reached without such disclosure or if the court agrees conditionally to accept the plea agreement as set forth above, or if the plea is to be based on the court's conditional indication about the sentence, all the terms of the plea, including the court's concurrence or its indication concerning sentence, shall be placed on the record in open court at the time the plea is entered. Nothing in this Rule shall be construed to authorize the court to dismiss or downgrade any charge without the consent of the prosecutor.

(d) Agreements Involving the Right to Appeal. Whenever a plea agreement includes a provision that defendant will not appeal, the court shall advise the defendant that notwithstanding the inclusion of this provision, the defendant has the right to take a timely appeal if the plea agreement is accepted, but that if the defendant does so, the plea agreement may be annulled at the option of the prosecutor, in which event all charges shall be restored to the same status as immediately before the entry of the plea.

Page 1

In the event the defendant files an appeal in a case in which the plea agreement included a provision that the defendant will not appeal, the State must exercise its right to annul the plea agreement no later than seven days prior to the date scheduled for oral argument or submission without argument.

(e) Withdrawal of Plea. If at the time of sentencing the court determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel or by imposing sentence in accordance with the court's previous indications of sentence, the court may vacate the plea or the defendant shall be permitted to withdraw the plea.

(f) Conditional Pleas. With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea. Nothing in this rule shall be construed as limiting the right of appeal provided for in R. 3:5-7(d).

(g) Plea Cut Off. After the pretrial conference has been conducted and a trial date set, the court shall not accept negotiated pleas absent the approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice.

Note: Adopted July 17, 1975 to be effective September 8, 1975. Paragraph (d) adopted July 29, 1977 to be effective September 6, 1977; paragraph (d) redesignated as (e); paragraph (f) adopted July 21, 1980 to be effective September 8, 1980; paragraphs (b), (c) and (e) and captions for paragraphs (b) and (c) amended May 23, 1989 to be effective June 15, 1989; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraphs (a) and (f) amended, paragraph (g) adopted July 13, 1994 to be effective January 1, 1995; caption to paragraph (g) amended July 5, 2000 to be effective September 5, 2000.

SUPREME COURT COMMENTARY

A "material change of circumstance" means a change occurring after the pretrial conference that strengthens or weakens the case of either the prosecution or the defense sufficiently to warrant a change in their plea-bargaining position. It may be either a change in fact or in the knowledge of counsel. Some typical examples that may constitute material change of circumstance are when new charges are filed after the plea cut-off has been imposed, a justifiable change of attorney has occurred, a witness becomes no longer available, a mistrial or hung jury occurs, or some evidence is newly discovered. However, a change that would ordinarily have been anticipated by a reasonably competent prosecutor or defense attorney, including some of the foregoing examples, is not material, nor is a change that results from counsel's lack of ordinary diligence. A "protracted trial" is one that will probably last two weeks or more. One example of manifest injustice is a sexual assault case in which the victim is a child: if the trial is likely to have a substantial adverse impact on the child, the court may grant waiver. "Manifest injustice" does not exist simply because the parties are able and willing to enter into a plea bargain on or before the date of trial.

A plea cut-off rule was recommended by twelve members of the Supreme Court Criminal Practice Committee in a dissent filed with the 1992-94 Criminal Practice Committee Recommendations on Rules Necessary to Implement the Criminal Division Operating Standards. See 137 {N.J.L.J.} 54, 76-77. That recommendation was adopted and further modified by the Supreme Court as set forth above.

COMMENT

History and Analysis of Rule Amendments: See Online Edition

1. Overview.
2. Paragraph (a); Plea Discussions Generally.
3. Paragraph (b); Entry of Plea.
4. Paragraph (c); Disclosure to Court.
   - 4.1. General principles.
   - 4.2. Prosecutorial disclosure.
   - 4.3. Terms of plea agreement.
   - 4.4. Rejection of plea; void plea.
5. Paragraph (d); Agreements Involving the Right to Appeal.
6. Paragraph (e); Withdrawal of Plea.
   - 6.1. Defendant's withdrawal.
   - 6.2. Prosecutor's withdrawal.
   - 6.3. Performance of plea agreement.
7. Paragraph (f); Conditional Pleas.
8. Paragraph (g); Plea Cut Off.

1. Overview. This rule follows generally the guidelines set forth in the Administrative Memorandum adopted by the Supreme Court in 1970. See 94 N.J.L.J. Index Page 1 (1971). And see State v. Korzenowski, 123 N.J. Super. 454, 456 (App. Div. 1973), certif. den. 63 N.J. 327 (1973), in which the text of the Memorandum was reproduced. It follows as well the practice which had developed pursuant thereto, and, as pointed out in the Report of the Committee on Criminal Practice, 98 N.J.L.J. Index Page 330 (1975), is in substantial accord with the procedure approved in the A.B.A. Standards Relating to Pleas of Guilty, Sec. 3-3 (Approved Draft 1968). See also, generally, as to the role of plea negotiation in the criminal justice process, State v. Cullars, 224 N.J. Super. 32 (App. Div. 1988), certif. den. 111 N.J. 605 (1988).

2. Paragraph (a); Plea Discussions Generally. Paragraph (a) authorizes plea negotiation discussions between the prosecutor and defense counsel but without the court's participation, except as authorized by paragraph (c) of the rule. This rule "institutionalizes" plea bargaining. See State v. Bellamy, 178 N.J. 127, 134

Page 2

FILED, Clerk of the Appellate Division, May 29, 2024, **A-002045-22**

Form was promulgated by Administrative Directive #15-01 issued October 12, 2001.

The criminal case manager's office in each county will, on request, provide the latest version of these forms to counsel. They are available in English and Spanish.

The appropriate forms should be completed, at least in duplicate, before the defendant appears before the judge to plead guilty. The original is handed to the judge who after taking the plea gives it to the criminal division manager for filing. A copy is given to the prosecutor for his/her file. Defense counsel should have a copy for his/her file.

The execution of the form or forms by the defendant will weigh heavily against a later contention by the defendant that the plea was not entered voluntarily and understandingly.[2] However, the execution of a form does not conclusively establish that the plea was entered voluntarily and understandingly.[3] Therefore, at the time the plea is tendered, merely taking the basic steps outlined in § 12.18, and executing the form still leaves room for the defendant to later raise the allegations discussed in § 12.18. In order to foreclose successful challenges by the defendant to the entry of the guilty plea, detailed questioning of the defendant is required when he/she tenders the plea. The questions the defendant should be asked when he/she tenders a guilty plea are set forth in § 12.33.

§ 12.21 Statement by defendant—Forms

Research References
West's Key Number Digest, Criminal Law ⚷273(4.1)
C.J.S., Criminal Law §§ 384, 389

These forms are frequently revised. Contact the Criminal Division Manager to get the latest versions. They are in the September 9, 2002 issue of the New Jersey Law Journal, 169 N.J.L.J. 1070.

§ 12.22 Conditional guilty pleas

Research References
West's Key Number Digest, Criminal Law ⚷1026.10(5)
C.J.S., Criminal Law § 1680

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[2] State v. Herman, 47 N.J. 73, 219 A.2d 413 (1966).

[3] State v. Deutsch, 34 N.J. 190, 168 A.2d 12 (1961).

Page 3

FILED, Clerk of the Appellate Division, May 29, 2024, A-002045-22

Rule 3:9-3(f) provides for "conditional pleas" of guilty.[1] A "conditional plea" of guilty is a guilty plea where the defendant reserves the right to appeal from the adverse determination of any specified pretrial motion. If the defendant wins the appeal, he/she is then afforded an opportunity to withdraw his/her guilty plea. The kinds of pretrial motions that a defendant might want to appeal following a "conditional plea" of guilty are: (1) a determination that a statement of the defendant is admissible; (2) a determination that a pretrial identification of the defendant is admissible; (3) a determination that a sound recording is admissible; (4) an order denying a motion to suppress evidence in circumstances in which the defendant contended that the evidence should have been suppressed on grounds other than a violation of the Fourth Amendment or Art. I, par. 7 of the New Jersey Constitution, and (5) any other determination regarding the admissibility of evidence made at a pretrial hearing.

A defendant may enter a "conditional plea" only with the consent of the prosecutor and the approval of the court. In order to appeal an adverse determination of a pretrial motion following the entry of a guilty plea, defense counsel must state on the record:

(1) that his/her client is entering a "conditional plea" of guilty pursuant to Rule 3:9-3(f);

(2) that his/her client reserves the right to appeal from the adverse determination of one or more *specified* pretrial motions.

The prosecutor should only consent to the entry of a "conditional plea" of guilty in those rare situations where the decision of the appellate court will dispose of the case. If an appellate decision adverse to the State will prevent the State from proving a prima facie case, then the case is an appropriate one for the entry of a conditional plea. In such a situation, the decision of the appellate court will dispose of the case because it will result in a dismissal of the indictment. However, in circumstances where an appellate decision adverse to the State will not prevent the State from proving a prima facie case, then the prosecutor should not consent to the entry of a "conditional plea." In such circumstances, the "conditional plea" might only serve to postpone the trial. Postponement will aid the defense. Witnesses for the State may be lost, and memories may dim. The prosecutor will be left trying an old stale case.

Rule 3:5-7(d) gives a defendant a right to appeal from a denial

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[Section 12.22]

[1] If the defendant reserves the right to appeal one or more adverse determinations but does not specify another issue or issues, then the latter issue or issues are waived. State v. Szemple, 332 N.J.Super. 322, 753 A.2d 732 (App.Div.2000).

Page 21

FILED, Clerk of the Appellate Division, October 11, 2024, **A-002045-22**, **AMENDED**

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The Honorable Judges of the
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Post Office Box 006
Trenton, New Jersey 08626

Re State of New Jersey (Plaintiff-Respondent)
v. Jamar Myers (Defendant-Appellant)

Docket No. A-002045-22

Criminal Action: On Petition for Reconsideration of Denial of Defendant's Appeal of Motion to Withdraw Guilty Plea in the Superior Court, Law Division (Criminal), Mercer County

Sat Below: Honorable J. Peter Warshaw, J.S.C.

Honorable Judges:

Please accept this letter memorandum, pursuant to R. 2:6-2(b), in lieu of a more formal brief submitted on behalf of the State of New Jersey.

TABLE OF CONTENTS

COUNTERSTATEMENT OF PROCEDURAL HISTORY 1

A. April 29, 2011 Homicide and Armed Robberies

B. May 7, 2011 Armed Robbery

COUNTERSTATEMENT OF FACTS 5

LEGAL ARGUMENT 6

POINT I DENIAL OF DFENDANT'S PLEA WAS PROPER.. 6

a. THE CONDITIONAL PLEA RULE DOES NOT APPLY TO DEFENDANT'S SEPARATE PLEA

b. THE TRIAL COURT CORRECTLY APPLIED SLATER

c. RELITIGATON OF THIS MATTER IS A VIOLATION OF VICTIM'S CONSTITUTIONAL RIGHTS

CONCLUSION 12

COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

A. April 29, 2011, Homicide and Armed Robberies

On February 26, 2014, a Mercer County Grand Jury returned Indictment Number 14-02-0232-I, charging defendant with murder, first degree, contrary to N.J.S.A. 2C:11-3a (Count I); murder as an accomplice, first degree, contrary to N.J.S.A. 2C:11-3a; 2C:2-6 (Count II); felony murder, first degree, contrary to N.J.S.A. 2C:11-3a(3) 1 (Count III); robbery, first degree, contrary to N.J.S.A. 2C:15-1 (Count IV); four counts of possession of a weapon for an unlawful purpose, second degree, contrary to N.J.S.A. 2C:39-4a (Counts V, VI, VII, XII); two counts of unlawful possession of a weapon, second degree, contrary to N.J.S.A. 2C:39-5b (Counts VIII, IX); tampering with evidence, fourth degree, contrary to N.J.S.A. 2C:28-6(1) (Count X); and attempted robbery, first degree, contrary to N.J.S.A. 2C:15-1; 2C:5-1 (Count XI). Da1-13. These charges resulted from two related crimes committed by defendant on April 29, 2011: first, was defendant's attempted robbery of Vizzoni's Pharmacy in Hamilton; second, was defendant's armed robbery and murder at the Brunswick Avenue Pharmacy in Trenton.

[1] Due to the unrelated nature of defendant's two cases, these sections have been separated for accuracy of the record.

The State filed a pretrial motion pursuant to N.J.R.E. 404(b) to introduce evidence of other wrongs and/or other acts. On September 30, 2016, the trial court granted, in part, and denied, in part, this motion.

On November 29, 2016, defendant pled guilty to first-degree felony murder, Count III of Indictment Number 14-02-0232-I. The State agreed to dismiss all other counts of the indictment and to recommend the mandatory minimum sentence. On July 27, 2017, defendant was sentenced in accordance with this plea deal to thirty-years of incarceration without parole. Defendant acknowledged what he was pleading to, acknowledged the concurrent nature of the sentences, and stated he did not have any questions about the consequences of this plea. Defendant was also advised of the burden related to attempting to undo a guilty plea.

Defendant appealed all of his pretrial rulings together. On April 12, 2019, the Appellate Division affirmed the trial court's decision on the N.J.R.E. 404(b) motion. On February 12, 2021, the Supreme Court of New Jersey issued an Order in which it declined to hear defendant's case regarding the N.J.R.E. 404(b) issue.

On April 14, 2022, defendant filed a motion to withdraw his guilty plea. After hearing oral argument, the trial court denied defendant's motion on March 3, 2022.

On March 13, 2023, defendant filed a notice of appeal of the denial of the motion to withdraw the guilty plea with the Superior Court, Appellate Division. On March 19, 2024, the Appellate Division heard oral argument in this matter and

affirmed the denial of defendant's motion to withdraw the guilty plea. Defendant filed a Motion for Reconsideration on March 28, 2024.

B. May 7, 2011 Armed Robbery

On August 23, 2011, a Mercer County Grand Jury returned Indictment Number 11-08-0833-I, charging defendant with robbery, first degree, contrary to N.J.S.A. 2C:15-1 (Count I); theft by unlawful taking, third degree, contrary to N.J.S.A. 2C:20-3a (Count II); aggravated assault, fourth degree, contrary to N.J.S.A. 2C:12-1b(1) (Count III); terroristic threats, third degree, contrary to N.J.S.A. 2C:12-3a (Count IV); possession of a firearm for an unlawful purpose, second degree, contrary to N.J.S.A. 2C:39-4a (Count V); unlawful possession of a handgun, second degree, contrary to N.J.S.A. 2C:39-5b (Count VI); possession of a defaced firearm, fourth degree, contrary to N.J.S.A. 2C:39-3d (Count VII); theft by receiving stolen property, third degree, contrary to N.J.S.A. 2C:20-7a (Count VIII); unlawful taking of a means of conveyance, fourth degree, contrary to N.J.S.A. 2C:20-10d (Count X). Da14-25. These charges were a result of defendant's armed robbery of a 7-Eleven in Hamilton that occurred on May 7, 2011.

Defendant subsequently filed a motion to suppress evidence. On October 4, 2013, the trial court granted defendant's motion to suppress in part. Specifically, the court suppressed the gun found in the vehicle, but found that the clothing and money found in a separate area of the vehicle would be admissible.

On November 29, 2016, the State, in an attempt to resolve all of defendant's cases, offered defendant a plea deal to resolve this case. Defendant accepted, and plead guilty to first-degree robbery, Count I of Indictment Number 11-08-0833-I, in exchange for a recommendation of a 12-year term of incarceration, subject to the No Early Release Act, to run consecutive to the sentence on Indictment Number 14-02-0232-I. On July 27, 2017, defendant was sentenced in accordance with this plea deal.

Defendant appealed all of his pretrial rulings in a single appeal. On April 12, 2019, the Appellate Division affirmed the trial court's decision on the suppression motion. Subsquently, the New Jersey Supreme Court granted limited certification, solely of the suppression issue in *this* case. The Supreme Court declined to hear the issues regarding defendant's other case.

On January 25, 2022, the Supreme Court issued an opinion reversing the denial of defendant's suppression motion on the 7/11 robbery. The Supreme Court dismissed defendant's conviction for this case and remanded the matter to the trial court. At that time, the State declined its right to further prosecute this matter because defendant was already serving a thirty-year sentence on his felony murder conviction.

COUNTERSTATEMENT OF FACTS

During the plea colloquy, defendant admitted that on April 29, 2011, he entered the Brunswick Pharmacy on Brunswick Avenue in Trenton, New Jersey. He further admitted he was armed with a handgun, and entered the store for the purpose of obtaining Percocet with a fraudulent prescription. Defendant admitted that after entering the store, he decided to commit armed robbery. Specifically, defendant admitted that he pulled out the gun and demanded that the victim give him Percocet. Most importantly, defendant stated that during the course of this attempted robbery the gun "went off" and shot and killed the victim. (1T:21-12 to 23-1).

At the motion to withdraw the guilty plea, the trial court noted the heavy burden was on the defendant. The court highlighted that defendant's assertion of innocence was a blanket, bald statement. Additionally, the court found defendant's reason for withdrawal weak. Defendant knew the consequences of his plea and his reasonable expectations were met. Most notably, the trial court found "the parties contemplated retaining a lot of rights in terms of appeal [at the time of the plea]… but there was never any discussion or preservation of any rights to do anything regarding the homicide conviction if the robbery conviction ultimately got reversed." (2T:48-7 to 48-13). Finally, the court acknowledged the rights the State gave up when entering this plea and highlighted the unfairness which would result if defendant were permitted to withdraw his plea.

LEGAL ARGUMENT

POINT I

a. THE CONDITIONAL PLEA RULE DOES NOT APPLY

Defendant argues the trial court wrongly denied his motion to withdraw his guilty plea under the conditional plea rule. R. 3:9-3(f). Defendant cites basic contract law in support of this argument. In short, defendant explicitly states that as a result of the pretrial motion in the 7-eleven case being overturned, he is entitled to withdraw his guilty plea on this pharmacy robbery, a wholly separate case.

The conditional plea rule states that "[w]ith the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea." R. 3:9-3. Additionally, R. 3:5-7(d) expressly permits "a defendant to challenge on appeal an unlawful search and seizure of evidence after entering a guilty plea." State v. Davila, 443 N.J. Super. 577, 586, (App. Div. 2016).

There is no law, nor case law, that allows the conditional plea rule to apply to a defendant's multiple unrelated indictments and pleas. This is a matter of common sense and logic. Rather, our courts have already determined that the conditional plea rule does not apply to multiple unrelated indictments, unless there was explicit

intention from both the State and defendant at the time of the pleas. State v. Dunns, No. A-0851-19T1 (App. Div. Mar. 9, 2020) (slip op. at 6).

In Dunns, the defendant pled to separate indictments, and was sentenced to serve one sentence concurrent to the other. Thereafter, defendant appealed the trial court's denial of his motion to sever on one of his two cases. The appellate court reversed the trial court's decision. Defendant was then allowed to withdraw his plea in that case only. The State then moved to withdraw the second plea, citing principles of basic contract law and fairness. See ibid.

The appellate court upheld the denial of the State's motion, and illustrated the difference between plea agreements and general contract law. Dunns, slip op. at *5. The appellate court found the "two plea agreements were separate and were not intended by both parties to represent a single global resolution of all criminal matters pending against defendant." Ibid. In this decision, the court highlighted that it was not "expressly state[d] on the record that the second agreement was part and parcel of the first agreement. Nor did the prosecutor expressly set as a condition of its plea offer that the State could withdraw from the second agreement if defendant were permitted to withdraw from the first agreement." Dunns, slip op. at *6. The appellate division's opinion made it clear that "[i]n the absence of a clear indication in the record that *both* parties intended for the two agreements to rise or fall together," plea

agreements on separate indictments should be viewed separately for the purposes of withdrawing a guilty plea. Dunns, slip op. at *1.

Following the persuasive opinion and reasoning in Dunns, here the crimes underlying the concurrent – but separate – sentences were committed by defendant over a week apart. The cases each had different facts, victims, and codefendants. Additionally, the indictments to which defendant pled were filed years apart. When the State articulated the plea deals on the record, it was clear the pleas were separate. (1T:5-15 to 5-20). The State specifically offered, "that he plead guilty to murder, to receive a 30-year period of New Jersey State Prison with a 30-year period of parole ineligibility. That would run concurrent to not only the Pennsylvania charge but to the robbery in Hamilton as well, I believe the number we placed on it was 12 NERA." Ibid. A review of the record illustrates that the State clearly intended two separate, distinct resolutions, while allowing defendant the benefit of serving those two separate, distinct sentences at the same time. This is further evidenced by the fact that, at the time of the guilty pleas, the trial court took the factual basis for the guilty pleas one at a time. (1T:21-12 to 24-18). Additionally, there are two separate Judgement of Convictions in this matter. Da64-70.

It is clear defendant pled to two unrelated indictments. In addition, the trial court created a thorough record at the time of the plea which is absent any proof that the State intended to allow defendant to withdraw from the second agreement if

defendant were permitted to withdraw from the first agreement. Contrary to defendant's assertions, the reversal of a pretrial motion in an unrelated case is wholly irrelevant when determining whether a defendant is entitled to withdraw his plea in the case at hand. As such, the conditional plea rule is not applicable in the current case.

b. THE TRIAL COURT CORRECTLY APPLIED THE SLATER FACTORS.

Defendant states that the trial court's decision must be reversed because it applied the wrong standard of law to defendant's motion to withdraw his guilty plea. Here, the trial court correctly analyzed defendant's motion to withdraw his plea using Slater factors. See State v. Slater, 198 N.J. 145, 151 (2009).

In Slater, the Court outlined a framework to assess claims to withdraw a plea:

> [I]n evaluating motions to withdraw a guilty plea, trial courts should consider the following factors: (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused.
>
> [State v. Lipa, 219 N.J. 323, 332 (2014)].

At the hearing for the motion to withdraw, the trial court discussed these factors and their applicability in the present case extensively. (2T:44-13 to 52-1.) The court found that defendant was merely making a bald assertation of innocence.

(2T:45-18 to 46-8). Additionally, the trial court found the nature of defendant's reasons for withdrawal unpersuasive, and the strength of the reasons to be without proof. (2T:49-3 to 49-16). Lastly, the trial court found clear prejudice to the State and unfair advantage to the defendant. (2T:50-14 to 51-20).

"The withdrawal of a guilty plea is within the broad discretion of the trial court." State v. Bellamy, 178 N.J. 127, 135 (2003); see also R. 3:21-1. "We will ... reverse the denial of a motion to withdraw a guilty plea 'only if there was an abuse of discretion which renders the lower courts' decision clearly erroneous.' " State v. Hooper, 459 N.J. Super. 157, 180 (App. Div. 2019) (quoting State v. Simon, 161 N.J. 416, 444 (1999)). "Although the ordinary 'abuse of discretion' standard defies precise definition, it arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.' " Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

In the present case, the trial court applied the correct standard of law with fleshed out reasoning and thorough explanation. As cited above, the trial court went through every factor individually and found that every factor weighed against allowing defendant to withdraw his plea. It is clear the trial court was well within its discretion when denying defendant's guilty plea.

c. RELITIGATION OF THIS MATTER IS A VIOLATION OF VICTIM'S CONSTITUTIONAL RIGHTS

The New Jersey Legislature has a clear interest in protecting the rights of victims of crimes. The Victims' Rights Amendment (VRA) set forth enumerated rights of crime victims. N.J. Const. art. 1, para. 22. The New Jersey Constitution specifically states, "A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system." N.J. Const. art. I, ¶ 22. The court must interpret the above principles and apply them in every case involving a victim, as to not violate the rights of those who have already been violated. In the present case, this Court must balance the defendant's constitutionally based interests with the victim's constitutional rights.

On April 29, 2011, this Defendant murdered Arjun Reddy Dyapa. He was a husband. He was a father. He was a brother. He was an uncle. The victims in this case, who survived Mr. Dyapa, have the right to fairness, compassion, and respect from the criminal justice system. They waited over five years for Defendant to admit that he murdered their loved one. Nothing can bring back Mr. Dyapa, but at least his family got justice and closure. Defendant's newest attempt to relitigate a crime that he has already admitted to is directly against the interest of these victims. These

victims will be retraumatized. As directly stated in the Constitution, it is the job of the this Court to respect these victims.

CONCLUSION

Based on the aforementioned reasons, the State respectfully requests that this Court deny defendant's Motion for Reconsideration of Denial of Defendant's Appeal of Motion to Withdraw Guilty Plea.

Respectfully submitted,

THERESA L. HILTON
Acting Mercer County Prosecutor

BY: ERIN REIN
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FILED, Clerk of the Appellate Division, October 18, 2024, **A-002045-22**

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October 18, 2024

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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-2045-22
INDICTMENT NO. 14-02-0232-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from the Denial of a Motion to Withdraw a Guilty Plea,
v.	:	Law Division, Mercer County.
JAMAR MYERS,	:	Sat Below:
Defendant-Appellant.	:	Hon. Peter E. Warshaw, Jr., J.S.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 1

LEGAL ARGUMENT 1

HAVING PREVAILED ON APPEAL, DEFENDANT IS ENTITLED TO WITHDRAW HIS PLEA. 1

CONCLUSION 8

INDEX TO APPENDIX

PAGE NOS.

State v. Adl, A-5530-16T3, 2019 WL 3714467
(App. Div. Aug. 7, 2019) ....

PROCEDURAL HISTORY AND STATEMENT OF FACTS

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

LEGAL ARGUMENT

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

HAVING PREVAILED ON APPEAL, DEFENDANT IS ENTITLED TO WITHDRAW HIS PLEA.

Almost three years ago, before the Supreme Court, Myers won a reversal of the denial of his motion to suppress evidence. Ever since then he has been trying to do exactly what his plea agreement allowed him to do in this very circumstance: seek to vacate that agreement and proceed to trial. The State's brief puts forth three reasons he is not entitled to the benefit of the bargain he struck. Two should not be considered by this Court, due to the novelty of one and the frivolity of the other. All are meritless. The denial of the motion to withdraw his plea must be reversed.

The State does not lead with the only argument it has pursued since Myers began attempting to vacate his plea two years ago: that he is not entitled

to do so under State v. Slater, 198 N.J. 145 (2009). The lack of focus on this point is likely because it is indefensible. Slater does provide one mechanism to withdraw a plea, due to a colorable claim of innocence. Id. at 151. But there are many mechanisms to withdraw a plea that have nothing to do with innocence and to which Slater has no applicability. For example, a defendant is entitled to withdraw a plea when:

- He pleaded to an illegal sentence. State v. Patterson, 435 N.J. Super. 498, 518 (App. Div. 2014).
- There is an insufficient factual basis to support the plea. State v. Barboza, 115 N.J. 415, 424 (1989).
- He was not informed that the sentence including a period of parole ineligibility. State v. Kovack, 91 N.J. 476, 485 (1982).
- He was misinformed about immigration consequences of his plea. State v. Gaitan, 209 N.J. 339, 371-72 (2012).
- He was not informed that he would be subject to parole supervision after he completes his sentence. State v. Johnson, 182 N.J. 232, 241 (2005).

In short, although some plea withdrawal motions have to meet the Slater standard in order to prevail, most do not. This is one of the motions that does not have to meet the Slater instead. Instead, Myers is entitled to withdraw his plea because he bargained for that right as part of the plea agreement.

The State does not dispute that when Myers pleaded guilty to charges from both indictments on the same day he explicitly preserved his right to

appeal the motion to suppress physical evidence under the conditional plea rule on the single plea form that encompassed all of the charges. Instead, the State argues for the first time that Myers's conditional plea somehow did not encompass both indictments he was pleading guilty to. This argument must be rejected.

As an initial matter, this argument was waived by the State failing to raise it below. It is well-established that "the points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review." State v. Witt, 223 N.J. 409, 419 (2015) (citing State v. Robinson, 200 N.J. 1, 19 (2009)). "The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves." Robinson, 200 N.J. at 19. "Parties must make known their positions at the suppression hearing so that the trial court can rule on the issues before it." Witt, 223 N.J. at 419 (emphasis added). If a party fails to "properly present[ ]" an issue "to the trial court when an opportunity for such a presentation is available," the court on appeal "will decline to consider" the issue. Ibid.

The State never disputed below that all parties understood the plea agreement to provide Myers the right to withdraw from the plea agreement in its entirety of he prevailed on appeal. Therefore there is no record of this

belatedly introduced intent the State asserts it had eight years ago for "two separate, distinct resolutions," (an assertion belied by the fact that there was in fact one resolution for all of the pending charges). (State's brief 8) The State cannot now for the first time invent a new rationale for its opposition to this motion and assert unsubstantiated facts in support of that opposition. It had one complaint for the last two years: Myers did not meet the Slater standard. That is the only issue that should be considered on appeal.

Substantively, the State marshals no legal support for its proposition that when two separate indictments cannot be encompassed in one plea bargain, a defendant winning an issue he preserved on appeal requires that the defendant be allowed to withdraw from the agreement as a whole. The State ignores the published case of State v. Diloreto, 362 N.J. Super. 600, 615-16 (App. Div. 2003), in which this Court held that right to withdraw from the entirety of a plea agreement after prevailing on appeal, as codified in the conditional plea rule, applies when "the defendant simultaneously pleads to multiple indictments and the pre-plea motion relates to only one." Id. at 616 n.6. It cites instead one unpublished case, State v. Dunns, A-0851-19T1, 2020 WL 1130327

(App. Div. Mar. 9, 2020),[1] which aside from not being precedential, does not support the State's argument.

Dunns is a case about limiting the State's right to withdraw from a plea agreement, not the defendant's right. In Dunns, "[t]he State and defendant negotiated two plea agreements, entered on different dates, to resolve the multitude of charges" that were charged in "several indictments." Id. at *1. The defendant won an appeal on the denial of a severance motion and sought to withdraw from only one plea agreement. Ibid. The State sought to vacate both agreements, arguing that they were part of a global resolution. Ibid. This Court affirmed the order denying the State's motion, noting that while our Court Rules "explicitly preserv[e] a defendant's right to seek withdrawal from a plea agreement under certain circumstances . . . '[o]ur Rules do not contain a corresponding right of the State to withdraw from a plea agreement.'" Id. at *5 (quoting State v. Means, 191 N.J. 610, 620 (2007)). See also State v. Warren, 115 N.J. 433, 443 (1989) ("[A]lthough notions of fairness apply to each side, the State as well as the defendant, the defendant's constitutional rights and interests weigh more heavily in the scale.").

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[1] The State does not state that there are no contrary unpublished opinions known to counsel, as required by Rule 1:36-3.

In contrast, in this case the defendant is seeking to withdraw from a plea by using the right to do so granted to him by the conditional plea rule. He also pleaded guilty to all of the charges from both indictments on the same day, making a clear a global resolution, in contrast to the two separate plea agreements in Dunn. This Court has properly understood that when a defendant pleads guilty to multiple charges from separate indictments in order to resolve all of those indictments together, that decision is informed by an understanding of the totality of the evidence against him, including by adverse evidentiary rulings. A defendant who prevails on one of those issues is now facing a materially different set of circumstances and can withdraw his plea of he so chooses. See, e.g., State v. Adl, A-5530-16T3, 2019 WL 3714467, at *6 (App. Div. Aug. 7, 2019) (reversing the denial of an order to suppress that stemmed from the facts of one case and "remand[ing] to afford defendant an opportunity to withdraw his guilty pleas to three offenses[,]" from multiple unrelated indictments) (Ra 1-5).[2] See also State v. Hager, 462 N.J. Super. 377, 388-89 (App. Div. 2020) (where the defendant was convicted of resisting arrest at trial and then entered an unconditional plea to a severed charge, this Court reversed the resisting conviction based on an evidentiary ruling and vacated

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[2] Ra – Appendix to defendant's reply brief. Pursuant to Rule 1:36-3, counsel is unaware of any unpublished opinions known to counsel.

the guilty plea because it "accept[ed the] defendant's representation" that the improper ruling "led directly" to the plea being entered).

In short, this Court understands that a defendant who enters a conditional plea agreement and has bargained for the right to appeal certain issues has bargained for the right to withdraw from that agreement in its entirety if he prevails on appeal. Myers gave up all of the constitutional rights attendant to his right to a trial when he lost two critical pretrial motions. The unfavorable suppression ruling was linchpin that allowed evidence of the crimes charged in one indictment to be admissible in a trial for the crimes alleged in the other indictment. That loss made the evidence against him in both cases significantly worse for him. And so he accepted a "final order to resolve this murder case as well as any other pending charges against Mr. Myers[;]" in other words, a global, unified resolution to all charge. (1T 5-1 to 6-1) When the Supreme Court reversed the denial of the motion to suppress, the bargain was no longer as much of a benefit to Myers. And so he wants to withdraw from it, exactly as the conditional plea rule allows.

As to the State's final argument against withdrawal, regarding the VRA, Myers responds only to note that the cursory argument is also tantamount to waiver. <u>State v. Williams</u>, 461 N.J. Super. 80, 105 (App. Div. 2019) (declining to address a cursory argument raised in a footnote); <u>N.J. Dep't of Env't Prot. v.</u>

Alloway Twp., 438 N.J. Super. 501, 505 n. 2 (App. Div. 2015) ("An issue that is not briefed is deemed waived upon appeal.").

CONCLUSION

For the reasons stated above, the denial of Jamar Myers's motion to withdraw from his guilty plea must be reversed.

Respectfully submitted,

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Dated: October 18, 2024

2019 WL 3714467
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Mikiel A. ADL, Defendant-Appellant.

DOCKET NO. A-5530-16T3
|
Argued May 6, 2019
|
Decided August 7, 2019

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 11-07-1083, 11-07-1088 and 11-12-1872.

Attorneys and Law Firms

Lauren S. Michaels, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Lauren S. Michaels, of counsel and on the briefs).

Jane C. Schuster, Assistant Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Jane C. Schuster, of counsel and on the briefs).

Before Judges Sabatino and Sumners.

Opinion

PER CURIAM

***1** Defendant Mikiel Adl was indicted for controlled dangerous substance (CDS) and weapons offenses arising out of a warrantless search of a house in Edison. Following the trial court's denial of his motion to suppress evidence seized in that search, defendant reached a global plea agreement involving that indictment and two other indictments. He pled guilty to second-degree conspiracy to distribute CDS while in possession of a firearm and second-degree certain persons not to possess a weapon, which both arose out of the warrantless search, and second-degree witness tampering. In accordance with the plea agreement, he was later sentenced to an aggregate prison term of twelve years with a six-year period of parole ineligibility. Pursuant to Rule 3:5-7(d), defendant preserved his right to appeal the denial of his suppression motion.

Defendant raises the following arguments on appeal:

POINT I

BECAUSE NEITHER THE ARREST WARRANT FOR A NON-RESIDENT NOR CONSENT OR APPARENT AUTHORITY ALLOWED POLICE TO ENTER AND SEARCH THE HOME, THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

A. The Police Entry Into The Dwelling Cannot Be Justified By The Arrest Warrant For Non-Resident Bradley.

B. Adl's Act Of “Stepping Aside” For The Police Did Not Equate To Consent To Enter.

C. Adl's Act Of Answering The Door Did Not, By Itself, Provide The Police With A Reasonable Basis To Believe That He Had Apparent Authority To Consent To A Search Of The Premises.

D. The State Has Waived Any Exigent-Circumstances Argument By Declining To Raise It Below.

POINT II

BECAUSE THE IMPOSITION OF THE DISCRETIONARY PAROLE BAR VIOLATED ALLEYNE V. UNITED STATES, THE PAROLE DISQUALIFIER ON THE WITNESS-TAMPERING COUNT MUST BE VACATED. IN THE ALTERNATIVE, BECAUSE THE SENTENCING JUDGE IMPOSED A DISCRETIONARY PAROLE BAR WITHOUT ARTICULATING ITS REASONS FOR DOING SO, RESENTENCING IS REQUIRED.

A. The Imposition Of The Discretionary Parole Bar Violated Our State And Federal Constitutions.

B. Alternatively, The Sentencing Judge Imposed The Discretionary Parole Bar Without Making The Requisite Findings, And Therefore, Resentencing Is Required.

Prior to oral argument, we requested the parties to submit supplemental briefs addressing the implications of our decision in State v. Bradley, Nos. A-3707-15, A-0060-16 (App. Div. Sep. 28, 2018), certif. denied, 237 N.J. 318 (2019),

where we reversed the decision of a different trial court denying a similar motion to suppress evidence arising from the same warrantless search that defendant sought to suppress, and our Supreme Court's decision in State v. Kiriakakis, 235 N.J. 420 (2018), regarding the constitutionality of imposing a period of parole ineligibility on the witness tampering conviction under N.J.S.A. 2C:43-6(b) without a jury trial. In his submission, defendant argues:

POINT I

THE COURT PROPERLY RECOGNIZED IN BRADLEY THAT THE EXACT SAME ENTRY AND SEARCH AT ISSUE IN THIS CASE WAS UNCONSTITUTIONAL, AND BECAUSE THE FACTS ADDUCED AT BRADLEY'S AND ADL'S SUPPRESSION HEARING[S] WERE LEGALLY INDISTINGUISHABLE. SUPPRESSION IS REQUIRED.

***2** POINT II

ALTHOUGH THE ISSUE RAISED IN POINT [II A] OF DEFENDANT'S OPENING BRIEF IS CONTROLLED BY THE SUPREME COURT'S DECISION IN STATE V. KIRIAKAKIS, RESENTENCING IS STILL REQUIRED FOR THE REASONS EXPRESSED IN POINT [II B].

Having considered these arguments in light of the applicable law and the record, we reverse the denial of defendant's motion to suppress based on essentially the same reasoning we followed in Bradley, as applied to the present record. Accordingly, we vacate the convictions for second-degree conspiracy to distribute CDS while in possession of a firearm and second-degree certain persons not to possess weapons, and remand so that defendant can move to vacate his guilty pleas. That being said, for the sake of completeness, we conclude the record does not support his contention that the court did not set forth its reasons for imposing a discretionary parole disqualifier for the witness tampering charge – which he now concedes did not violate his constitutional rights.

I

Since the events leading up to the law enforcement officers' decision to conduct the warrantless search were fully detailed in Bradley, we need not repeat them here. Suffice it to say, that more than ten police officers went to the Edison house to execute an arrest warrant against Malcom A. Bradley – believing he was present in the house – who was accused of fatally shooting a victim while they were in separate cars waiting at a stoplight in Plainfield. As a result of the evidence seized during the warrantless search, defendant and five co-defendants, including Bradley, were charged in forty-nine counts of Indictment No. 11-07-01083. Defendant was named in eight of those counts; CDS and weapons offenses, and a charge of second-degree conspiracy to distribute CDS while in possession of a firearm, N.J.S.A. 2C:39-4.1 and 2C:5-2. On that same date, the one-count Indictment No. 11-07-01088, also arising from the warrantless search, charged him with second-degree certain persons not to possess a weapon, N.J.S.A. 2C:39-7.

Defendant moved to suppress the evidence seized in the warrantless search. At the suppression hearing, the State presented the sole testimony of Sergeant Michael Triarsi of the Union County Prosecutor's Office. He stated that at 11:44 p.m. on March 25, 2011, possessing an arrest warrant, he knocked on the door of a house in Edison to apprehend Bradley. He was wearing plain clothes and had a police badge around his neck. Law enforcement did not know that defendant was present in the house nor did they suspect him of any wrongdoing at that time.

According to Sgt. Triarsi, a man, who he later identified as defendant, opened the door. Sgt. Triarsi asked, "where is he [?]" and defendant stepped to the side, which Sgt. Triarsi said he understood to mean "[c]ome on in." The officers located Bradley in the den located to the right of the front door. The officers found a handgun "underneath" Bradley and observed narcotics, baggies, and "things of that nature" in his immediate vicinity. The police arrested Bradley, secured defendant and his girlfriend Heather Ganz, along with three other occupants, and applied for a search warrant. Bradley admitted to possession of the handgun and the narcotics in his vicinity, but denied possession of anything else in the house. During the subsequent warrant search, additional contraband was found.

***3** In addition to Sgt. Triarsi's testimony, the State played the home surveillance video, which it obtained from co-defendant Ganz. The video was not played at Bradley's motion to suppress hearing. Although the video is blurry and interrupted by flashes of light, it shows that when Sgt. Triarsi knocked on the front door there were two other law enforcement officers on the steps directly behind him. The officers do not appear to have their guns drawn, although they are holding their right hands close to their sides. It appears from the video that after

defendant opened the door, he moved left, and Sgt. Triarsi and two officers on the steps entered the residence followed by six other officers, some of whom appear to be in uniform.

Defendant was the only witness presented on his behalf. He testified that as he opened the door to leave the house the police shined a light in his face, threw him to the ground and handcuffed him. Although he was dating Ganz at the time of the search, he denied having the authority to let anyone into the house and said that it was not his intention to let the police enter.

After reserving decision, the court issued an order and a written decision denying the motion to suppress.[1] The decision was based upon the court's assessment of whether there was an exception to the prohibition against warrantless searches because defendant gave third-party consent to the police to search the house. Illinois v. Rodriguez, 497 U.S. 177, 186 (1990). The court found the police officers' belief that defendant had the authority to consent to a search was objectively reasonable in view of the attendant facts and circumstances. Id. at 188-89; State v. Bruzzese, 94 N.J. 210, 219, 221 (1983). The court held:

> Based on all the testimony presented ..., the facts establish that [defendant] opened the door in response to the police knocking; he did not object to police entry or state in any way, shape, or form that the police were not allowed to come in; police asked about Bradley's presence and [defendant] stepped aside in response to the question. The act of stepping aside by [defendant] can fairly be interpreted as granting permission to enter the premises. The reasonableness of that inference is also buttressed by [defendant's] failure to verbalize any objection to the officer's search into the residence.[ ] Based on these circumstances, the court finds that the police had an objectively reasonable basis to believe that [defendant] possessed common authority over the property to be searched and that his actions and inactions granted the officers consent to enter the residence.

1 Although the court was aware that Bradley had previously moved in Middlesex and Union vicinages to suppress the evidence obtained from the warrantless search of the house, there is no indication in the record that the court was aware of those rulings or reviewed the transcripts or opinions rendered in those cases.

Ten months later, defendant reached a global plea agreement resolving three indictments. He pled guilty to second-degree conspiracy to distribute CDS while in possession of a firearm under Indictment No. 11-07-01083 (count two) and second-degree certain persons not to possess weapons under Indictment No. 11-07-01088 (count one). He also pled guilty to second-degree witness tampering under Indictment No. 11-12-01872 (count three), which arose from a separate incident involving threats defendant made to a woman arising from their mutual involvement in a legal proceeding. In accordance with the plea agreement, defendant was sentenced to: a six-year prison term with a three-year parole bar for second-degree conspiracy to distribute CDS while in possession of a firearm; a five-year prison term with a five-year parole bar for second-degree certain persons not to possess weapons to run concurrent to the CDS offense; and a six-year prison term with a discretionary three-year parole bar under N.J.S.A. 2C:43-6(b) for second-degree witness tampering to run consecutive to the CDS offense and to run concurrent to the certain persons offense.

II

***4** We first address defendant's contention that the trial court erred in denying his motion to suppress because the law enforcement officers' warrantless search in the house was not justified because they did not have valid consent to enter the house to execute the arrest warrant against Bradley. The State disagrees based upon the court's factual findings and legal conclusions that valid consent to enter the house was given by defendant.[2]

2 Issues regarding the scope of the law enforcement officers' execution of the arrest warrant and the search incident to an arrest, and whether there were

exigent circumstances to enter the house, were not present in this appeal as they were in Bradley.

Under our standard of review, we must defer to the trial court's findings of fact "so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015) (internal citations omitted); see also State v. Gonzales, 227 N.J. 77, 101 (2016) (recognizing that factual findings will be upheld if there is sufficient credible evidence in the record to support the findings).

However, we owe no deference to the trial court's conclusions of law. See State v. Hinton, 216 N.J. 211, 228 (2013) (internal citations omitted). Nor are we "obliged to defer to clearly mistaken findings ... that are not supported by sufficient credible evidence in the record." State v. Gibson, 218 N.J. 277 (2014).

To a considerable extent, the court's ruling on the suppression motion embody a mixture of factual and legal determinations, and the significance, under search-and-seizure principles, of factual details that emerged at the hearing. Our scope of review is therefore a mixed one, depending upon the particular facet of the trial court's decision in question.

It is well-established that a resident of property may vitiate the warrant requirement by consenting to a search by the police. State v. Domicz, 188 N.J. 285, 305 (2006); see also State v. Legette, 227 N.J. 460, 474-75 (2017) (ruling the State failed to establish consent to justify the warrantless police search of a residence).

An "essential element" of such consent to conduct a warrantless search is the individual's "knowledge of the right to refuse [it]." State v. Johnson, 68 N.J. 349, 353-54 (1975); see also Legette, 227 N.J. at 475 (reversing a finding of consent by a defendant who had been stopped by an officer on a reasonable suspicion of illegal drug use, because the State had not shown the defendant "thought he could refuse [the officer's] search into his apartment"). In a noncustodial setting such as the present one, the State does not necessarily have to establish that police officers expressly advised the person who allowed their search of the right to refuse consent, but that burden remains on the State to demonstrate that person's knowledge of right to refuse. Johnson, 68 N.J. at 354.

"[C]onsent to a warrantless search ... must be shown to be unequivocal, voluntary, knowing, and intelligent." State v. Sugar, 108 N.J. 151, 156 (1987). Consent is a factual question determined by an examination of the totality of the circumstances. State v. Koedatich, 112 N.J. 225, 264 (1988).

Applying these legal standards, as we did in Bradley, we respectfully disagree with the court's conclusion that defendant's opening of the house's front door and standing to the side, gave the large group of assembled police officers valid consent to enter and search the dwelling. Sgt. Triarsi did not testify that he or any of the other officers present advised defendant of his right to refuse consent. Nor did the State establish that defendant was already aware of that right.

***5** The video clearly shows that defendant leaned aside after he encountered the officers at the door. See State v. S.S., 229 N.J. 360, 374-81 (2017) (clarifying the limited scope of appellate review of factual findings based on video evidence, but declaring that "[a]ppellate courts have an important role in taking corrective action when factual findings are so clearly mistake – so wide of the mark – that the interest of justice demand intervention"); see also State v. A.M., 237 N.J. 384, 395-96 (2019). This is insufficient proof that he knowingly and voluntarily consented to their search into the dwelling. Wearing garb that identified him as a law enforcement officer, Sgt. Triarsi knocked on the door with several other officers assembled behind him. Rather than identify himself or converse with defendant, Sgt. Triarsi immediately demanded to know "[W]here is he[?]"; referring to Bradley.

The totality of circumstances objectively would have been intimidating or alarming for a citizen opening the door to this encounter. As the Court observed in Johnson, "[m]any persons, perhaps most, would view the request of a police officer to make a search as having the force of law." 68 N.J. at 354. Hence, "[u]nless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful." Ibid.; see also State v. Rice, 115 N.J. Super. 128, 130-31 (App. Div. 1971) (ruling that where a police officer knocked on an apartment door and entered, without any words being spoken between the officer and the person who opened the door, the search was not with knowing consent and instead was, "[a]t best ... permitted in submission to authority").

Accordingly, we are constrained to rule that the court's conclusion that defendant's actions and inactions granted the officers consent to enter the residence is unpersuasive and not supported by substantial credible evidence. We thus conclude the consent exception to a warrantless search does not apply.

We likewise are unpersuaded that the record suffices to establish defendant had apparent authority to allow the officers into this private dwelling. The United States Supreme Court has applied the apparent authority doctrine "when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their search is a resident of the premises[.]" Rodriguez, 497 U.S. at 186 (emphasis added); see also Georgia v. Randolph, 547 U.S. 103, 109 (2006) (noting that police may reasonably rely upon consent given by "a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant." (emphasis added)).

The Court has warned in this context that Fourth Amendment rights must not be "eroded ... by unrealistic doctrines of 'apparent authority.' " Stoner v. California, 376 U.S. 483, 488 (1964). The trial court's analysis here threatens such an erosion. It is not objectively reasonable for police to assume that whenever an adult answers a door to a dwelling, the adult has the apparent authority to consent to the police entering.

None of the officers asked defendant if he owned or lived in the house. They obtained no information before entering about his reason for being on the premises. Defendant's mere conduct in opening the door in response to Sgt. Triarsi's knocking, and in thereafter leaning his body away from the officers' path, does not provide sufficient objective indicia that he possessed the right to decide who may enter the premises.

Indeed, the police appeared to know little about the house other than they suspected Bradley was inside. They had no information about who lived there or whether defendant was their relative or a guest of the residents. There simply is not enough evidence in this record to conclude, as a matter of law, that defendant possessed the apparent authority to consent to the police search.

***6** Having concluded that the record or the applicable law does not support the consent exceptions to the warrant requirement, we must consider the ramifications of that conclusion. It is clear that the firearm and CDS that were seized from the house after their illegal warrantless search were "fruits of the poisonous tree" and should have been suppressed. See State v. O'Neill, 193 N.J. 148, 171 n.13 (2007). Consequently, this matter must be remanded to afford defendant an opportunity to withdraw his guilty pleas to three offenses and have the judgment of conviction vacated.

III

In his initial appellate brief, defendant contends a remand is necessary for resentencing because the imposition of a discretionary parole bar on the witness tampering conviction violated Alleyne v. United States, 570 U.S. 99 (2013). However, in his supplemental brief, he acknowledges that our Supreme Court rejected the identical argument in State v. Kiriakakis, 235 N.J. 420, 442 (2018). Yet, he continues to press forward with the alternative argument he initially raised that the court imposed a discretionary parole bar without articulating its reasons for doing so. State v. Bessix, 309 N.J. Super. 126, 129-30 (App. Div. 1998); see also State v. Sainz, 107 N.J. 283, 290 (1987).

Normally, we would not address this issue because we reverse the court's denial of defendant's motion to suppress and, therefore, a remand is necessary so that defendant can withdraw his guilty pleas. However, for the sake of completeness, we address and reject defendant's remaining contention.

The record clearly provides that the court set forth its reasons for imposing defendant's sentence in accordance with the plea agreement. In weighing the sentencing factors, the court noted defendant's age and his extensive and significant criminal history (including parole violations) and concluded that aggravating factor three, N.J.S.A. 2C:44-1(a)(3) (the risk of re-offense), applied. The court specifically found that no mitigating factors applied. Thus, there is no basis for a remand based upon alleged errors made at sentencing.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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