SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3184-22-T2
INDICTMENT NO. 22-07-635-I

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	On Appeal from a Judgment of Conviction of the Superior Court
Plaintiff-Respondent,	:	of New Jersey, Law Division, Bergen County.
v.	:	
DALE EDWARDS,	:	Sat Below:
Defendant-Appellant.	:	Hon. Carol Novey Catuogno, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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TRANSCRIPT KEY

"Da" – Defendant's appendix

"PSR" – Presentence Report

"1T" – January 4, 2023 (motion)

"2T" – February 3, 2023 (motion)

"3T" – March 31, 2023 (plea)

"4T" – April 28, 2023 (sentencing)

PRELIMINARY STATEMENT

At each step in what was purportedly supposed to be an ordinary traffic stop, Officer Steven Oliver violated either some policy, statute or constitutional right. First, Oliver failed to turn on his body-worn camera ("BWC") until he was already speaking with the driver, Mr. Dale Edwards, in violation of the BWC statute, which requires that officers activate their cameras upon initiating a stop. Moreover, the audio did not turn on until thirty seconds after Oliver turned the video on, at which point the initial encounter had concluded and Oliver had returned to his car. Because the BWC statute creates a rebuttable inference that missing footage would be exculpatory, and the presumption was never rebutted, this Court should apply that presumption.

After initially speaking with Edwards and as soon as his audio was finally activated, Oliver deactivated the audio on his BWC to speak to another officer, undoubtedly about how they could expand the scope of the motor vehicle stop and search the car. Upon devising a plan, Oliver prolonged the search, asking Edwards questions about the size of his pupils and an out-of-state warrant, and requested consent to search. Oliver effectively conceded, however, that he did not have reasonable suspicion to prolong the detention or to request consent to search. While Oliver initially testified that he thought Edwards might have been driving under the influence due to his nervous

behavior and small pupils, he ultimately admitted that he did not have objective reason to believe that those factors are indicative of intoxication and that he did not even ask Edwards whether he was under the influence or direct him to perform the standardized field sobriety tests. In addition, pupil size is affected by a number of medical conditions, including diabetes, and Edwards told the officer that his pupils were small for that reason. And while Oliver indicated in his police report that he was also suspicious of Edwards due to an out-of-state warrant, he admitted that the warrant was not extraditable and therefore that he could not detain him based on that warrant.

Instead of reasonable suspicion, what Oliver had was a hunch. When Edwards refused to consent, Oliver made clear that if Edwards would not grant him consent to search, or confess to having drugs in the car, he would continue to detain him to obtain dogs to sniff the car for drugs. Because he did not have reasonable suspicion to ask for consent to search, or to prolong the detention, and did so anyway, Oliver violated Edwards' rights against unreasonable searches and seizures. In addition, by threatening Edwards that the detention would be prolonged if he did not waive either his right against self-incrimination or against unreasonable searches and seizures, without an adequate basis to engage in this threatened course of conduct, Oliver rendered Edwards' confession involuntary and created a custodial environment in which

Oliver was required to advise Edwards of his rights under Miranda v. Arizona, 384 U.S. 436, 444 (1966). Finally, even after obtaining an admission that drugs were in the car, Oliver continued to question Edwards without advising him of his rights, again violating his rights.

For these reasons and others expressed below, this Court should suppress both the physical evidence and the statements. In alternative, this Court should remand for a second suppression hearing so that a new court can consider the application of the rebuttable presumption created by BWC statute, as well as other evidence suggesting that Oliver is not credible and acted unlawfully at each step of the search and seizure.

PROCEDURAL HISTORY

Bergen County Indictment charged Mr. Dale Edwards with third-degree possession of an controlled substance under N.J.S.A. 2C:35-10A(1), fourth-degree possession of false identification under N.J.S.A. 2C:21-2.1D, second-degree unlawful possession of a handgun without a permit under N.J.S.A. 2C:39-5B(1), fourth-degree possession of a defaced firearm under N.J.S.A. 2C:39-3D and second-degree gun possession by certain persons under N.J.S.A. 2C:39-7B(1).[2] (Da 1-2) On January 4, 2023, the Honorable Carol Novey

[2] Codefendant Kelly Wilson was also charged with certain offenses, but the charges against her were ultimately dismissed.

Catuogno, JSC heard argument on Edward's motions to suppress physical evidence and statements, and on February 3, 2023, Judge Catuogno denied in part and granted in part Edward's motions. (1T; 2T 4-3 to 16-4; Da 3)

On March 31, 2023, Edwards pleaded guilty before Judge Catuogno to second-degree unlawful possession without a permit. (3T 18-20 to 19-25; Da 4-10) In exchange for the plea, the State agreed to recommend a five-year sentence with a one-year period of parole ineligibility pursuant to a Graves Act waiver, N.J.S.A. 2C:43-6(c), 2C:43-6.2, and dismissal of the remaining counts and motor vehicle summons. (3T 18-20 to 19-25) On April 28, 2023, Judge Catuogno considered and rejected mitigating factors 8 and 9, and found aggravating factors 3, 6, and 9, as well as mitigating factor 9, and imposed sentence in accordance with the plea. (4T 16-11 to 19-16; Da 11-13)

Edwards filed a timely notice of appeal on June 22, 2023. (Da 14-17)

STATEMENT OF FACTS

On April 16, 2022 at around 4:50 pm, Officer Steven Oliver[3] from South Hackensack Police Department conducted a motor vehicle stop after

[3] Six months earlier, in October of 2021, Oliver attended a Street Cop Training Conference, which, according to a report published by the Office of the State Comptroller, promoted unconstitutional, harassing and discriminatory practices, including illegally prolonging motor vehicle stops to detect criminality. (Da 23) New Jersey Office of the State Comptroller, The High Price of Unregulated Police

purportedly observing a white Chevy Equinox make an illegal U-turn from Route 46 east onto Route 46 west. (1T 14-6 to 16-9, 136-5 to 137-6) He testified that he accordingly wrote the driver, Edwards, tickets for making an illegal U-turn, in violation of N.J.S.A. 39:4-125, and for careless driving, in violation of N.J.S.A. 39:4-97. (1T 136-11 to 137-14) Oliver testified that he must have also had a reason for writing Edwards tickets for obstructing the passage of other vehicles, in violation of N.J.S.A. 39:4-67, and delaying traffic, in violation of N.J.S.A. 39:4-56, but that he "could not recall at this exact moment if [Edwards] was delaying traffic or not," or if there were any cars in front of or behind him, or if he cut off or almost hit anyone. (1T 141-21 to 143-8; 147-1 to 148-14)

After pulling him over, Oliver asked Edwards for a copy of his license, registration and proof of insurance.[4] (1T 26-24 to 27-2) Edwards provided him

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Training to New Jersey (Dec. 6, 2023)), available at: nj.gov/comptroller/reports/2023/20231206.shtml. Although his name is spelled "Steven Oliveri" in the conference attendance list, (Da 23), the online South Hackensack Police Department roster makes clear that the correct spelling is "Steven Oliver." Roster, South Hackensack Police Department (available online) (Da 69).

[4] Oliver did not turn on his body-worn camera until he was standing at the door of the defendant's car, in violation of State law which requires officers turn on their BWC as soon as they activate their police lights. (1T 105-7 to 106-18) Because there is a thirty-second delay between the time the video is turned on and the audio is being recorded, the audio of the initial interaction between Oliver and Edwards was not captured. (1T 40-20 to 41-4) Oliver also said that he deactivated the sound on the BWC multiple times when he was speaking with other officers. (1T 69-12 to

with his Montana driver's license and temporary registration, but no insurance. (1T 27-5 to 7) Edwards told Oliver that the car belonged to his brother-in-law and that his wife was the passenger in the car. (1T 42-1 to 3) Oliver acknowledged that he had not initially asked either Edwards or the passenger to exit the car, as he had no reason to be concerned for his safety or that they would flee. (1T 128-5 to 129-1)

After speaking with Edwards, Oliver returned to his car to run Edward's license and check for warrants. (1T 28-9 to 14) Oliver discovered that Edwards had a non-extraditable warrant out of Montana. (1T 28-13 to 18) Because the Montana warrant was non-extraditable, Oliver conceded that he was never going to arrest Edwards on the warrant. (1T 115-7 to 116-2)

After verifying his license and registration, and checking for any warrants, Oliver returned to Edwards' car and asked Edwards to exit the car. (1T 26-6 to 16, 29-3 to 10, 109-2 to 10, 127-15 to 23) Oliver testified that he asked him to do so because Edwards appeared nervous and because his pupils were constricted, which he said had led him to believe that Edwards might be under the influence or in the possession of narcotics. (1T 27-13 to 28-5, 116-

17) He conceded that he again violated policy by failing state that he was deactivating the BWC prior to doing so. (1T 72-2 to 20)

16 to 20) By contrast, in his police report, Oliver indicated that he asked Edwards to step out to ask him about the Montana warrant. (1T 130-13 to 14)

After the Oliver directed Edwards to step out of the car, he told him that his pupils were "like pinholes," to which Edwards responded that he had not had his insulin and needed to eat something.[5] (1T 125-13 to 126-24) Even though the officer testified that he believed Edwards might be under the influence, he did not ask Edwards whether he was under the influence or administer any field sobriety tests. (1T 121-9 to 18) Oliver conceded that did not have the training to determine whether Edwards was under the influence and clarified that he never said that he thought that Edwards was incapable of driving. (1T 122-1 to 17) He also admitted that pupil size "does not indicate of [sic] criminal activity" and that he was "not saying those two are connected." (1T 124-9 to 10) When asked why he was suspicious of Edwards, Oliver testified that although he "didn't witness anything criminal[,] it doesn't mean that it didn't happen" because "[i]t's always possible somebody could be involved in criminal activity." (1T 124-2 to 8)

After questioning Edwards about the Montana warrant and whether there were any drugs in the car, Oliver asked Edwards for consent to search the

[5] Until he was confronted with the video footage, Oliver testified that he did not recall the defendant saying this. (1T 116-21 to 24, 125-13 to 126-24)

vehicle. (1T 29-7 to 23, 42-7 to 43-14) When Edwards refused to grant consent, Oliver told him that he would get a canine to smell the exterior of the car, unless Edwards wanted to just give him consent to search or tell him where the drugs were located. (1T 30-2 to 8) Edwards then told him that there were drugs inside the car. (1T 30-7 to 8) Oliver never told Edwards that he had a right to refuse consent. (1T 158-17 to 19)

Oliver then asked Edwards to show him where the drugs were located, and Edwards complied, showing him three plastic red containers in the driver's door compartment, including one which contained a crystal-like substance which the officer suspected to be methamphetamine. (1T 30-9 to 25) Oliver continued to ask Edwards a number of incriminating questions about where he had got the drugs, to whom they belonged, and the last time they had done the drugs. (1T 43-19 to 46-5) Oliver then arrested Edwards for possession of methamphetamine, placed him in handcuffs and put him inside the police car. (1T 31-1 to 6, 163-4 to 13)

Oliver then instructed the passenger, Wilson, to exit the car and asked her if there were any additional illegal items inside the car. (1T 31-11 to 19) She ultimately indicated that she had a needle containing methamphetamine in her purse. (1T 31-22 to 23) Oliver retrieved the needle and placed Wilson

under arrest. (1T 32-1 to 2) The officers did not read either of them their rights under Miranda v. Arizona, 384 U.S. 436, 444 (1966). (1T 166-1 to 3)

After both individuals had been arrested, the other officer brought Wilson to the station and retrieved the department station camera. (1T 154-14 to 25) Oliver and the other officer then searched the car. (1T 32-3 to 33-14) They found a Social Security card and a driver's license with Edwards' photo and another person's name (1T 33-17 to 21) and a nine-millimeter handgun under the front passenger seat. (1T 34-5 to 8) Although no one had read him his rights, the officers asked Edwards and Wilson about ownership of the gun. (1T 166-1 to 167-7) Edwards responded that he did not know whose gun it was. (1T 62-3 to 8)

The trial court found that the initial stop of Edwards was lawful because Oliver witnessed Edwards make an illegal U-turn. (2T 11-13 to 12-6) The court also found that the officer developed reasonable suspicion that Edwards was under the influence of narcotics, due to his nervous behavior and "pinhole pupils," justifying "a more intrusive line of questioning." (2T 13-1 to 20) The court concluded that the officer's accusatory questions about whether Edwards was under the influence of narcotics and if there were drugs in the car did not transform the stop into a custodial interrogation. (2T 13-1 to 20, 13-21 to 14-9) The court also decided that the officer's question regarding the ownership of

the drugs did not elicit an involuntary statement because the defendant did not have to assume ownership of the drugs. (2T 14-10 to 14) The court found that the police developed probable cause to search the car when Edwards told and showed him drugs were in the car. (2T 14-19 to 15-20) Finally, the court found that the officer's question about the ownership of the gun constituted custodial interrogation because the question was designed to elicit an incriminating response and was asked after Edwards had been placed under arrest for the possession of a controlled substance. (2T 15-21 to 16-14)

LEGAL ARGUMENT

POINT I

THE POLICE PROLONGED THE DETENTION AND REQUESTED CONSENT TO SEARCH WITHOUT REASONABLE SUSPICION, REQUIRING SUPPRESSION. (2T 13-12 to 20)

Because the police unlawfully prolonged the detention and sought consent to search without reasonable suspicion of criminal activity, in violation of the Fourth Amendment and Article I, paragraph 7 of the New Jersey Constitution, all of the evidence must be suppressed. U.S. Const. amends. IV, XIV; N.J. Const. art. 1, para. 7; Wong Sun v. United States, 371 U.S. 471, 484 (1963).

As "warrantless stops and searches are presumptively invalid, the State bears the burden of establishing that any such stop or search is justified by one of the 'well-delineated exceptions' to the warrant requirement.'" State v. Shaw, 213 N.J. 398, 409 (2012) (quoting State v. Frankel, 179 N.J. 586, 598 (2004)). The law is clear that when a car is stopped due to a purported motor-vehicle violation, "[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." Rodriguez v. United States, 575 U.S. 348, 354 (2015). In order to extend to prolong the stop "beyond the time required to complete the stop's mission," an officer needs "reasonable suspicion independent from the justification for a traffic stop." State v. Dunbar, 229 N.J. 521, 540 (2017). Accordingly, for instance, "[a]n officer may not conduct a canine sniff in a manner that prolongs a traffic stop beyond the time required to complete the stop's mission, unless he possesses reasonable and articulable suspicion to do so." Id. (citing Rodriguez, 575 U.S. at 357).

For the same or similar reasons, "unless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional." Carty, 170 N.J. at 647. Thus, our Supreme Court has held that police cannot seek consent to search a

stopped car without reasonable and articulable suspicion that a search of the car will yield evidence of a crime. Id. at 635. This requirement "serves to validate the continued detention associated with the search . . . . [and] prevent the police from turning a routine traffic stop into a fishing expedition for criminal activity unrelated to the stop." Id. at 647.

Reasonable suspicion requires that the officer be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the belief that the suspects are engaged in ongoing criminal activity, and in the case of consent searches, that the search will yield evidence of that crime. See State v. Pineiro, 181 N.J. 13, 21 (2004) (internal quotation marks omitted); see also Carty, 170 N.J. at 647-48. "[N]either inarticulate hunches nor an arresting officer's subjective good faith can justify infringement of a citizen's constitutionally guaranteed rights." State v. Alessi, 240 N.J. 501, 518 (2020) (quoting State v. Arthur, 149 N.J. 1, 8 (1997)).

The police needed reasonable suspicion of criminal activity to prolong detention after completing the tasks related to the traffic infraction and to ask for consent to search. Yet after Oliver checked Edwards' license and registration, he did not have reasonable suspicion to continue to detain Edwards, or to ask Edwards for consent to search. Oliver testified that he was

suspicious of Edwards because he was nervous and because his pupils were constricted, which he said led him to believe Edwards was "possibly" under the influence or in possession of illegal drugs. (1T 121-5 to 11, 122-17, 124-17 to 17) In contrast, in his police report, Oliver only said that he was suspicious of Edwards because he discovered a non-extraditable out-of-state warrant. (1T 130-13 to 131-2) None of these circumstances, however, individually or cumulatively, created a reasonable belief that Edwards was under the influence or in possession of drugs. Thus, it was impermissible for Oliver to ask Edwards for consent to search or continue to question him after Edwards denied him consent to search.[6]

[6] The OSC report found that a "significant portion of the six-day Conference [attended by Oliver six months earlier] focused on officers taking proactive steps to detect criminality during the course of motor vehicle stops for speeding and minor traffic violations" and that "a number of the tactics taught were unjustifiably harassing and unconstitutional." New Jersey Office of the State Comptroller, The High Price of Unregulated Private Police Training to New Jersey. The instructors encouraged people to prolong stops to get canine units to check for drugs and to seek consent to search without reasonable suspicion. Id. One instructor played a video clip of a woman who had been stopped for a purported motor vehicle violation and commented on her body language and behavior, as well as her appearance, telling the attendees that she was "obviously an illicit drug user" because she is "not a runway model, that's for sure." Id. The instructor also relied on her refusal of consent to search as a suspicious factor. Id. After the supervisor in the video clip directed the officer to let her go because there was no basis to continue to detain her, the instructor called the supervisor in the video clip a "fucking idiot" and told the attendees that they should have allowed the investigation to continue so a canine unit could have sniffed the car for drugs, even though the officer did not have reasonable suspicion to prolong the detention. Id.

First, the officer lacked reason to believe that Edwards was driving while under the influence. The driving while intoxicated statute does not specify the quantum of narcotics, hallucinogens, or habit-producing drugs sufficient to satisfy the statute (by contrast, a blood-alcohol level over .08 is a per se violation of the statute). State v. Bealor, 187 N.J. 589 (2006) (quoting State v. Tamburro, 68 N.J. 414, 421 (1975)); see also N.J.S.A. 39:4-50. Instead, "under the influence" has been defined to mean "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to . . . narcotic, hallucinogenic or habit producing drugs," so as "to render such person a danger to himself as well as to other persons," and "a condition which so affects the judgment and control of a motor vehicle operator as to make it improper for him to drive on the highway." Id.

Although Oliver said he suspected Edwards might be under the influence because his pupils were small, the officer admitted that he never said that he thought Edwards was incapable of safely operating a motor vehicle or

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Relatedly, "an entire section of [the instructor's] training . . . [was] dedicated to an 'I Do Not Consent Game," during which [the instructor] show[ed] a montage of people refusing to consent in an attempt to illustrate that a motorist's refusal to consent is a suspicious factor that justifies prolonging an investigative detention." Id. Moreover, multiple instructors encouraged officers to illegally prolong stops by "finger fucking" their computers and "playing Tetris" (pretending to conduct computer lookups) in order to continue investigations and continuing to question individuals after completing the tasks related to the motor vehicle stop. Id.

presented a danger to himself or others. (1T 122-13 to 14) In addition, Oliver did not testify that Edwards was behaving in ways that suggested that he was suffering from poor reaction time, lack of balance, inability to pay attention, or suffered any other deficits that would make it unsafe for him to drive.

Moreover, Oliver conceded that he did not conduct any sobriety tests[7] and was never trained to determine whether an individual is under the influence of drugs. (1T 121-12 to 122-2) Furthermore, that no officer or expert was ever requested to perform any testing to determine whether Edwards was in fact under the influence and Edwards was not charged with driving under

[7] Although the officer testified that he did not conduct field sobriety tests because he thought Edwards might be under the influence of drugs, not alcohol, those same tests are used to help determine whether an individual is under the influence of narcotics, hallucinogens, or other habit-inducing drugs. See State v. Olenowski, 255 N.J. 529, 555, 555 n.8 (2023). "The rationale for performing the [divided-attention] tests in drugged driving cases is that any drug that impairs driving ability will also impair the driver's ability to perform divided attention tests, which help evaluate a driver's 'psychomotor' skills." Id. at 555. The "[e]ye examinations can reveal whether the driver has ingested drugs that may detrimentally affect such things as the driver's visual acuity, contrast sensitivity, glare sensitivity, ability to track objects, coordination, and other driving-related skills." Id. Even if the officer had reasonably believed that Edwards might be under the influence, conducting field sobriety tests should have been the next reasonable step. See Amy Porath-Waller & Douglas J. Beirness, An Examination of the Validity of the Standardized Field Sobriety Test in Detecting Drug Impairment Using Data from the Drug Evaluation and Classification Program, 15 Traffic Injury Prevention (2014) (Da 25-32) (confirming that the standardized field sobriety tests are useful in identifying central nervous system (CNS) stimulants, CNS depressants, narcotic analgesics, and cannabis, as well as alcohol).

the influence, suggests that the police did not actually believe Edwards was under the influence and instead simply wanted to search the car.

Oliver did not explain why or under what circumstances he believed that small pupils could be a sign of intoxication, other than to say that his belief was "based on his training and experience."[8] (1T 27-19 to 21) See State v. Demeter, 124 N.J. 374, 382 (1991) ("[I]n some situations, a police officer may have particular training or experience that would enable him to infer criminal activity in circumstances where an ordinary observer would not . . . . [But] the officer must be able to explain sufficiently the basis of that opinion, so that it "can be understood by the average reasonably prudent person." (citations omitted)); see also State v. Goldsmith, 251 N.J. 384, 404-05 (2022) (explaining that "[t]he State, however, must provide at least "some evidence" to support the assertion that a neighborhood should be considered as 'high-crime'" and noting that an officer's subjective belief and a vague description of his prior experiences in the area was not enough to meet that standard). He

[8] Even highly-trained drug-recognition experts ("DRE") only evaluate a suspect's pupil size in a strictly controlled setting as one part of a 12-step test designed to help determine the cause of intoxication. Olenowski, 255 N.J. at 555. While in a dark room, the DRE will measure the suspect's pupil in response to three different levels of light stimulus in a dark room. Id. Even after completing the 12-step test, which again is completed in controlled settings and includes a toxicology report, the DRE can only testify that the results of the tests are "consistent with" the individual being under the influence of certain categories of drugs. Id. at 609–10.

did not provide objective evidence that small pupils are a reliable indicator of intoxication (such as by providing the percentage of the time a person with small pupils is intoxicated) or even testify, for instance, that he had previously investigated or arrested a certain number of people with small pupils and that those individuals were ultimately determined to be under the influence.[9] See Demeter, 124 N.J. at 386 (finding no probable cause to search a film canister even though the officer testified that "his past experience showed that a high percentage of such film containers, when found without cameras, contained narcotics" and that he had previously investigated at least twenty narcotics incidents involving the use of film containers to hold drugs, and noting the lack of objective evidence "about what percentage of observed containers held drugs"). In fact, what the officer ultimately conceded was that pupil size "does not indicate of [sic] criminal activity" and that he was "not saying those two [things] are connected." (1T 124-10 to 13)

Pupil size is influenced by a number of factors, including diabetes and age. Marian Kiel, et al., Distribution of Pupil Size and Associated Factors: Results from the Population-Based Gutenberg Health Study, Journal of

[9] Oliver testified that he had only conducted one or two dozen arrests for drug activity, some of which included persons under the influence of drugs, in his seven years as an officer. (14-11 to 13, 28-1 to 5)

Ophthalmology (2022) (available online) (explaining different factors that influence pupil size and that persons with diabetes have smaller pupils). Edwards explained to Oliver that the reason his pupils were constricted was because he is diabetic and needed his insulin and to eat something.[10] (1T 125-20 to 25, 126-21 to 24) See, e.g., J.C. Park, et al., Pupillary Responses in Non-Proliferative Diabetic Retinopathy, Sci. Rep. 7, 44987 (2017) (available online) (explaining that "pupil size has long been recognized to be abnormally small in diabetics' and confirming that finding across many variables). Oliver did not know whether Edwards' pupils were small in comparison to Edwards' baseline.

Thus, the fact that Edwards' pupils appeared small did not provide him with reason to believe Edwards was under the influence, and also therefore did not provide him with reason to believe that drugs were inside the car. See State v. Cusick, 110 N.J. Super. 149, 151-152 (App. Div. 1970) (holding that a car may be searched incident to a justifiable arrest for driving while intoxicated).

[10] Unlike Oliver, drug-recognition officers are trained "to be aware of the major non-drug causes of impairment that may mimic signs of drug or alcohol impairment (e.g., head trauma, low blood sugar in diabetics, seizures and neurological disorders, conjunctivitis, some mental health issues, and "physical defects" like injuries that might affect performance of certain steps of the protocol). State v. Olenowski, 255 N.J. 529, 587–88 (2023).

Likewise, Edwards' nervousness does not provide the officer with reasonable suspicion that Edwards was under the influence or in possession of illegal drugs. Our Supreme Court has repeatedly made clear that nervous behavior, including excited movements, does not justify a detention, prolonging a detention or asking for consent to search. See State v. Rosario, 229 N.J. 263, 277 (2017) (explaining that because "[n]ervousness and excited movements are common responses to unanticipated encounters with police officers on the road," those factors do not warrant reasonable suspicion); Carty, 170 N.J. at 647 (holding that an individual's appearance of nervousness does not justify extending the scope of a detention or requesting consent to search).

Nor did the non-extraditable out-of-state warrant justify prolonging the detention or seeking consent to search. Oliver himself testified that he was not going to arrest Edwards based on the warrant because it was non-extraditable.[11] (1T 114-6 to 116-2, 132-1 to 7) See United States v. Hight, 127 F. Supp. 3d 1126, 1129-30, 1134 (D. Colo. 2015) (noting that the officer acknowledged that he could not arrest the suspect for the out-of-state warrant because it was non-extraditable and finding no basis to prolong the detention

[11] Oliver also conceded that he could not even remember the basis for the out-of-state warrant. (1T 115-20)

based on discovery of the warrant); cf. United States v. Howell, 71 F.4th 195, 198 (4th Cir. 2023) ("That search, however, did not indicate whether the warrant was extraditable, such that an officer in another state could act on it."). In addition, our Supreme Court has clearly explained that although the fact that a suspect has a criminal history or a possible criminal background can be a relevant factor to be considered alongside other indicia of criminal activity, it does not warrant an officer in a belief that the suspect is currently engaged in criminal history. See State v. Valentine, 134 N.J. 536, 547 (1994) ("[A]n officer's knowledge of a suspect's prior criminal activity alone is not sufficient to justify the initial stop of a suspect or to justify a frisk."); Hight, 137 F. Supp. at 1134 (finding no basis to prolong the detention where the defendant was driving cross country, with voluminous cargo, cash, and occupants in a rental car, after being released from jail, and appeared frustrated, and the officers discovered an non-extraditable warrant for "dangerous drugs"). What is missing here is critical – any suspicious behavior indicative of criminal activity. Apart from knowing that Edwards had some kind of criminal history, all the officer knew was that Edwards' pupils appeared small (which the officer ultimately conceded was not indicative of intoxication) and that he seemed nervous. For the reasons explained above, this was not enough.

Finally, this Court should infer that the missing audio from the beginning of the stop would have helped demonstrate that Edwards was behaving normally and not in a way that someone under the influence or in possession of illegal drugs would behave. As discussed further below in Point IV, the law requires that "the video and audio recording functions of a [BWC] shall be activated . . . at the initiation of any other law enforcement of investigative encounter between an officer and a member of the public" and "the [BWC] shall remain activated until the encounter has fully concluded and the officer leaves the scene." N.J.S.A. 40A:14-118.5(c)(1). If "a law enforcement officer, employee, or agent failed to adhere to the recording or retention requirements . . . "or intentionally interfered with a BWC's ability to accurately capture audio or video records,' and . . . the defendant 'reasonably asserts that exculpatory evidence was destroyed or not captured,'" the defendant is entitled to "a rebuttable presumption that exculpatory evidence was destroyed or not captured." Id. at 533 (quoting N.J.S.A. 40A:14-118.5(q)(2)). As Edwards argued below, Oliver did not turn on his body-worn camera until he was standing at the door of the defendant's car, in violation of State policy and law requiring him to turn on his body-worn camera as soon as the police lights are turned on. (1T 105-7 to 106-18) As a result, the first thirty seconds of the footage – the entirety of the initial police encounter – does not

have audio. (1T 40-20 to 41-4) Because defense counsel reasonably argued below that the missing evidence could have been exculpatory, (1T 188-2 to 7, 201-5 to 22, 202-11 to 16), and the State did not rebut this argument, the trial court should have applied the statutory presumption and found that the missing audio would have helped demonstrate that Edwards was not acting intoxicated or in a way that suggested he was in possession of drugs.

POINT II

BECAUSE EDWARDS' CONFESSION WAS INVOLUNTARY, BOTH THE CONFESSION AND THE DERIVATIVE EVIDENCE SHOULD BE SUPPRESSED. (2T 14-15 to 17; Da)

Because there was no reasonable suspicion to prolong the search, the officer's threat that he would prolong the search unless Edwards waived his Fourth and Fifth Amendment rights was coercive and rendered Edwards' confession involuntary. U.S. Const. amends. V, XIV; N.J. Const. art. 1, paras. 7; N.J.S.A. 2A:84A-19. Thus, suppression of the statements and derivative evidence is required. See State v. O'Neill, 193 N.J. 148, 171 n.13 (2007).

The right against self-incrimination is guaranteed by the Fifth Amendment of the Federal Constitution, as incorporated by the Due Process Clause, and state statute, N.J.S.A. 2A:84A-19. State v. L.H., 239 N.J. 22, 41 (2019). Before using a confession at trial, the State is required to "prove the

voluntariness of a confession beyond a reasonable doubt." Id. at 27. The classic test of voluntariness is whether the confession is "the product of an essentially free and unconstrained choice by its maker." Colombe v. Connecticut, 367 U.S. 568, 602 (1961); see State v. Burris, 145 N.J. 509, 525 (1996) ("ultimately, the question is whether the defendant's will was overborne"); State v. Galloway, 133 N.J. 631, 655 (1993) ("The real issue is whether the person's decision to confess results from a change of mind rather than from an overbearing of the suspect's will"). "The voluntariness determination weighs the coercive psychological pressures brought to bear on an individual to speak against his power to resist confessing." L.H., 239 N.J. at 27 (2019). A confession is not voluntary if it is extracted by "threats or violence," "obtained by any direct or implied promises," or "the exertion of any improper influence." Brady v. United States, 397 U.S. 742, 753 (1970) (citation omitted)).

This Court, our Supreme Court and the Supreme Court of the United States have previously considered when an officer's threatened course of conduct constitutes coercion. This Court and the Supreme Court of the United States have held that consent cannot be voluntary after the police tell an individual that they have a warrant. Bumper v. North Carolina, 391 U.S. 543 (1968) (holding that "there can be no consent" "when that 'consent' has been

given only after the official conducting the search has asserted that he possesses a warrant"); State v. Dolly, 255 N.J. Super. 278, 284–287 (App. Div. 1991) (consent deemed involuntary when induced by threat to execute defective search warrant). On the other hand, "an officer's comment regarding the inevitability of a search warrant does not indicate coercion if it is 'a fair prediction of the events that would follow' rather than 'a deceptive threat made to deprive [an individual] of the ability to make an informed consent.'" State v. Hagans, 233 N.J. 30, 42 (2018) (quoting State v. Cancel, 256 N.J. Super. 430, 434 (App. Div. 1992)) (finding no coercion because the officers had probable cause for a warrant). Where the police in fact have probable cause to seek a warrant, an officer's statement that he will get a warrant unless the individual consents is "nothing more than a candid assessment of the likelihood that a judge would grant his application for a search warrant" and does not render the consent involuntary. Id. (finding that the officer's statement did not render the consent to search involuntary because the officer had probable cause to justify a search warrant); see also Cancel, 256 N.J. Super. at 434 (same). Likewise, this Court has previously applied the same rationale to an officer's threat to prolong a search to use a drug-sniffing dog, finding that the threat does not constitute coercion where the officers had reasonable suspicion to prolong the

search to use a dog.[12] See State v. Baum, 393 N.J. Super. 275, 290 (App. Div. 2007), (finding the codefendant's confession was not coerced because "[w]hen there is reasonable suspicion of drugs and the threat to call for a dog is calmly given, as it was here, such a threat will not be considered coercive." (citation omitted)), affirmed on other grounds, 199 N.J. 407 (2009)[13]; State v. Elders, 386 N.J. Super. 208, 230 (App. Div. 2006) (finding that the threat did not render the consent to search involuntary because the officers had reasonable suspicion to prolong the investigation to use drug dogs), affirmed in part and reversed in part on other grounds, 192 N.J. 224 (2007).

Here, the police coerced Edwards to confess by engaging in and threatening to engage in an unjustified course of conduct. The police had already asked Edwards for consent to search without reasonable suspicion, and Edwards had refused to consent. (1T 30-2 to 8) Then, the officer threatened to

[12] Notably, the Supreme Court has more recently made clear that reasonable suspicion is only required to conduct a drug dog sniff where it would prolong a stop. State v. Dunbar, 229 N.J. 521, 537-540 (2017). Here, any drug dog sniff would have prolonged the stop because the tasks related to the traffic stop had been completed. See id.

[13] On appeal, the Supreme Court said, "We decline the invitation to consider whether the reference to the dog was so unduly coercive as to be constitutionally infirm [in violation of the Fifth Amendment]. By the time the officer said that he could have a dog brought to the scene, he had discovered that [the codefendant] did not have a valid license and [codefendant] had already admitted that some of her earlier responses were false and that they had been involved in illegal use of narcotics earlier in the day." State v. Baum, 199 N.J. 407, 425 n. 5, 425–26 (2009).

call for a drug dog, if Edwards was not willing to consent or confess that there were drugs in the car. (1T 43-8 to 14) At no point did the officer advise Edwards of his right to refuse consent, see State v. Johnson, 68 N.J. 349, 354 (1975) (holding that the State must prove knowledge of the right to refuse consent, to justify a search on this basis), or, as explained in Point III, of the right against self-incrimination. Unlike in the above cases, here, the officer lacked an adequate basis to engage in the threatened course of conduct. Specifically, Oliver did not have reasonable suspicion to prolong the detention or seek consent to search, and yet he told him that he was going to prolong the detention until Oliver either incriminated himself or consented to a search. By making it exceedingly clear that Edwards was not free to leave and by pressuring him to waive his constitutional rights, Oliver rendered Edwards' confession involuntary.

Because Edwards' confession that there were drugs in the car was the result of coercion, that confession and the derivative evidence, including the physical evidence and subsequent statements, must be suppressed. See O'Neill, 193 N.J. at 171 n.13 ("The fruit-of-the-poisonous-tree doctrine denies the prosecution the use of derivative evidence obtained as a result of a Fourth or Fifth Amendment violation.").

POINT III

SUPPRESSION OF EDWARDS' RESPONSES TO OLIVER'S QUESTIONS IS REQUIRED BECAUSE EDWARDS WAS IN CUSTODY WHEN THE POLICE QUESTIONED HIM WITHOUT FIRST ADVISING HIM OF HIS RIGHTS. (1T 195-1 to 8; 2T 12-7 to 14-18)

The trial court erred in only suppressing the statements made after the police formally arrested Edwards. The trial court should have also suppressed Edwards' responses to the questions asked earlier by Oliver because the responses were obtained in violation of Miranda v. Arizona, 384 U.S. 436, 444 (1966). Edwards was in custody once Oliver made clear that he was not going to let Edwards leave even after completing the tasks related to the motor vehicle stop, or alternatively, after Oliver obtained probable cause for an arrest. Because Edwards was in custody, Oliver was required to read Edwards his Miranda rights. Because he failed to do so, this Court should suppress Edwards' responses to Oliver's questions. U.S. Const. amends. V, XIV; N.J. Const. art. 1, paras. 7; N.J.S.A. 2A:84A-19.

"Miranda 'warnings must be given before a suspect's statement made during custodial interrogation may be admitted in evidence.'" State v. O'Neal, 190 N.J. 601, 615 (2007) (quoting Dickerson v. United States, 530 U.S. 428, 431-32 (2000)). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise

deprived of his freedom in any significant way." Miranda, 384 U.S. at 444; see also Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (explaining that interrogation includes "express questioning or its functional equivalent," including "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect").

Our Supreme Court has held that where "a reasonable person in [an individual's] position, based on the nature of the police encounter, would not have believed that he was free to leave," the individual is in custody and the police are obliged to advise him of his Miranda rights prior to any questioning. O'Neal, 190 N.J. at 616, 622 (explaining that the custody standard is an objective one and is based on the totality of the circumstances). The Supreme Court of the United States and Appellate Division have held that a defendant detained pursuant to a motor vehicle stop is not in custody for the purposes of Miranda where he has no reason to believe that "he [will] be detained beyond the time required to complete the motor vehicle stop." State v. Hickman, 335 N.J. Super. 623, 630-32 (App. Div. 2000); see also Berkemer v. McCarty, 468 U.S. 420, 441-42 (1984) (holding that a person stopped pursuant to a motor vehicle stop is not automatically entitled to the protections guaranteed by Miranda). By contrast, our Supreme Court has specifically held that an

individual is in custody where an officer has developed probable cause for an arrest, even if the officer has not yet formally arrested that individual. O'Neal, 190 N.J. at 616, 622 ("[A] reasonable officer would have believed he or she had probable cause to arrest defendant for a drug transaction and would not have permitted defendant to leave. Similarly, a reasonable person in defendant's position, based on the nature of the police encounter, would not have believed that he was free to leave.").

A. Edwards Was in Custody When the Police Told Him that They Would Get Drug Dogs Unless He Consented to a Search or Confessed and Therefore the Police Were Required to Advise Him of His Rights

Edwards was in custody when the police told him that he would get drug dogs unless Edwards gave him consent to search or confessed drugs were located inside the car. "A reasonable person in [Edward's] position, based on the nature of the police encounter, would not have believed that he was free to leave" at this point. See O'Neal, 190 N.J. at 616, 622.In fact, Oliver admitted that Edwards was not free to leave at this point. (1T 150-3 to 11) Oliver explicitly told Edwards that he would not let him go and that he would prolong the detention by requesting that a drug dog be sent over to check for drugs, unless he incriminated himself. (1T 43-8 to 14) Cf. Berkemer, 468 U.S. at 441-42 ("At no point during that interval was respondent informed that his detention would not be temporary."). Thus, unlike the defendant in Hickman,

Edwards had ample reason to believe that he would "be detained beyond the time required to complete the motor vehicle stop." 335 N.J. Super. at 632.

The Supreme Court of the United States' rationale in Berkemer elucidates why the police behavior here is meaningfully different from questioning an individual during an ordinary traffic stop. The Berkemer Court explained that the reason that ordinary traffic stops do not automatically require the reading of Miranda is because the presumptively brief nature of those stops, "mitigate[s] the danger that a person questioned will be induced 'to speak where he would not otherwise do so freely.'" 468 U.S. at 437-38. "[Q]uestioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." Id. Traffic stops, by contrast, usually do not "exert[] upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." Id. However, the Supreme Court acknowledged that "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Id. at 440.

Oliver pressured Edwards to waive his right against self-incrimination by telling him that if he did not confess or consent to a search, he would continue to detain Edwards to seek assistance of a drug dog unit. (1T 43-8 to 14) After Edwards refused consent to search, Oliver said, "Listen, you don't have to consent. I can get a canine to come and they can (inaudible) the car and then I get it or you can just consent to search or even just tell me." (1T 43-8 to 14) Thus, Edwards knew that he would not be released upon completion of the tasks related to the traffic stop (which had already been completed) and his detention would not be brief. This case is akin to the situation identified by the Berkemer Court, where the individual knows that he will not be released until he gives the police that answers they are looking for. 468 U.S. at 437-38. Because the officer made clear that Edwards was not free to leave, and would not be leaving anytime soon, unless he consented to a search or confessed, he needed to read Edwards his Miranda rights.

Because Edwards was in custody when Oliver told him that he could either consent to a search or tell him whether there were drugs in the car, Edward's response that there were drugs in the car should have been suppressed. (1T 43-8 to 19)

B. At the Latest, Edwards Was in Custody Once Oliver Obtained Probable Cause for an Arrest, Not Only After Police Formally Arrested Him.

After Edwards indicated that there were in facts drugs in the car, the police had probable cause for an arrest and were required to read Edwards his Miranda rights prior to asking him incriminating questions. O'Neal, 190 N.J. at 616, 622 (holding that once an officer has probable cause to arrest, the officer is required to read a suspect his Miranda rights prior to questioning him because the suspect would not feel free to leave). Because Oliver did not read Edwards his Miranda rights, all of Edwards' responses to Oliver's many questions, including those about whether he wanted to show Oliver where the drugs were in the car, to whom the drugs belonged, where he got the drugs and the last time he did the drugs, must be suppressed.[14] (1T 43-19 to 46-5) Finally, although a formal arrest is not necessary for an individual to be in custody for the purposes of Miranda, Edwards' response to the officer's questions about ownership of the gun must be suppressed for the additional reason that he had been formally arrested and put into a patrol car at this point. (1T 62-3 to 62-17)

Because the officer questioned Edwards in violation of Miranda, Edwards' responses to those questions, both verbal and non-verbal, must be

[14] Notably, the officer also extensively questioned Edwards' wife and codefendant after discovering the drugs and arresting Edwards, without advising her of her Miranda rights. (1T 47-1 to 58-15) Although Edwards does not have standing to challenge these violations, they are worth noting to demonstrate the continuous and flagrant nature of the unlawful police conduct in this case.

suppressed. See Doe v. United States, 487 U.S. 201, 210 (1988) ("Whether a verbal or non-verbal communication, to be a testimonial or communicative act [covered by Miranda], the suspect's 'communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.'"). Thus, in addition to Edwards' verbal responses, this Court should also suppress Edwards' act of showing the officer where the drugs were located, as this act was equivalent to a verbal response of telling the officer where they were locating. See State v. Kelsey, 429 N.J. Super. 449, 455 (App. Div. 2013) (holding that the State cannot force a defendant to incriminate himself by compelling him "to divulge the location of incriminating physical evidence"); State v. Mason, 164 N.J. Super. 1, 3-4 (App. Div. 1979) (suppressing the defendant's act of turning over drugs because "[n]on-verbal responses to questioning are treated in the same way as are verbal response. The privilege against self-incrimination extends to all acts intended to be of a testimonial or communicative character, whether in verbal or other form." (citations omitted)).

POINT IV

IF THIS COURT DOES NOT ORDER SUPPRESSION OF ALL OF THE EVIDENCE, IT SHOULD REMAND FOR ANOTHER SUPPRESSION HEARING. (Not raised below)

If this Court does not order suppression, this Court should remand to the trial court for a new suppression hearing where the trial court should reconsider its findings, including its credibility findings regarding Oliver, after applying the rebuttable presumption created by Oliver's failure to record the BWC and after considering Oliver's attendance at the Street Cop Conference and the findings of OSC. In addition to arguing that Oliver unlawfully asked for consent to search, prolonged the detention, and elicited involuntary and un-Mirandized statements, the defense also argued that Oliver stopped Edwards without reasonable suspicion of a motor vehicle violation. (2T 10-24 to 12-6) If the court finds on remand that the officer is not credible due to his failure to adhere to the requirements of the BWC statute, attendance at the Street Cop Conference, and testimony, this would call into question Oliver's claim that he had observed a motor vehicle violation.

As explained above, the BWC statute provides that "every uniformed State, county, and municipal patrol law enforcement shall wear a BWC that electronically records audio and video while acting in performance of the officer's official duties." Jones, 475 N.J. Super. at 532 (quoting N.J.S.A. 40A:14-118.5). "[T]he video and audio recording functions of a [BWC] shall be activated . . . at the initiation of any other law enforcement of investigative encounter between an officer and a member of the public" and "the [BWC]

shall remain activated until the encounter has fully concluded and the officer leaves the scene." N.J.S.A. 40A:14-118.5(c)(1). If "a law enforcement officer, employee, or agent failed to adhere to the recording or retention requirements . . . "or intentionally interfered with a BWC's ability to accurately capture audio or video records,' and . . . the defendant 'reasonably asserts that exculpatory evidence was destroyed or not captured,'" the defendant is entitled to "a rebuttable presumption that exculpatory evidence was destroyed or not captured." Jones, 475 N.J. Super. at 533 (quoting N.J.S.A. 40A:14-118.5(q)(2)). The statute's purpose is to "promot[e] transparency and accountability in policing in our communities" and are critical to "support[ing] or dispel[ing] a civilian's claim against a law enforcement officer." N.J. Gov. Statement to Assemb. B. 4312 (Oct. 19, 2020); see also Attorney General Law Directive No. 2022-1, Update to Body Worn Camera Policy, § 1.1 (Jan. 19, 2022) ("[BWC] footage provides objective evidence of what occurred and plays a crucial role in the public discourse around police accountability. BWCs also serve as a powerful deterrent to misconduct by both the police and members of the public interacting with police.).[15]

[15] See also N.J. Gov. Statement to S.B. 1163 (Oct. 19, 2020) ("I share the sponsors' goal of promoting transparency and accountability in policing in our communities. Body worn cameras . . . improve accountability; promote transparency; enhance the quality of police-civilian interactions and law enforcement performance;

If the Court is inclined to remand for a new suppression hearing rather than suppress the evidence, this Court should "direct that a new judge preside over the suppression hearing on remand" "as the judge made credibility findings and may be committed to her previous view of the evidence." State v. Haskins, -- N.J. Super. --, --, 2024 WL 461763, at *5 (App. Div. Feb. 7, 2024) (citing State v. Jones, 475 N.J. Super. 520, 534 (App. Div. 2023)); see also State v. Jones, 475 N.J. Super. 520, 534 (App. Div. 2023) (requiring suppression hearing be assigned to new judge as motion judge weighed evidence and made credibility findings). At the new hearing, the court must determine, "based on [] application of the statutory requirements," "whether [Edwards] is entitled to the rebuttable presumption under N.J.S.A. 40A:14-118.5(q)(2), and whether the State can successfully rebut the presumption." Jones, 475 N.J. Super. at 535.

As argued by defense counsel and admitted by Oliver, Oliver violated the statute and the Attorney General Guidelines by failing to turn on his BWC

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contemporaneously record objective, impartial evidence for use in investigations, disciplinary matters, and court proceedings. . . ."); Exec. Order No. 201 (Nov. 24, 2020) ("WHEREAS, the Attorney General has sought . . . to promote the professionalism, accountability, and transparency . . . ; and WHEREAS, ensuring trust between the police and the communities they serve is a critical component of public safety; . . . and WHEREAS, the deployment of body worn camera systems . . . can be a powerful tool for building community trust, both by creating a record of law enforcement professionalism in interactions with the public, and by providing evidence of officer misconduct when it does occur . . . .")

as soon as he initiated the stop and repeatedly turning off the audio during the stop without any notice or explanation. (1T 188-2 to 7, 201-5 to 22, 202-11 to 16) Attorney General Law Directive No. 2022-1, Update to Body Worn Camera Policy, §§ 1.1, 5.2, 5.3.1, 6.5, 7.1.1; N.J.S.A. 40A:14-118.5. As also pointed out by defense counsel, the missing video and audio from the beginning of the stop could have revealed that Edwards was stopped without reasonable suspicion of a motor vehicle violation and that the officers decided to prolong the detention and request consent to search without good (or based on an improper) reasons. (1T 188-2 to 7, 201-5 to 22, 202-11 to 16) The video could have also helped illustrate the coercive and custodial nature of the police encounter. Thus, if this Court decides to remand this matter for another hearing, the new trial court should consider whether the State is able to rebut the presumption that the missing video and audio would have revealed exculpatory evidence and helped demonstrate that the stop, request for consent to search, prolonged detention, questioning and search were conducted in violation of Edwards' constitutional rights.

If this Court declines to suppress the evidence for the reasons explained above, a remand is also necessary for the trial court to consider Oliver's attendance at the October 2021 Street Cop Conference and the OSC report. According to the report, instructors encouraged attendees to engage in an array

of unconstitutional, harassing and discriminatory practices. New Jersey Office of the State Comptroller, The High Price of Unregulated Police Training to New Jersey. Particularly relevant here, the instructors encouraged officers to stop cars for pretextual and innocent reasons and also "to stop a designated number of cars to get a 'general baseline' of normal behavior during a motor vehicle stop" by asking them generic questions. Id. In addition, as explained earlier, instructors encouraged attendees to unconstitutionally prolong stops and seek consent to search without reasonable suspicion, which is precisely what Edwards is arguing occurred here. Id. Lastly, the instructors made over one hundred discriminatory or harassing remarks and "promot[ed] a militaristic style of policing, undermin[ed] state-mandated training and safety initiatives, encourag[ed] insubordination, and dehumanize[ed] civilians."[16] Id. The OSC report suggests that Oliver took what he had learned at the Street Cop Conference and stopped, continued to detain, and pressured Edwards to

[16] For instance, one instructor said, "he felt 'victorious' about having killed people in the line of duty and described his involvement in 13 incidents of deadly force, when he shot eight people, killing four, as 'batting .500.'" New Jersey Office of the State Comptroller, The High Price of Unregulated Police Training to New Jersey. Another instructor showed a meme of a monkey in a shirt, with the caption, "simple questions, simple answers," after describing a stop of a 75 year-old Black man from Trenton. Id. If the trial court had known that Oliver had recently attended a six-day long training where he had been taught to perform his job this way, the trial court might not have found Oliver credible.

waive his Fourth and Fifth Amendment rights based on a hunch, a disregard for the rights of individuals, and a "ends justify the means" mentality. Id.

For these reasons, if this Court declines to suppress all the evidence in this case, this Court should remand the matter to reconsider its findings based on the BWC statute and the OSC report.

CONCLUSION

For the reasons explained in Point I and Point II, this Court should order suppression of both the physical evidence and statements. For the reasons set forth in Point III, this Court should suppress Edwards' responses to the questions asked by Oliver while Edwards was in custody. Finally, as explained in Point IV, if this Court does not order suppression, this Court should remand for another suppression hearing so that a new court can consider the BWC and the OSC report.

Respectfully submitted,

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New Jersey Superior Court
Appellate Division

DOCKET NO. A-003184-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Bergen County.
DALE EDWARDS,	:	
Defendant-Appellant.	:	Sat Below: Hon. Carol Novey Catuogno, A.J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On July 13, 2022, a Bergen County grand jury returned Indictment Number 22-07-00635, charging defendant, Dale Edwards, with count one, third-degree possession of a controlled dangerous substance (CDS), methamphetamine, N.J.S.A. 2C:35-10(a)(1); count two, fourth-degree possession of a false government document, N.J.S.A. 2C:21-2.1(d); count three, second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1); count four, fourth-degree possession of a defaced firearm, N.J.S.A. 2C:39-3(d); and count five, second-degree possession of a firearm by a certain person, N.J.S.A. 2C:39-7(b)(1). (Da1 to 2, 11).[1] [2]

Defendant moved before trial to suppress statements he made to police at the scene as well as evidence seized from his vehicle. (2T4-3 to 9). On January 4, 2023, the Honorable Carol Novey Catuogno, A.J.S.C., presided over an evidentiary hearing on the motions. (1T). On February 3, 2023, the

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[1] "Da" refers to the defendant's appendix
"Db" refers to the defendant's brief
"Pa" refers to the State's appendix
"1T" refers to the transcript dated January 4, 2023
"2T" refers to the transcript dated February 3, 2023
"3T" refers to the transcript dated March 31, 2023
"4T" refers to the transcript dated April 28, 2023

[2] The indictment also charged a co-defendant as to certain counts. That name is redacted from the indictment. (Da1 to 2).

court denied defendant's motion to suppress the physical evidence seized during the automobile search and certain statements he made to police at the scene of the stop. The court granted defendant's motion to suppress as it pertained to statements he made while seated inside of the police vehicle. (2T3-21 to 16-14; Da3).

Defendant subsequently pleaded guilty to count three, second-degree unlawful possession of a handgun, pursuant to a negotiated plea agreement. (3T15-15 to 18-18). In the plea forms, defendant preserved the right to appeal the court's ruling on his motions to "SUPPRESS EVIDENCE" and "SUPPRESS STATEMENTS (MIRANDA MOTION)." (Da5). The court incorporated the plea forms into the record during the plea hearing, finding that there were no additional promises outside of those contained in the agreement. (3T19-17 to 19).

On April 28, 2023, the court sentenced defendant in accordance with the terms of the plea agreement. The court imposed a five-year prison sentence with a one-year parole disqualifier. (4T21-13 to 25). The court also imposed certain fines and fees. (4T21-22 to 25). The court dismissed the balance of the indictment. (4T22-3 to 4). Defendant filed a notice of appeal on June 22, 2023. (Da14 to 17).

COUNTER-STATEMENT OF FACTS

A. Motion Hearing

South Hackensack Police Officer Steven Oliver testified for the State at the hearing on the motions to suppress. Officer Oliver had been a police officer for over seven years, and he had been involved with many arrests involving narcotics. (1T14-3 to 10). At approximately 4:50 p.m. on April 16, 2022, Officer Oliver was on routine patrol near Phillips Avenue and Route 46 in South Hackensack. (1T14-24 to 15-16). He saw a white Chevrolet Equinox with a temporary New Jersey license plate driving east on Route 46 perform an illegal U-turn and drive west on Route 46. (1T15-22 to 25, 178-23; Da65).

Officer Oliver activated his lights and stopped the vehicle in a parking lot along Route 46. (1T16-5 to 6, 23-19 to 24). Officer Oliver walked to the vehicle and asked the driver, later identified as defendant, to produce his license, registration, and proof of insurance. (1T25-1 to 15). Officer Oliver saw a passenger inside the vehicle, later identified as defendant's wife. (1T26-1, 42-3). Defendant provided a driver's license from the State of Montana. He could not produce any proof of insurance. He also could not produce the vehicle's registration, although another police officer who arrived later obtained a temporary registration from defendant. (1T27-5 to 7, 113-3 to 19; V:16:53:23 to 27).

When speaking with defendant, Officer Oliver saw that his pupils were "extremely constricted." In the officer's experience and training, which included training related to narcotics, constricted pupils was "usually indicative of someone being under the influence or in possession of narcotics." (1T27-19 to 25, 123-18 to 21). The officer also observed that defendant appeared "extremely nervous," meaning that he we was "shaking" and "avoiding eye contact." (1T27-13 to 16). Officer Oliver returned to his police vehicle and checked defendant's driver's license in his computer system. The system reported that defendant had a warrant out of Montana "that was not extraditable." According to Officer Oliver, this meant that Montana would not come to New Jersey to pick up defendant. Thus, he did not intend to arrest defendant based on the warrant. He could not recall the nature of the offense underlying the warrant during his testimony. (1T28-15 to 16, 114-4 to 11, 115-14 to 24).

The officer exited his vehicle and asked defendant to come outside. (1T29-9 to 10). Officer Oliver wanted to speak to defendant again due to his shaking, avoidance of eye contact, and constricted pupils. He also wanted to ask defendant about the out-of-state warrant. Officer Oliver suspected that defendant might have been under the influence. (1T116-18 to 20, 121-5 to 11, 133-13 to 19).

Once outside the vehicle, defendant stood around unrestrained smoking a cigarette, though he still appeared nervous. His pupils were still constricted. (1T29-12 to 14; V:16:58:00 to 58:11). The officer initially asked where defendant was traveling, and defendant claimed he was going to New York. The officer observed, "Your eyes are like pinholes right now," to which defendant explained that he needed his insulin or something to eat. The officer then asked defendant about the "trouble" he got into in Montana. Defendant responded that the trouble was attributable to "stupid choices" meaning "drugs." The officer asked if any drugs were in his car or on his person. Defendant denied having any drugs. (V:16:58:11 to 59:07).

Next, Officer Oliver asked for consent to search the car. Defendant declined, explaining that he did not want to consent to search a car that he did not own. (V:16:59:07 to 59:18). The officer responded:

> But you're the one driving. Listen, you don't have to consent. I can get a canine to come here and it can hit on the car. You know, it's either way, it's up to you. I can either have the canine come, and they can alert to the car and then I can get it. Or you can just give me the consent to search or you can just tell me.
>
> [(V:16:59:18 to 59:25).]

Defendant immediately responded that there were drugs in the car, specifically identifying "meth." (V:16:59:25 to 59:31). The officer asked defendant to show him where the narcotics were located, and defendant guided

the officer to drugs located in the passenger door compartment. (1T30-4 to 15, 78-2 to 5). The officer saw three containers: two were empty and one contained suspected methamphetamine. (1T30-23 to 25).

Officer Oliver asked defendant whether the drugs belonged to just him or to him and his wife. Defendant initially denied that the methamphetamine belonged to him. The officer responded: "Am I going to have to arrest her, too? Because it's in the car." Defendant acknowledged that the drugs belonged to him shortly thereafter. (V:16:59:40 to 17:00:00). Officer Oliver told defendant that he wanted to be "nice" to defendant because defendant had been "cool" with the officer. He encouraged defendant, who was still moving around unrestrained, to continue to smoke his cigarette. (V:17:00:00 to 00:09). He asked defendant about the last time he did methamphetamine, and defendant stated that he used "last night." (V:17:00:09 to 00:14). Officer Oliver asked whether anything else was in the vehicle that the officer should know about, explaining that he was going to search it anyway. Defendant shook his head no. (V:17:00:11 to 00:24). While they were still standing outside of the vehicle, the officer asked defendant whether he was in New Jersey trying to evade the "warrants" for his arrest in other jurisdictions. Defendant acknowledged the warrants but said he was not evading them. (V:17:00:34 to 00:44).

Following this exchange, the officer told defendant that he was going to checked defendant's pockets and asked about where he obtained the methamphetamine. Defendant shrugged his shoulders, stating that it was in the car. The officer informed defendant about the procedural aspects of arrest, searched his person, and eventually handcuffed him. (V:17:01:08 to 02:44).

The officer then requested that Wilson exit the vehicle and he asked her if there were any other illegal items inside of the car. (1T31-18 to 19). She told that the officer that a loaded needle with methamphetamine was inside of her purse. (1T31-22 to 23). Officer Oliver retrieved the drugs and placed her under arrest. (1T32-1 to 2).

Officer Oliver returned to the vehicle and continued the search. (1T33-11 to 16). During the search, he found a New Hampshire driver's license for "Mark Weinstein" with defendant's photograph and a social security card for "Mark Weinstein." (1T33-18 to 21). Later, the police officer found a loaded nine-millimeter handgun without a serial number under the front passenger seat. (1T34-5 to 8, 35-3). The police questioned defendant about the gun while he was sitting inside the police car, and he denied knowing anything about it. (1T62-3 to 8; 2T16-2 to 14).

The police ultimately impounded the vehicle. (1T69-20 to 21). The officer issued six motor-vehicle citations against defendant, including for

careless driving, N.J.S.A. 39:4-97; improper U-turn, N.J.S.A. 39:4-125; failing to possess an insurance card, N.J.S.A. 39:3-29; obstructing the passage of other vehicles, N.J.S.A. 39:4-67; delaying traffic, N.J.S.A. 39:4-56; and operating a motor-vehicle while in possession of narcotics, N.J.S.A. 39:4-49.1. (Pa1 to 6; 1T22-20 to 23, 135-11 to 136-3).

B. The Court's Findings and Decision

Following the hearing on the matter, the court issued an order and oral decision rejecting defendant's motion to suppress items seized during the automobile search and partially rejecting his motion to suppress his oral statements. As a starting point, the court found the officer's testimony credible and consistent with the body-camera footage. (2T5-2 to 13). The court found that the officer conducted a lawful stop based on reasonable suspicion after he witnessed defendant conduct an illegal U-turn on Route 46. (2T11-13 to 23). The court found that the officer's subsequent observations of defendant's nervousness, trembling, and constricted pupils established reasonable suspicion that defendant was under the influence of narcotics and justified a more intrusive line of questioning. (2T13-12 to 20). Once defendant indicated that there were drugs in the car, the officer had probable cause to conduct an automobile search under State v. Witt, 223 N.J. 409 (2015). (2T15-7 to 15).

As to the Miranda[3] issue, the court cited to State v. Hickman, 335 N.J. Super. 623, 631 (App. Div. 2000), and emphasized that accusatory questioning during a roadside search does not necessitate Miranda warnings. The court found that the questioning occurred outside the car during daylight for mere minutes, and that the questions addressed issues regarding whether defendant had been driving under the influence. The court further found that defendant's responses were voluntary and the police did not overbear his will. (2T13-21 to 14-9). However, the court suppressed defendant's statement to police that he did not know who owned the firearm found in his car because defendant was in custody at that point and the police asked him a question reasonably likely to elicit an incriminating response. (2T16-2 to 14).

C. Guilty Plea

Defendant admitted as part of his guilty plea that, on April 16, 2022, a police officer pulled him over in his vehicle. He admitted that he owned and constructively possessed a handgun found inside of the vehicle during a search by the officer. He admitted that the handgun was operable and that it was unlawful for him to possess the handgun in the vehicle. (3T15-15 to 18-18).

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

LEGAL ARGUMENT

POINT I

THE OFFICER LAWFULLY SEARCHED DEFENDANT'S VEHICLE PURSUANT TO THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT.

Defendant argues that the police unlawfully prolonged the stop after Officer Oliver checked defendant's license and discovered that he had an outstanding warrant in Montana. The State submits that defendant's arguments lack merit. Within ninety seconds of returning to defendant and asking him out of his vehicle, defendant revealed that his car contained narcotics, thus establishing probable cause to search the car. The questioning during this ninety-second period that defendant contends violated his constitutional rights did not exceed the time it would have taken to issue motor-vehicle summonses for defendant's infractions, especially given that defendant still had had not produced proof of insurance enabling him to legally drive the vehicle away. The questioning consisted of routine inquiries attendant to any traffic stop and reasonable follow-up inquiries based on observations and defendant's responses.

In addition, defendant's reckless U-turn on a major highway, constricted pupils, extreme nervousness, and admission that he got into trouble in Montana for making "stupid choices" involving "drugs" established reasonable

suspicion that defendant was driving under the influence or possessed drugs. In fact, it would have been objectively unreasonable for the officer to allow defendant to drive away without issuing him summonses, sorting out whether the vehicle was properly insured, asking about his criminal history in Montana, and investigating defendant's objective signs of impairment.

Law enforcement officers must have a "reasonable and articulable suspicion that an offense, including a minor traffic offense, has been or is being committed" to justify a motor-vehicle stop. State v. Amelio, 197 N.J. 207, 211 (2008). During an otherwise lawful traffic stop, a police officer may inquire "into matters unrelated to the justification for the traffic stop." State v. Dunbar, 229 N.J. 521, 533 (2017) (citation and internal quotation marks omitted). These inquiries include "checking the driver's license, verifying whether the driver has any outstanding warrants, and inspecting the automobile's registration and proof of insurance." Id. (citation and internal quotation marks omitted). It also includes questions to the driver and passenger regarding "their route of travel and their purpose." State v. Baum, 199 N.J. 407, 424 (2009).

"If, during the course of the stop or as a result of the reasonable inquiries initiated by the officer, the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those

suspicions." State v. Dickey, 152 N.J. 468, 479-80 (1998) (citation and internal quotation marks omitted). But "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Dunbar, 229 N.J. at 534.

In this case, defendant argues that "after [Officer] Oliver checked [defendant's] license and registration, he did not have reasonable suspicion to continue to detain Edwards, or to ask [defendant] for consent to search." (Db12). Thus, defendant's entire constitutional claim in Point I boils down to the ninety-second period after Officer Oliver checked defendant's license and before defendant admitted to having drugs inside his vehicle. (V:16:57:57 to 59:27). Defendant's claim is restricted to this period because he could not reasonably argue that the police lacked a basis to detain defendant after he admitted his vehicle contained drugs – indeed, defendant's brief concedes that the police had probable cause to arrest him after he "indicated that there were in fact drugs in the car." (Db32). Defendant's challenge, narrow as it is, fails for several reasons.

First, the questioning prior to defendant's admission that the vehicle contained contraband did not prolong the seizure "beyond the time reasonably required" to complete the original mission of the stop. Dunbar, 229 N.J. at

534. The officer still had to issue four summonses for motor-vehicle offenses related to defendant's reckless driving. In addition, defendant still had not yet produced proof of insurance, which eventually resulted in a fifth summons, see N.J.S.A. 39:3-29. (Pa2 to 6). Thus, if Officer Oliver had released defendant at that juncture, he ran the risk of releasing a driver without the necessary liability insurance for his vehicle. See N.J.S.A. 39:6B-2. Given all this, the officer was justified in detaining defendant during this ninety-second period without even factoring in the objective indicia of driving under the influence and drug possession. See State v. Hickman, 335 N.J. Super. 623, 637 (App. Div. 2000) (holding that inquires about the defendant's nervousness and whether a car contained contraband "did not prolong the stop," in part, because the officer had to issues summonses and "the stop would have continued for some additional period of time").

Second, the inquiries prior to defendant's admission that his car contained drugs consisted of permissible routine questions attendant to traffic stops, see Baum, 199 N.J. at 424, and broader questions reasonably addressing suspicions raised by defendant's answers and the officer's observations, see Dickey, 152 N.J. at 479-80. Specifically, during the first forty-eight seconds after defendant exited the car, the officer asked defendant about where he was traveling and what he was doing in the area. The officer also confronted

defendant about his constricted pupils (based on observations) and asked about the trouble that he got into in Montana (as evidenced by the outstanding warrant). (V:16:57:57 to 58:45). Once defendant explained his troubles in Montana involved "stupid choices" and "drugs," the combination of facts known to the officer plainly supported questioning defendant for the next forty-two seconds prior to his admission that the car contained drugs. (V:16:58:45 to 59:27). That is, defendant's reckless U-turn on a major thoroughfare, excessive nervousness, and constricted pupils, combined with his admission to criminal conduct involving drugs back in Montana, all justified the officer asking additional questions about defendant's recent use and possession of narcotics.

Third, though the officer did not require reasonable suspicion beyond that needed to justify the original stop, the officer's observations did establish reasonable suspicion. The minimal standard for reasonable suspicion is met when there are specific and articulable facts which, taken together with rational inferences, suggest that criminal activity or a motor-vehicle offense is afoot. Terry v. Ohio, 392 U.S. 1, 21, 30 (1968); State v. Bernokeits, 423 N.J. Super. 365, 376 (App. Div. 2011). "[I]nnocent circumstances in the aggregate can support a finding of reasonable suspicion." State v. Stovall, 170 N.J. 346, 368 (2002). "The reasonable suspicion inquiry . . . considers the officers'

background and training, and permits them 'to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.'" State v. Nelson, 237 N.J. 540, 555 (2019) (quoting United States v. Arvizu, 534 U.S. 266, 273 (2002)). "To appropriately view the 'whole picture,' the Court must not engage in a 'divide-and-conquer' analysis by looking at each fact in isolation," Nelson, 237 N.J. at 554-55 (quoting District of Columbia v. Wesby, 138 S.Ct. 577, 588 (2018)), because it is "rare indeed" to observe activity that is consistent only with wrongdoing and incapable of an innocent interpretation. State v. Arthur, 149 N.J. 1, 11 (1997). At bottom, the reasonable suspicion standard is a "rather lenient test," United States v. Santana, 485 F.2d 365, 368 (2d Cir. 1973), requiring a "significantly lower degree of objective evidentiary justification than does the probable cause test," State v. Davis, 104 N.J. 490, 501 (1986), which itself does not even rise to a more-likely-than-not standard. Texas v. Brown, 460 U.S. 730, 742 (1983).

Here, defendant's constricted pupils, nervousness, reckless driving, and admission to getting into trouble in Montana for "stupid choices" involving "drugs" established reasonable suspicion that defendant was driving under the influence or possessed drugs. See State v. Jones, 179 N.J. 377, 390-91 (2004) (citing cases for the proposition that criminal history is a relevant factor in a

probable-cause analysis); State v. Stovall, 170 N.J. 346, 367 (2002) (adhering to the "well-established rule that a suspect's nervousness plays a role in determining whether reasonable suspicion exists"); State v. Johnson, 42 N.J. 146, 165 (1964) (observing that "proof of the erratic manner or result of . . . driving is admissible as evidence" of driving while intoxicated); State v. Kenyon, 651 N.W.2d 269, 274 (S.D. 2002) (observing that "constricted pupils" is a "physical symptom[] of stimulant use" and supported reasonable suspicion to prolong a detention); State v. Dubaniewicz, 208 A.3d 619, 495-96 (Vt. 2019) (citing the officer's observations of defendant's "constricted pupils" as supporting reasonable suspicion that defendant was under the influence of illegal drugs).[4]

This is not to say that every one of these factors established reasonable suspicion on their own – for instance, observations of nervousness, standing alone, do not establish reasonable suspicion. See, e.g., State v. Mann, 203 N.J.

[4] Additional out-of-state cases support the proposition that constricted pupils contribute to reasonable suspicion of impaired driving. See, e.g., State v. Stewart, 340 P.3d 802, 807 (Utah Ct. App. 2014). In addition, unpublished cases in New Jersey have similarly recognized that "constricted pupils" are an objective indication of impairment. See, e.g., State v. Cantalupo, No. A-4142-16T2, 2019 WL 149654, at *8 (App. Div. Jan. 8, 2019); State v. Mauro, No. A-2085-09T3, 2011 WL 2307256, at *5 (App. Div. May 31, 2011). (Pa7 to 22).

328, 339-40 (2010). Nevertheless, the combination of these factors clearly established reasonable suspicion. [5]

Fourth, defendant's argument about the officer lacking reasonable suspicion to justify his request consent to search is misplaced. As explained above, Officer Oliver had reasonable suspicion, and those facts were known before requesting consent to search. But, more fundamentally, the officer did not conduct a consent search, and the Law Division did not rely on a consent theory to justify the search. The Law Division relied on the automobile exception to the warrant requirement, finding that defendant's admission that the car contained drugs justified the search under State v. Witt, 223 N.J. 409 (2015). (2T15-11 to 20).

For this reason, defendant's reliance on State v. Carty, 170 N.J. 632 (2002), is inapposite. In Carty, the Supreme Court held that "to effectuate a

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[5] The State does not rely on the legal authority of the out-of-state warrant as establishing probable cause to arrest defenant. We hasten to add that in a variety of circumstances, an officer may reasonably arrest an individual on an out-of-state warrant despite an indication that the foreign jurisdiction will not extradite in order to confirm the foreign jurisdiction's intentions. See United States v. Jones, 260 Fed App'x 769, 772-74 (6th Cir. 2008); United States v. Boyce, No. 1:10-CR-62-TLS, 2011 WL 1085792, at *4 (N.D. Ind. March 21, 2011); United States v. Burnett, No. 21-68-DLB-CJS, 2022 WL 17828325, at *5 (E.D. Ky. Nov. 23, 2022). (Pa23 to 41). However, in this case, Officer Oliver had no plan to confirm Montana's preferred course of action, and the record does not otherwise detail the relevant circumstances, policies, or extradition procedures permitting an alternative assessment of whether there were objective reasons to detain defendant on the warrant. See State v. Bruzzese, 94 N.J. 210, 219 (1983)

consent search" without reasonable suspicion "is unconstitutional" because it prolongs the stop. Id. at 647 (emphasis added). The Court additionally noted that requiring reasonable suspicion before a consent search "serves the prophylactic purpose of preventing the police from turning a routine traffic stop into a fishing expedition." Id. Thus, "consent searches following a lawful stop of a motor vehicle should not be deemed" voluntary and knowing "unless there is reasonable and articulable suspicion." Id. In this case, unlike in Carty, the officer relied on the automobile exception to justify the search, thus the constitutional rule for consent searches does not apply.

Defendant's additional arguments to the contrary also lack merit. Defendant unleashes a flurry of attacks at the officer's testimony, asserting that he is not a drug-recognition expert, did not explain in enough detail "why or under what circumstances" constricted pupils are a sign of impairment, and "did not actually believe" defendant was under the influence. (Db15 to 18). However, the Law Division found the officer credible, and the officer testified that in his training and experience "constricted pupils . . . is an indication of drug use," which led him to believe that defendant was "[p]ossibly under the influence." (1T122-6 to 8, 17). The weight of the authority in other jurisdictions – as well as unpublished cases by this Court – confirms that a police officer's observation of constricted pupils reasonably suggests drug

impairment. See, e.g., Kenyon, 651 N.W.2d at 274; Dubaniewicz, 208 A.3d at 495-96; Stewart, 340 P.3d at 807; Cantalupo, No. A-4142-16T2, at *8; Mauro, No. A-2085-09T3, at *5.

Scrutinizing the depth of Officer Oliver's knowledge regarding constricted pupils or his legal opinion of what gave rise to reasonable suspicion is not germane to this Court's inquiry. The question is whether Officer Oliver's observations, viewed objectively, justified his actions. This is because the "proper inquiry for determining the constitutionality of a search-and-seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent." Bruzzese, 94 N.J. at 219. Thus, "[t]he fact that the . . . officer does not have the state of mind hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Id. at 220 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)); accord State v. Bacome, 228 N.J. 94, 103 (2017).

Finally, as to defendant's complaint that the officer did not turn on his body-warn camera in time to capture the initial exchange when the officer asked for defendant's driving credentials, defendant is not entitled to a "rebuttable presumption that exculpatory evidence was destroyed or not captured" because he did not "reasonably assert[] that exculpatory evidence was destroyed or not

captured." N.J.S.A. 40A:14-118.5(q)(2) (emphasis added). Defendant contends that his defense counsel "reasonably argued . . . that the missing evidence could have been exculpatory." (Db22). However, arguing that missing evidence "could have been" exculpatory is not the same as "reasonably asserting" that such evidence "was" exculpatory. N.J.S.A. 40A:14-118.5(q)(2). And a close reading of the passages cited in defendant's brief reveals that defense counsel did not allege that the body-camera footage omitted any "exculpatory evidence." In fact, defense counsel seemingly refrained from making any assertions about what occurred before the body camera turned on. (Db22 citing 1T188-2 to 7, 201-5 to 22, 202-11 to 16).

Even if defendant was entitled to the presumption, the credible testimony of the officer about defendant's demeanor and appearance rebutted it. In addition, defendant's nervousness and constricted pupils continued when defendant stepped outside of the vehicle, so the court had the benefit of assessing the officer's observations against the body-warn camera footage at the point in which defendant alleges the officer lacked sufficient legal justification to detain defendant. For all these reasons, this Court should reject defendant's argument and affirm the trial court's decision on defendant's motion to suppress physical evidence.

POINT II

DEFENDANT VOLUNTARILY ADMITTED THAT HIS CAR CONTAINED DRUGS.

Defendant next argues that Officer Oliver advising him about a potential dog sniff overbore his will and coerced his admission that drugs were inside the vehicle. Defendant argues that all of his statements and derivative evidence subsequent to that admission should be suppressed. (Db26). The State disagrees. The trial court weighed all of the circumstances of the car stop and correctly found that nothing overbore defendant's will. That finding is entitled to deference. Defendant's argument to the contrary incorrectly conflates the law regarding consent searches under the Fourth Amendment with the law regarding voluntary confessions and Due Process.

Separate from the safeguards against self-incrimination contained in Miranda v. Arizona, 384 U.S. 436 (1966), "[d]ue process . . . requires that the State 'prove beyond a reasonable doubt that a defendant's confession was voluntary and was not made because the defendant's will was overborne.'" State v. L.H., 239 N.J. 22, 42 (2019) (quoting State v. Knight, 183 N.J. 449, 462 (2005)). Our appellate courts "generally will defer to a trial court's factual findings concerning the voluntariness of a confession that are based on sufficient credible evidence in the record." Id. at 47.

"The voluntariness determination weighs the coercive psychological pressures brought to bear on an individual to speak against his power to resist confessing." Id. To determine voluntariness,

> [a] court must look at the totality of the circumstances, including both the characteristics of the defendant and the nature of the interrogation. Relevant factors to be considered include the suspect's age, education and intelligence, advice concerning constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature, and whether physical punishment and mental exhaustion were involved.
>
> [State v. Galloway, 133 N.J. 631, 654 (1993).]

A court may also consider defendant's prior interactions with the criminal justice system. State v. Hreha, 217 N.J. 363, 383 (2014).

Because "[t]here is a natural reluctance on the part of a suspect to admit to the commission of a crime and furnish details[,] . . . [e]fforts by an interrogating officer to dissipate this reluctance and persuade the person to talk are proper as long as the will of the suspect is not overborne." State v. Miller, 76 N.J. 392, 403 (1978). Our constitutional standards governing interrogation "gives officers leeway to tell some lies during an interrogation[,]" although "[c]ertain lies" such as "false promises of leniency" may undercut voluntariness if they, "under the totality of circumstances, have the capacity to overbear a suspect's will." L.H., 239 N.J. at 44.

Here, the relevant factors overwhelmingly support the court's finding that defendant's will was not overborne when he admitted that the drugs were in his car. The record shows that defendant is forty-five years old. (Pa1). His out-of-state warrant and admission that he had been in trouble with drugs in Montana meant that this was not his first contact with the criminal justice system. The officer spoke to defendant in a commercial parking lot next to a major highway. They spoke in broad daylight, while defendant's wife sat in the vehicle a few feet away. Officer Oliver only questioned defendant for approximately ninety seconds outside of the vehicle before defendant admitted that his vehicle contained drugs, and the overall stop before defendant's admissions lasted mere minutes. Officer Oliver remained calm during the interaction, and defendant smoked a cigarette while answering questions. There was nothing in their verbal or nonverbal exchanges suggesting any physical or psychological coercion. While defendant admitted that one particular spot in his vehicle contained drugs – perhaps based on an ill-conceived strategy to placate the officer's suspicions by revealing evidence of a less serious crime – he did not reveal that the vehicle contained other illegal items. In sum, there was substantial credible evidence supporting the court's finding that defendant's will was not overborne and his statements were voluntary.

Defendant's argument in this point incorrectly conflates the law addressing the validity of consent under the Fourth Amendment with the issue of voluntariness required by due process. To waive one's Fourth Amendment rights, our courts demand that "the consent must be unequivocal and specific and freely and intelligently given." State v. King, 44 N.J. 346, 352 (1965) (citation and internal quotation mark omitted). "[T]he consenting individual must have been aware of her right to refuse, before giving consent." State v. Hagans, 233 N.J. 30, 39 (2018). An officer's comment regarding the inevitability of obtaining a court-authorized search warrant may indicate coercion if is a "deceptive threat made to deprive [an individual] of the ability to make an informed consent." Id. (quoting State v. Cancel, 256 N.J. Super. 430, 433-34 (App. Div. 1992)).

In contrast, the voluntariness of a defendant's statement does not hinge on a person's knowledge of their right to refuse to speak to police, equivocation, or the specificity of their statements. Even significant lies about the evidence by the police do not vitiate a confession's voluntariness in most cases. The only requirement is that the suspect's will is not overborne. L.H., 239 N.J. at 44; Miller, 76 N.J. at 403. It is thus no surprise that our courts consult different factors for making these separate legal judgments. Compare Hagans, 233 N.J. at 39-40 (listing guideposts for assessing the voluntariness of

consent), with Galloway, 133 N.J. at 654 (listing factors for assessing voluntariness of speaking with the police); see also State v. Andrews, 243 N.J. 447, 479-80 (2020) (reasoning that "the Fourth Amendment's privacy protections should not factor into analysis of the Fifth Amendment's applicability").

At bottom, the cases cited by defendant addressing the validity of consent are inapplicable because this is not a consent search.[6] The officer's representation that, "I can get a canine to come here and it can hit on the car," (V:16:59:15 to 59:25), came nowhere close to the sorts of investigative tactics that could call a suspect's confession into question. See State v. Morton, 155 N.J. 383, 450-51 (1998) (holding that defendant's confession during a nine-and-a-half hour custodial interrogation was voluntary despite the police feigning the destruction of a prior taped confession and subjecting the defendant to polygraph tests). For all these reasons, this Court should reject

[6] Defendant also relies on this Court's decision in State v. Baum, 393 N.J. Super. 275, 291-92 (App. Div.), aff'd as modified, 199 N.J. 407 (2009), which justified a vehicular search based on the automobile exception to the warrant requirement. That case supports the State's position because the panel reasoned that the officer's threat to use a drug-sniffing dog "can hardly be considered the type of remark that would have overwhelmed [the suspect's] free will." Id. at 290. To the extent that the panel suggested that reasonable suspicion was always necessary to conduct (or threaten to conduct) a dog sniff of a vehicle, our Supreme Court has subsequently "disapprove[d] of that reading." Dunbar, 229 N.J. at 539.

defendant's arguments in this point. The court certainly did not abuse its discretion in finding that defendant's statements were voluntary.

POINT III

DEFENDANT WAS NOT IN CUSTODY UNTIL THE OFFICER TOLD HIM THAT HE WAS GOING TO BE UNDER ARREST.

Defendant argues that the police violated Miranda by questioning him after bringing up the use of a drug-sniffing dog. Defendant alternatively argues that the police violated Miranda by questioning defendant after the police obtained probable cause for an arrest. The remedy for these violations, according to defendant, is that his responses to questions while in custody should be suppressed. Thus, defendant does not argue that any derivative physical evidence must be suppressed because of the alleged Miranda violations. (Db27).

The State disagrees with defendant's contentions. However, we acknowledge that defendant was improperly questioned without Miranda warnings while in custody shortly thereafter when Officer Oliver told defendant that he was going to be under arrest. Accordingly, only his statements responding to questions from that point forward should be suppressed. Although defendant does not argue otherwise, we underscore that the physical evidence obtained during the search of defendant's car should not

be suppressed. This is because the State had probable cause to search defendant's vehicle before the unwarned custodial statements. In addition, the application of the exclusionary rule for Miranda violations does not extend to physical evidence. Thus, while defendant may withdraw his guilty plea on remand because he conditioned the plea on the appeal of his Miranda motion, the evidence obtained during the search remains in the case.

Turning to the law, the United States Supreme Court held in Miranda v. Arizona, 384 U.S. at 444-45, that certain warnings must be provided and waived by a suspect in order for the suspect's custodial statement to be admissible. "'Custody' for the purposes of Miranda requires a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" State v. Erazo, 254 N.J. 277, 298 (2023) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). Thus, "[t]he critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action . . . ." Id. (quoting State v. P.Z., 152 N.J. 86, 103 (1997)).

The factors that a court may consider in determining custody include "the time, place and duration of the detention; the physical surroundings; the nature and degree of the pressure applied to detain the individual; language used by the officer; and objective indications that the person questioned is a suspect." State v. Smith, 374 N.J. Super. 425, 431 (App. Div. 2005). The

relevant inquiry is determined objectively, based on how a reasonable person in the suspect's position would have understood his situation, rather than "on the subjective views harbored by either the interrogating officers or the person being questioned." State v. Hubbard, 222 N.J. 249, 267 (2015).

Through the years, well-established case law has identified circumstances that generally do not constitute custody and therefore do not require Miranda warnings. For example, in Berkemer v. McCarty, 468 U.S. 420, 437-39 (1984), the United States Supreme Court held that the policies underlying Miranda decision would not be served by requiring the police to give the warnings prior to questioning a detained motorist. The Court highlighted two features of traffic stops driving its analysis.

"First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief." Id. at 437. "Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police[,]" as they occur in public and usually involve one or two police officers. Id. at 438. The Court analogized a traffic stop to other "Terry stops," which the Court observed had never been "subject to the dictates of Miranda." Id. at 439-40.

In applying the analysis to the roadside DWI investigation in Berkemer, the Court held that interrogation by the officer occurring in connection with

field sobriety tests did not require Miranda warnings. Id. at 441. The Court reasoned that at no time prior to the officer's questions was defendant "subjected to restraints comparable to those associated with a formal arrest" or "informed that his detention would not be temporary." Id. at 441-42. The Court additionally emphasized the "short period" between the stop and defendant's eventual arrest. Id. at 441.

Of course, that is not to say that Miranda warnings are never required following an automobile stop. Warnings may eventually be required if the detained motorist is subject to "restraints comparable to those associated with a formal arrest." Id. at 441; accord Erazo, 254 N.J. at 298.

A. Defendant Was Not In Custody When Officer Oliver Referenced a Dog Sniff

Defendant first argues that his roadside detention with Officer Oliver became custodial when the officer told defendant that he could get a dog to conduct a sniff of his vehicle. The State disagrees. Officer Oliver made this comment within the first ninety seconds of questioning defendant after re-approaching the car. Defendant was unrestrained outside of the vehicle and smoking a cigarette. Officer Oliver was calm and informal in his manner. (V:16:59:18 to 59:25). Merely informing defendant that the officer could call for a dog sniff did not impose a restraint on defendant's freedom to the degree

associated with a formal arrest. See Erazo, 254 N.J. at 298; Smith, 374 N.J. Super. at 430-31.

The facts here are not materially distinguishable from Berkemer. Defendant was unrestrained, the questioning was brief, and the officer had not "informed" defendant that his "detention would not be temporary." Berkemer, 468 U.S. at 441-42. If mentioning a potential investigative step such as a dog sniff converts a stop into custody, then conducting field sobriety tests would also convert a stop into custody. Yet, Berkemer confirms that the administration of field sobriety tests does not equate to custody. This Court should not depart from that reasoning in this case.

In addition to Berkemer, a number of cases by this Court hold that roadside detentions do not require Miranda warnings, and the facts of those cases compare favorably to the circumstances here. For example, in Baum, 393 N.J. Super. at 280-84, the officer questioned the driver, a pregnant young woman, for an extensive period during an automobile stop. The questioning occurred late at night while she stood outside crying in front of the officer's patrol car. The officer mentioned the potential for calling a drug-sniffing dog, asserted that the driver was not being honest, and inquired about the amount of drugs a passenger in the car had obtained in a recent transaction. The questioning without Miranda warnings continued after the driver admitted that

her car contained narcotics. Id. This Court rejected the defendant's argument that the driver "was subject to custodial interrogation and should have been given Miranda warnings." Id. at 291. While acknowledging her isolation, this Court reasoned that she was not in custody because she was "visible by her passengers, not handcuffed, humiliated, searched, or confined in the police car." Id.[7]

In this case, the officer's questioning was shorter in duration, less isolating, less onerous, and contained the same reference to a potential dog sniff. Because the driver in Baum was not in custody, it follows that defendant here was not in custody when the officer referenced a potential dog sniff. See also State v. Reininger, 430 N.J. Super. 517, 537 (App. Div. 2013) (holding that the roadside questioning of defendant did not establish custody despite a pat down of defendant's person and his repeated admissions that his vehicle contained firearms); Hickman, 335 N.J. Super. at 629 (holding that questioning of detained passenger regarding whether he possessed contraband did not require Miranda warnings and defendant's contrary claims were "clearly without merit"); State v. Weber, 220 N.J. Super. 420, 424 (App. Div. 1987)

[7] Our Supreme Court granted leave to appeal and affirmed, although it did not reach the merits of the Miranda claim in its decision because defendant did not have standing to claim that the police violated the Fifth Amendment rights of the driver. Baum, 199 N.J. at 412.

(holding that police may inquire about his consumption of alcohol during roadside field sobriety tests without giving Miranda warnings).

B. Defendant Was Not in Custody As Soon As the Police Had Probable Cause to Arrest Him

Defendant alternatively argues that he was in custody as soon as the police had probable cause to arrest him, which defendant identifies as the moment after defendant "indicated that there were in fact[] drugs in the car." (Db32). The State disagrees, but acknowledges that the investigatory detention turned into custody shortly thereafter when Officer Oliver stated that defendant was going to be under arrest. Specifically, while questioning defendant about who owned the drugs defendant had just shown him, the officer asked, "Am I going to have to arrest her, too? Because it's in the car." (V:16:59:40 to 17:00:00). Because this question revealed the officer's intention to arrest either defendant or both defendant and his wife, the State agrees that defendant was in custody under Miranda from that moment forward. See United States v. Leal-Felix, 665 F.3d 1037, 1041 (9th Cir. 2011) (explaining that one definition of "formal arrest" is "informing the suspect that he is under arrest").

Accordingly, the only dispute regarding defendant's alternative argument is whether defendant's testimonial assertions should be suppressed immediately following his admission that there were drugs in the car or

approximately thirty seconds later when the officer asked whether defendant's wife should be arrested "too." (V:16:59:30 to 17:00:00). As to this dispute, the State underscores that "[w]hat ultimately matters to the determination of whether Miranda is triggered is custody, . . . not . . . the existence of probable cause[.]" United States v. Butler, 249 F.3d 1094, 1099 (9th Cir. 2001). Custody is determined by consulting the relevant objective circumstances, which include "the extent to which the person was confronted with evidence of guilt," but also include the "language used by the officers, the physical characteristics of the place where the question[ing] occurs, the degree of pressure applied to detain the individual, [and] the duration of the detention." Id.; accord Smith, 374 N.J. Super. at 431.

Indeed, while a police officer – and suspect – may be mutually aware of circumstances constituting probable cause to arrest the suspect, that information alone does not convert a roadside detention into custody. See Berkemer, 468 U.S. at 423, 441-42 (holding defendant not in custody despite his failure of field sobriety test); Reininger, 430 N.J. Super. at 537 (holding that the roadside questioning of defendant did not establish custody despite that defendant repeatedly admitted that his vehicle contained firearms); Baum, 393 N.J. Super. at 291 (holding that driver's admission that car contained narcotics did not convert roadside questioning into custody).

Here, a number of factors support the conclusion that defendant was not in custody prior to Officer Oliver asserting that he was under arrest: the brief period of the detention; the calm, informal, and public nature of the interaction between defendant and Officer Oliver; the lack of any physical restraints; and the fact that defendant had only admitted that he knew drugs were in a vehicle that he had borrowed for the first time that day (as opposed to admitting that the drugs belonged to him).

Defendant's argument relies heavily on State v. O'Neal, 190 N.J. 601 (2007), but that case is distinguishable. In O'Neal, two officers approached defendant immediately after they witnessed a person hand money to defendant in exchange for a vial that defendant pulled out of his own sock. The purchaser retreated into a doorway, locked the door behind him, and prevented the police from pursuing him. The police then confronted defendant, asking him, "[W]hat's going on?" Defendant replied that he did nothing wrong. One officer directed a second officer to check the bulge in defendant's sock. The second officer patted-down the area with the bulge, and asked defendant what was inside his sock. Defendant admitted his sock contained cocaine. The officer then searched inside of defendant's sock, finding forty-nine vials of cocaine. Id. at 607. The Supreme Court cited the multi-factor analysis for

determining custody, and ultimately determined that the "defendant was in custody" when the officer asked defendant about his sock. Id. at 615-16.

The facts in O'Neal are distinguishable for a number of reasons. For one, the case did not involve a vehicle stop. Two, the officers observed defendant commit a drug offense. Three, the officers physically intruded upon defendant's privacy by patting down his person in search of drugs. Four, the totality of the circumstances clearly indicated to the defendant that the officers knew drugs were on his person, leaving him with no plausible deniability.

In short, all of the case law, including O'Neal, does not hold that an officer must issue Miranda warnings when "the police ha[ve] probable cause for an arrest," as defendant suggests. (Db32). This Court should thus find that defendant was in custody when the officer told him that he was going to be arrested but no earlier than that point in time.

C. Defendant's Remedy for the *Miranda* Violation Does Not Include Suppression of the Physical Evidence

Because defendant pleaded guilty conditioned on the appeal of his Miranda motion, see R. 3:9-3(f), the State acknowledges that he has the right to withdraw his guilty plea to second-degree unlawful possession of a handgun. State v. Diloreto, 461 N.J. Super. 185, 194 (App. Div. 2019), aff'd as mod., 245 N.J. 179 (2021). However, the State's concession does not affect the admissibility of the physical evidence obtained during the search of

defendant's vehicle, including the handgun. This is because the police had probable cause to search the vehicle before the custodial interrogation and would have discovered the firearm and other physical evidence irrespective of defendant's admission that the drugs belonged to him. Even if that were not the case, the exclusionary rule does not apply to the physical fruits of unwarned custodial statements.

As to probable cause arising before the search of the vehicle, the analysis here is not materially distinguishable from aforementioned decision in O'Neal, 190 N.J. at 616, where the Supreme Court addressed the remedy for a Miranda violation. There, the Court held that the Miranda violation – asking defendant what was in his sock while he was in custody – was harmless because "[t]he fact that defendant told the police what they were about to discover had no bearing on the legality of the seizure of the cocaine." Id. The Court added that "[t]he police had probable cause to search and arrest defendant prior to asking the offending question and would have discovered the cocaine when they searched the sock." Id.

Like in O'Neal, the police here had probable cause to search defendant's vehicle prior to the Miranda violation when defendant admitted that his vehicle

contained narcotics.[8] To this point, defendant asserts in his brief that "the police had probable cause for an arrest" after defendant "indicated that there were in facts drugs in the car." (Db32). That same probable cause to arrest defendant established probable cause to search his vehicle's passenger compartment under State v. Witt, 223 N.J. 409 (2015).

Nor is there any reasonable debate that Officer Oliver intended to search the vehicle once defendant admitted that it contained drugs – because that is precisely what occurred. After defendant admitted that his car contained narcotics, Officer Oliver asked defendant to show him where the drugs were located. Defendant guided Officer Oliver to the spot inside the vehicle where the drugs were stashed. During subsequent questioning, Officer Oliver asked defendant if the vehicle contained any additional drugs, explaining that he was "going to search it anyway." Defendant denied that the vehicle contained anything else. (V:16:59:28 to 17:00:30). Despite defendant's denial, Officer Oliver searched the vehicle and found many other illegal items including a handgun.

[8] The State notes that defendant admitted his vehicle contained narcotics before the point in time in which defendant alleges, in his alternative argument (Point III.B.), that he was in custody.

In sum, because this case in all fours with O'Neal regarding the remedy for the Miranda violation, all of the physical evidence obtained during the search of defendant's vehicle is admissible.

Though, on top of this rationale, the physical evidence obtained during the car search is also admissible for a more fundamental reason: the exclusionary rule does not apply to the physical fruits of a suspect's unwarned custodial statements. The United States first addressed this issue twenty years ago in United States v. Patane, 542 U.S. 630, 634 (2004). In that case, the police arrested a suspect and did not fully administer Miranda warnings. The police nonetheless questioned the suspect, a convicted felon, about a firearm located in his residence. Defendant eventually admitted that he had a firearm in his residence, and he gave the police permission to retrieve it. The police then retrieved the firearm in the house. Id. at 635.

Defendant filed a motion to suppress the gun, arguing, among other claims, that the police obtained it due to the Miranda violation. The district court and court of appeals agreed that the evidence was inadmissible at trial, with the latter court basing its decision on the Miranda violation. Id. at 635. The United States Supreme Court reversed the court of appeals, reasoning that the admission of nontestimonial physical evidence "does not run the risk of admitting into trial an accused's coerced incriminating statements against

himself" and could not otherwise be justified under the exclusionary rule. Id. at 644-45 (Kennedy, J., concurring).[9]

Following Patane, this Court has adopted the same limitation on the exclusionary rule, holding that a BB gun seized after defendant admitted to possessing it in an unwarned custodial statements did not justify its suppression. State v. Hager, 462 N.J. Super. 377, 388-89 (App. Div. 2020). In addition, our Supreme Court has twice cited to Patane with approval. See State v. O'Neil, 193 N.J. 148, 171 n.13 (2007); State v. Boretsky, 186 N.J. 271, 278 (2006). And even before Patane was decided, this Court has reasoned that the proper remedy for a Miranda violation does not entail suppression of physical evidence. State in Interest of A.S., 227 N.J. Super. 541, 548-49 (App. Div. 1988).

This is all to say that the applicable authorities establish that the exclusionary rule does not apply to any of the physical evidence seized during the search of defendant's vehicle in this case. Accordingly, the physical evidence in this case is admissible because the police had probable cause to

[9] The State cites to the concurring opinion's rationale because the general rule for interpreting opinions where a majority of the Court espouses no single rationale is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977).

search the vehicle prior to any unwarned custodial statements, and the exclusionary rule would not apply to the physical evidence obtained as a result of defendant's unwarned statements even in the absence of preexisting probable cause.

POINT IV

THERE IS NO BASIS TO REMAND FOR ANOTHER SUPPRESSION HEARING.

In his final point, defendant asks for another suppression hearing to raise two claims that defendant acknowledges he failed to raise with the trial court. The State objects to a remand for this purpose. Defendant waived these claims on appeal by failing to address them with the trial court, and he cites to no law or competent evidence in support of his request.

"Appellate review is not limitless." State v. Robinson, 200 N.J. 1, 19 (2009). "[T]he points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review." Id. at 19. Thus, "[f]or sound jurisprudential reasons, with few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'" State v. Witt, 223 N.J. 409, 419 (2015) (quoting Robinson, 200 N.J. at 20).

Here, defendant waived any claim about the rebuttable presumption that exculpatory evidence was not captured on the body camera during the brief

period that the officer failed to activate it at the beginning of the stop.[10] Defense counsel below neither referred to this statute, nor "reasonably assert[ed]" that exculpatory evidence was destroyed or not captured, as is required to trigger the presumption under the statute, N.J.S.A. 40A:14-118.5(q)(2). Because defendant failed to proffer any exculpatory evidence that was not captured by the body camera, the court had no reason to address the presumption. Defendant's claim in his brief that his trial counsel reasonably asserted that the video contained exculpatory evidence merely cites remarks by defense counsel noting that the officer violated the body-warn camera policy. (Db37 citing 1T188-2 to 7, 201-5 to 22, 202-11 to 16). These remarks fall well short of the statute's requirements.

Though defendant relies heavily on State v. Jones, 475 N.J. Super. 520 (App. Div. 2023), the rationale in that case clearly support the State's position here. In Jones, the defendant filed a brief in accordance with Rule 3:5-7(b), which offered a starkly contrasting version of events than that proffered by the State. The brief also asserted that defendant was entitled to a rebuttable presumption pursuant to N.J.S.A. 40A:14-118.5(q). Among other disputed

[10] To the extent that defendant intimates in his preliminary statement that Officer Oliver wrongly turned the body-camera audio off while speaking with other officers, the State notes that the procedure is permissible. See N.J.S.A. 40A:14-118.5(c)(2)(c).

factual contentions, the defendant asserted that the body-warn camera worn by one of the officers, which the State conceded could not be located, would have shown that the officer did not see a gun in plain view through the car windshield and that the officer only saw the gun once he ordered defendant out of the car and searched his person. Id. at 525. Despite these contrasting proffers as to the facts and the missing body camera footage, the trial court denied the defendant's motion to suppress without conducting an evidentiary hearing. As to the defendant's claim that he was entitled to a rebuttal presumption pursuant to N.J.S.A. 40A:14-118.5(q)(2) for the lost body-camera footage, the trial court reasoned that the statute did not apply to suppression hearings. Id. at 526.

On appeal, this Court reversed, reasoning that a testimonial hearing was warranted under Rule 3:5-7(c), because the defendant disputed material facts in the pre-hearing submissions. Id. at 528. This Court also reasoned the trial court erred because "the rebuttable presumption set forth in N.J.S.A. 40A:14-118.5(q)(2) is applicable at suppression hearings," but cautioned that the opinion was "not a determination" that the defendant was "entitled to the presumption." Id. at 535. The Court explained that the trial court should make that determination based on the "parties' arguments and evidence" in connection with the suppression hearing. Id.

In this case, unlike in Jones, the trial court has already conducted an evidentiary hearing. At that hearing, defendant did not ask the Court to apply the rebuttable presumption set forth in N.J.S.A. 40A:14-118.5(q)(2), and his argument did not meet the preconditions necessary for its application. Remanding this case for a second bite at the apple to argue for the rebuttable presumption is unwarranted. This Court should therefore reject defendant's argument for a remand on this basis.

Similarly, defendant also waived any claims regarding Officer Oliver's alleged attendance at a "Street Cop" conference. The record contains no competent evidence about what occurred at this conference or who attended. In violation of basic rules of appellate practice, defendant alleges that Officer Oliver attended the conference by citing to a purported roster of attendees that he wrongfully included in his appendix. Defendant also cites to a report about the conference in order to make factual assertions about what occurred during Officer Oliver's purported attendance. This Court should not consider these documents because they were not presented to the trial court and are not part of the appellate record. See Townsend v. Pierre, 221 N.J. 36, 45 n.2 (2015); State v. Golotta, 178 N.J. 205, 211-12 (2003).[11] In short, defendant presents

[11] Defendant's reliance on records outside of the appellate record is particularly improper given that police departments denied that certain officers attended the conference and the roster contains a disclaimer that it "could be . . . over

nothing to this Court supporting the relief he seeks, and, even if these claims were in the record and preserved for appeal, the officer's mere attendance at this private conference is not enough to overturn the trial court's discretionary credibility finding. See State v. Elder, 192 N.J. 224, 244 (2007).

The State notes that if defendant withdraws his guilty plea for the reasons discussed in Point III, supra, he is not foreclosed from moving for reconsideration with the motion court with whatever competent proof he can muster regarding the officer's alleged attendance and lectures at this conference. See State v. Washington, 453 N.J. Super. 164, 186-87 (App. Div. 2018) (holding that a court may grant reconsideration in the interests of justice based on new or additional information). Of course, in order to prevail, he will have to justify not raising this issue earlier and convince the court that the officer's purported attendance at this conference compromised his testimony so gravely that the court's credibility determination was "palpably incorrect." Id.

The State stresses that because defendant has pleaded guilty, he is not entitled to move for reconsideration on remand without withdrawing his guilty

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inclusive." (Da18). What is more, Officer Oliver's name does not appear on the list. Defendant's brief – piling supposition on top of a rule violation – presumes that the roster misspelled Officer Oliver's name as "Oliveri."

plea. "Generally, a guilty plea constitutes a waiver of all issues which were or could have been addressed by the trial judge before the guilty plea." State v. Robinson, 224 N.J. Super. 495, 498 (App. Div. 1988). While a defendant may appeal to this Court from the denial of a motion to suppress following a guilty plea, R. 3:5-7(d), or condition a guilty plea on the right to appeal from other pretrial motions, R. 3:9-3(f), that limited right to appeal based on the record below does not equate to an open-ended invitation to re-litigate resolved motions based on new information. If defendant here his unwilling to withdraw his guilty plea, then his only other option is filing a motion for post-conviction relief. There is no other procedural vehicle to advance this claim. Thus, for all these reason, this Court should not remand this matter for a new suppression hearing.

CONCLUSION

Based on the foregoing, the State respectfully requests that the judgment below be affirmed.

Respectfully submitted,

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REPLY LETTER BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3184-22-T2
INDICTMENT NO. 22-07-635-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Bergen County.
DALE EDWARDS,	:	
		Sat Below:
Defendant-Appellant.	:	Hon. Carol Novey Catuogno, 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).

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CITATION KEY

"Sb" – State's brief

"Db" - Defendant's brief

STATEMENTS OF PROCEDURAL HISTORY AND FACTS

Mr. Dale Edwards relies upon the Statement of Procedural History and Statement of Facts included his original brief.

LEGAL ARGUMENT

Edwards relies upon the arguments made in his previously filed brief and only adds the following points.

A. Reasonable Suspicion of Criminal Activity Was Required to Expand the Scope of the Motor Vehicle Stop and to Request Consent to Search.

The State argues that State v. Carty, 170 N.J. 632, 647, modified, 174 N.J. 351 (2002), is inapposite because there was no consent search in this case (Sb 17-18), but the Carty Court's reasoning applies here. In considering whether reasonable suspicion was required to request consent to search, the Court in Carty relied on cases holding that "continuing a Terry stop beyond that which is necessary to resolve the initial stop violates the Fourth Amendment unless there is an additional articulable and reasonable basis to continue the detention," and held that "[u]nless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after the completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional." Id. The Court said that the rule applied regardless of whether the tasks related to the motor vehicle stop had been completed. Id.

As the State acknowledges in its brief (Sb 17-18), the purpose of the reasonable suspicion requirement is to "validate the continued detention" and "prevent[] police from turning a routine traffic stop into a fishing expedition for criminal activity unrelated to the stop." See Carty, 170 N.J. at 647. It's of no moment that the search in this case was based on the automobile exception, rather than consent; the probable cause was based on statements Mr. Edwards made after the police unconstitutionally expanded the scope of the motor vehicle stop and prolonged the detention.

While the State argues that the police's additional questioning, request for consent to search, and threat to summon the dogs did not prolong the detention because the police had not yet written the tickets (Sb 12-13), the law is clear that this is not the standard. As explained above, Carty makes clear that the law protects against suspicionless fishing expeditions, regardless of whether all the tasks related to the motor vehicle stop have been completed. The Supreme Court of the United States has said the same. Rodriguez v. United States, 575 U.S. 348, 357 (2015) ("The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, . . . but whether conducting the sniff 'prolongs'—i.e., adds time to —'the stop.'"). To hold that this is not a prolonged detention because the officer had not yet written the tickets would inappropriately limit prolonged detention arguments to an infinitesimal number and sanction

suspicionless fishing expeditions during motor vehicle stops, so long as the police wait to write any tickets.

In addition, although not necessary to Edwards' argument, the fact that the police had done everything they needed to and had all the information necessary to write the tickets, makes it obvious that the police's conduct did delay the stop. The State argues that the police still did not have proof of insurance and that they were therefore justified in continuing the detention to prevent an uninsured driver from getting back on the road. (Sb 13) But there is no legal basis to continue an investigation or impound a vehicle for failure to provide proof of insurance, not even where the police have probable cause to believe that the vehicle is uninsured. While statutes give officers authority to remove unregistered cars from public highways, they do not provide the police with authority to move or impound uninsured vehicles. See N.J.S.A. 39:3-4 (unregistered vehicles), 39:5-47 (stolen vehicles), 39:3-29 (failure to provide proof of license, insurance or registration); N.J.S.A. 39:6B-2 (uninsured vehicles). Thus, the police could only write Mr. Edwards a ticket for failure to provide insurance, nothing more. See also State v. Terry, 232 N.J. 218, 265 (2018) (J. Rabner, dissenting) ("Under N.J.S.A. 39:3-29, a driver must present a license, insurance card, and registration certificate when an officer asks for them. If the driver of a car fails to do so, the police can issue a summons that may result in a fine of $150. [It] does not authorize impoundment.").

Instead of writing Edwards tickets and sending him on his way after confirming ownership of the car and running a record check, Oliver told Edwards to exit the car, and began questioning him, asking for consent to search and threatening to bring drug dogs. There can be no real dispute; those actions expanded the scope of, and thereby prolonged, the stop.[1] See State v. Dunbar, 229 N.J. 521, 539 (2017) ("It is similarly unchallenged that the stop can evolve into an unlawful detention if its scope expands too far or the stop is unnecessarily prolonged. . . . Thus, a lawful traffic stop may turn unconstitutional if the officer overly broadens the scope or prolongs the stop, absent independent reasonable suspicion."); United States v. Clark, 902 F.3d 404, 411 (3d Cir. 2018) ("Simply stated, we hold that, after [the officer's] computerized check confirmed [the defendant's] authority to drive the vehicle and without any other indicia he lacked that authority, the traffic stop was effectively completed. To then turn to the passenger . . . for questioning that sought suspicion for criminal activity went

[1] This case is wildly different from State v. Hickman, 335 N.J. Super. 623, 637 (App. Div. 2000), relied on by the State for the proposition that asking incriminating questions about criminal activity does not prolong a detention. (Sb 17) There, all the questioning occurred when the officer first approached the defendant's car; the officer did not direct the defendant to exit the car or ask additional questions after he had already ran the defendant's information and confirmed ownership of the car. In addition, the officer did not request consent to search or threaten to bring drug dogs to sniff the car. Also, this case preceded State v. Carty and State v. Rodriguez, which make clear that the relevant question is whether the police expanded the scope of the stop or prolonged the detention, irrespective of whether the officer had already written the motor vehicle tickets.

beyond 'ordinary inquiries incident to [the traffic] stop.'" (citation omitted) (second alteration in original)). While the State complains that this additional questioning and investigation only prolonged the stop by 90 seconds, the Supreme Court of the United States has made clear that there is no de minimis exception for minor delays. Rodriguez, 575 U.S. at 357 (reversing the lower court's decision); United States v. Clark, 902 F.3d 404, 410, 410 n.4 (3d Cir. 2018) ("There is no de minimis exception to this rule." (citing Rodriguez, 575 U.S. at 357)).

B. The Police Did Not Have Reasonable Suspicion of Criminal Activity.

In the alternative, the State attempts to argue that Oliver had reasonable suspicion of criminal activity, pointing to Edwards' "reckless driving," constricted pupils, nervous behavior and criminal history. (Sb 14) While the State says Edwards was driving recklessly, in order to show that Oliver had reasonable suspicion that Edwards was under the influence, the sole motor vehicle violation that the officer testified to was the making of the illegal U-turn. The officer admitted that he did not recall whether Edwards cut other drivers off or otherwise drove recklessly or carelessly. (1T 141-21 to 143-8, 147-1 to 148-14) Nor did Oliver testify that Edwards was driving in a way that made him believe that he was under the influence. Altogether, there is zero evidence that the way Edwards was driving suggested that he was under the influence.

In addition, as explained in his opening brief, while an individual's nervous behavior and criminal history may be considered by the police as part of the totality of the circumstances, those factors are inadequate to support reasonable suspicion. (Db 19-20)

That leaves the constricted pupils. The State cites to a number of out of state and unpublished cases to support its argument that Edwards' pupil size warranted Oliver in a belief that he was under the influence. In fact, these cases help elucidate all that this case is missing.

For instance, in State v. Stewart, 340 P.3d 802, 807 (Utah 2014), the Court found reasonable suspicion that a defendant was under the influence and therefore to conduct sobriety tests where the defendant was slurring, jittery, not making sense, and had constricted pupils. The court noted that the prescription medications could have explained her constricted pupils, but relied on the defendant's statement that her prescription medications would not be causing any ill-effects to conclude that illegal drugs or alcohol might be having those effects. Id.

The State's reliance on State v. Dubaniewicz, 208 A.3d 619, 620-625 (Vt. 2019), fares no better. There, the court found reasonable suspicion that a defendant was under the influence of drugs due to a number of observations the officer made about the defendant, including track marks on the back of her hands, the unusually warm jacket she was wearing, pale complexion, rapid pulse, constricted pupils, and

change in her affect from the first stop, when she appeared "dopesick," to a second stop, when she appeared no longer sick. Id. Importantly, "the sergeant [was] experienced law enforcement officer who has led drug investigations, attended trainings and continuing education relating to criminal drug activity and investigations, and instructed fellow officers in trainings regarding basic drug identification and investigation." Id. at 624. For all those reasons, the court found that it was reasonable for the officer to investigate the defendant for driving under the influence. Id. Even so, the court found that the officer did not have reasonable suspicion to expand the stop from a potential DUI traffic stop to a drug investigation, after determining that field sobriety testing was unnecessary. Id.

Unlike in the cases cited by the State, the sole purported objective sign that Edwards was under the influence was his pupil size.[2] And, whereas Stewart said

[2] The other cases cited by the State are inapposite for that same reason. See State v. Kenyon, 651 N.W.2d 269, 274 (S.D. 2002) (finding a "sufficient" basis for reasonable suspicion where "[the defendants] were sweating, had constricted pupils and slurred speech, all of which are physical symptoms of stimulant use" and had given the police inconsistent answers about where they were going while traveling "a known drug corridor for methamphetamine traffic"); State v. Cantalupo, No. A-4142-16T2, 2019 WL 149654, at *7-8 (N.J. Super. Ct. App. Div. Jan. 8, 2019) (finding reasonable suspicion the defendant was driving while intoxicated, justifying field sobriety testing, where the defendant was slurring, moving slowly, swaying, having trouble standing had constricted pupils and smelled of a strong chemical order); State v. Mauro, No. 09-03-266, 2011 WL 2307256, at *1-2, 5 (N.J. Super. Ct. App. Div. 2011) (finding probable cause to believe drugs were inside the car where the police had received a call about a suspicious driver and observed the driving swerving, and where the defendant,

his medical condition could not explain the symptoms he was exhibiting, Edwards told Oliver that his pupils were constricted due to his medical condition.

Oliver, unlike the officer in Dubaniewicz, was not a drug expert – he was not even qualified to do field sobriety tests. See Dubaniewicz, 208 A.3d at 620-625 (finding the officer's belief that the defendant was intoxicated was reasonable due to his specialized expertise). Oliver could not explain why he believed Edwards' pupil size could be indicative of intoxication, and ultimately conceded that small pupil size was not indicative of criminal activity. (Db 16-17) As argued in Edwards' opening brief, Oliver's training or lack thereof, and inability to explain the basis for his beliefs matters because the State has the burden to prove that the officer's beliefs were objectively reasonable. (Db 17) To determine whether Edwards' pupils were actually constricted relative to a normal baseline and whether constricted pupils, without any other purported signs of intoxication, warrant an officer in a reasonable belief that an individual is involved in drug use and activity, the trial court (and officer) would have needed to know more.

Finally, the fact that no one ever performed any sobriety tests, undermines the State's argument that the police had reasonable suspicion to believe Edwards was under the influence, much less reasonable suspicion that drugs would be inside

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once pulled over, appeared pale, had a red nose, constricted pupils, and the police had recovered a small pipe with powdery residue upon performing a lawful frisk).

the car. Dubaniewicz, 208 A.3d at 620-625 (the officer did not have reasonable suspicion of drug activity where he decided sobriety tests were unnecessary). For these reasons, even assuming for the sake of argument that constricted pupils could be a sign of intoxication, this one factor is not enough.

C. Mr. Edwards Reasonably Asserted that the Missing Body-Worn Camera Footage Would Have Contained Exculpatory Evidence, and Did Not Waive the Argument. Nor Is His Argument that Oliver's Attendance at the Street Cop Conference Supports Suppression the Kind of Argument that Can Be Waived.

The State argues that Mr. Edwards is not entitled to the statutory presumption that the missing evidence was exculpatory because he did not "reasonably assert" that the missing video evidence "was" exculpatory, but this Court should find that the defendant's initial burden is minimal and was satisfied here. (Sb 19-20) The law is clear that remedial statutes, like this one, are supposed to be construed broadly in accordance with their remedial purpose. See Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Rev., 197 N.J. 339, 364 (2009); Barratt v. Cushman & Wakefield of New Jersey, Inc., 144 N.J. 120, 126–27 (1996); Shaw v. Shand, 460 N.J. Super. 592, 608–09 (App. Div. 2019). Therefore, as the State appears to concede, it should be enough that defense counsel argues or proffers that the police violated the body-worn camera statute and that the evidence would

have supported the defense's theory, as long as that argument or proffer is not unreasonable or implausible on its face.[3]

Here, defense counsel reasonably argued that missing evidence would have showed that no reasonable suspicion existed, and that the police were trying to find a way to unconstitutionally prolong the stop and search the car.[4] (1T 191-18 to 192-20, 201-5 to 22) It also appears he was arguing that the missing video of the stop would have shown that Mr. Edwards did not make an illegal U-turn. (1T 202-11 to 19) In addition, defense counsel repeatedly argues that the officer's failure to follow the law demonstrates that he is not credible and shows that he was lying about what happened. (1T 187-22 to 188-11, 190-7 to 8, 203-9 to 10, 204-12 to 14)

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[3] The Legislature used the word "asserts" rather than "proves," "demonstrates," or "shows." An assertion is defined as "[a] declaration or allegation" and "[a] person's speaking, writing, acting, or failing to act with the intent of expressing a fact or opinion; the act or an instance of engaging in communicative behavior." Black's Law Dictionary (11th ed. 2019). Reasonable is defined as "being in accordance with reason," "not extreme or excessive," "moderate" and "fair." Merriam-Webster.com Dictionary, Merriam-Webster.

[4] Although "body worn camera may be deactivated, consistent with directives or guidelines promulgated by the Attorney General" "while the officer is participating in a discussion pertaining to criminal investigation strategy and planning, provided that the discussion is not conducted in the immediate presence of a civilian and further provided that the officer is not actively engaged in the collection of physical evidence," the officer must first state aloud that they are deactivating for this reason. Attorney General Law Directive No. 2022-1, § 6.5; N.J.S.A. 40A:14-118.5 (c)(2)(c). Oliver did not adhere to this directive before deactivating his camera. (1T 201-10 to 17) Furthermore, officers should not be permitted to turn off their camera to shield evidence of a plan to violate a defendant's rights, as defense counsel alleged occurred here. (1T 201-5 to 22)

Because defense counsel did reasonably assert that the missing evidence was exculpatory, and the State did not attempt to address the defense's argument about the body-worn cameras, Mr. Edwards was entitled to the presumption.

If this Court is not inclined to apply the presumption on appeal because the trial court did not consider the statute or apply the standard, and if this Court does not suppress the physical evidence for other reasons, then it should remand for a new suppression hearing, without forcing Mr. Edwards to withdraw from the plea. Contrary to the State's argument, this case is not like State v. Witt, 223 N.J. 409 (2015), and therefore Edwards did not waive the argument that the missing evidence would have been exculpatory. (Sb 40)

In Witt, the Supreme Court held that a defendant could not challenge the unlawfulness of a stop on appeal where trial counsel only challenged the lawfulness of the search. 223 N.J. at 419. The Court explained that courts should generally decline to consider issues not presented to the trial court when defense counsel had "the opportunity for such a presentation" because:

> [I]t would be unfair, and contrary to our established rules, to decide the lawfulness of the stop when the State was deprived of the opportunity to establish a record. . . . The trial court, moreover, was never called on to rule on the lawfulness of the stop.

By contrast, here, trial counsel argued that Oliver violated law and policy by failing to properly use his body worn camera, and that the missing evidence would

have supported his arguments that the detention was prolonged without reasonable suspicion and shown the officer was not credible. The State had the opportunity to respond to this argument, but failed to do so.

Defense counsel did enough to preserve the argument. Defense counsel did not have to cite to the statute or use the magic words to preserve the argument about the body-worn-camera footage. See State v. Robinson, 200 N.J. 1, 19 (2009) ("The important fact is that the trial court was alerted to the basic problem[.]" (citation omitted)); State v. Watson, 472 N.J. Super. 381, 439 (App. Div. 2022) (finding that, even though defense counsel had not specifically cited the Confrontation Clause, "[c]onsidering the totality of these circumstances, although counsel might have done more to articulate an objection based on Sixth Amendment grounds, as distinct from N.J.R.E. 404(b) principles, we do not believe that defendant impliedly waived his Confrontation Clause rights"), rev'd on other grounds, 254 N.J. 558 (2023).

As a final, related note, Edwards' argument that the Street Cop conference evidence supports the defense's theory that the stop was unconstitutionally prolonged and calls into question Oliver's credibility is not the kind of argument that can be waived. First, Witt does not apply because there was no opportunity to present this argument below, as the Office of the Comptroller Report was not released until December of 2023. Second, the Street Cop argument is not a

standalone argument, unlike arguing for the first time on appeal that a stop was unconstitutional. Witt should not be extended to arguments that are made in support of suppression claims that were raised below. As the argument is not waived, Edwards does not have to withdraw his plea to advance it.[5]

Edwards is filing, along with this brief, a motion to expand the record to include this relevant and new Street Cop information, so that this Court can consider the information on appeal. In alternative, if this Court remands for a new suppression hearing, Edwards should be permitted to introduce this new evidence.

D. The State errs in its interpretation of State v. Baum.

The State wrongly interprets State v. Baum, 393 N.J. Super. 275, 291-92 (App. Div.), aff'd on other grounds, 199 N.J. 407 (2009), and argues that it

[5] The State argues that Edwards' only option is to withdraw from the plea and file a motion for reconsideration based on this new evidence, where he would have to show why he did not come forward with the evidence earlier and why the trial court's credibility determination was "palpably incorrect." (Sb 44) To the contrary, the trial court must reconsider interlocutory orders at any time where new evidence calls into question the veracity of the officer's testimony. See State v. Boston, 469 N.J. Super. 223, 240-41 (App. Div. 2021) (interlocutory orders can be revisited at any time before final judgment in the interests of justice and finding plain error where the trial court failed to reconsider its order denying suppression where new evidence demonstrated the officer was not credible); State v. Dispoto, 383 N.J. Super. 205, 215 (App. Div. 2006) (the trial court should reconsider the interlocutory order where "the judge was faced with evidence that called into question the veracity of [the officer's] affidavit"). However, because these arguments were not waived, Edwards should not have to withdraw from the plea agreement to advance them.

supports its argument. (Sb 25, n.6) While the State contends that the Baum Court found that a threat to bring drug dogs did not overwhelm the driver's will, the Court specifically conditioned its finding on the fact that the police had reasonable suspicion of drugs. Id. at 290. The fact that our Supreme Court in State v. Dunbar, 229 N.J. 521 (2017), has since made clear that reasonable suspicion is only necessary to use drug dogs where their use prolongs the detention, only means that the police can lawfully threaten to use drug dogs where their use would not prolong the detention or where the police have reasonable suspicion to prolong the detention. Otherwise, the police are threatening to engage in unlawful conduct by threatening to use drug dogs, which is coercive.

CONCLUSION

For the reasons above and those included in Edwards' opening brief, this Court should suppress the physical evidence and statements. In the alternative, the Court should remand for another suppression hearing before another judge.

Respectfully submitted,

/s/ Ashley Brooks
Ashley Brooks, Esq.

Dated: June 19, 2024