SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003940-23

STATE OF NEW JERSEY,	:	Criminal Action
	:	
Plaintiff-Appellant,	:	
	:	ON APPEAL FROM AN ORDER
	:	SUPPRESSING EVIDENCE
	:	ENTERED BY THE
	:	SUPERIOR COURT OF NEW
v.	:	JERSEY, LAW DIVISION,
	:	PASSAIC COUNTY
JEROME L. GAYDEN,	:	
	:	INDICTMENT NO. 21-10-00676-I
Defendant-Respondent.	:	
	:	

Sat Below: Honorable Barbara Buono-Stanton, J.S.C.

BRIEF FOR PLAINTIFF-APPELLANT

CAMELIA M. VALDES
PASSAIC COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-APPELLANT
ADMINISTRATION BUILDING
401 GRAND STREET
PATERSON, NEW JERSEY 07505-2095
(973) 881-4800

Timothy Kerrigan
Chief Assistant Prosecutor
Attorney # 002462012
Tkerrigan@passaiccountynj.org
Of Counsel and on the Brief

Date: September 20, 2024

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[3]

On October 20, 2021, a grand jury returned Indictment 21-10-00676-I charging Jerome L. Gayden ("Defendant") with multiple crimes related to the unlawful possession of a handgun and ammunition. Pa001-Pa006.

On February 25, 2022, Defendant filed a "Notice of Motion to Suppress Evidence" ("Motion") and requested a testimonial hearing. Pa007.

On August 16, 2022, the Honorable Marybel Mercado-Ramirez ("Judge Ramirez") heard Defendant's Motion. Pa031. Judge Ramirez acknowledged that this matter involved the State's allegations that police had received a call reporting a black male with dreadlocks wearing blue shorts and a white tank top and using crutches was in front of a specific address on Rosa Parks Boulevard with a gun in his pocket. Pa031-Pa032. About five minutes later, police arrived at the address, which was in a high crime area, and identified Defendant as the suspect. Pa032. One of the officers made eye contact with Defendant and Defendant appeared startled. Pa032. The officer told Defendant to stop, but Defendant "immediately accelerated his walking pace". Pa032. The officer observed Defendant wearing a black fanny pack that had a large bulge around the front of his torso, and it appeared there was a heavy object inside given the manner in which it was swaying. Pa032.

[3] Because of the interrelated nature and for the convenience of the reader, the Statement of Facts and Procedural History have been combined.

Judge Ramirez denied Defendant's Motion and request for a testimonial hearing. Pa031. In her ruling, Judge Ramirez made findings of fact after reviewing the surveillance video that captured the incident. Pa035. Judge Ramirez found that, when the police vehicle turned into the driveway of the business outside of which Defendant was located, the turn of the police vehicle was "not abrupt by any means." Pa035. Rather, Judge Ramirez found that the shaking of the police car depicted in the surveillance video was caused by the front tire of the vehicle passing over the curb, not by the vehicle stopping suddenly, as Defendant contended. Pa035-Pa036.

Judge Ramirez also found Defendant "did in fact pick up his pace in the two steps he took" after the police car pulled into the driveway, and that he "accelerated his pace to nearly double what his stride was initially" after police arrived. Pa038.

Judge Ramirez found that the numerous circumstances described by the police – including the startled look, the command to stop, the flight, and the observation of the weighed down fanny pack – "were happening simultaneously." Pa037.

On August 18, 2022, Defendant plead guilty to Unlawful Possession of a Handgun. Pa021. On October 19, 2022, Defendant was sentenced to 5 years in prison with 42 months parole ineligibility. Pa021. On March 8, 2024, the Appellate Division vacated Judge Ramirez's decision denying Defendant's Motion and remanded for a full evidentiary hearing in front of a different judge. Pa043-Pa-44.

On May 30, 2024, the Honorable Barbara Buono-Stanton, J.S.C. ("Judge Stanton") conducted an evidentiary hearing on Defendant's motion to suppress. 1T[4].

During the hearing, the State presented testimony from Paterson Police Officer Hector Mendez ("Officer Mendez"). 1T7:15-80:14. Officer Mendez testified that at 9:25 p.m. on August 13, 2021, he was patrolling the area of Rosa Parks Boulevard in a marked police unit with a partner. 1T10:13-11:21. However when Officer Mendez began to describe how he received a call from dispatch that there was a possible armed individual, defense counsel objected to the testimony as "hearsay". 1T11:20-12:1. Judge Stanton sustained the objection. 1T12:2.

After some discussion, Judge Stanton agreed to allow the testimony for the effect it had on the listener and "because it's not being offered for hearsay." 1T14:10-12. Judge Stanton added that "if at any point it's being offered for hearsay, I'll give it the weight that I should." 1T14:12-15.

Officer Mendez then testified that he received a call and responded to the said location to look for a black male with dreadlocks walking with crutches wearing a white tank top and blue shorts who was in front of 46 Rosa Parks and armed with a firearm. 1T15:1-12 and 16:10-14. Officer Mendez testified that when he arrived at

[4] Designations to transcripts are as follows:
1T – Transcript of the May 30, 2024 evidentiary hearing on Defendant's "Motion to Suppress Evidence".
2T – Transcript of Judge Stanton's June 28, 2024 decision granting Defendant's "Motion to Suppress Evidence".

the scene, he observed a person matching that description in front of the mechanic shop located at 46 Rosa Parks Boulevard. 1T15:13-17 and 16:15-22.

Officer Mendez explained that, when the police vehicle approached the scene, he saw the suspect break away from a group and begin walking north. 1T18:6-17 and 71:16-21. Officer Mendez described how the mechanic shop located at 46 Rosa Parks Boulevard has an open parking lot in the front and, as the squad car into the lot, the suspect walked right in front of the squad car and then continued walking away from the squad car towards Warren Street. 1T21:5-12 and 19:23-25.

Officer Mendez testified that he intended to conduct a field interview but, before he got out of the squad car, he made eye contact with the suspect and the suspect seemed startled and began walking away at a faster pace. 1T46:22-24; 19:17-25 and 48:15-19. Officer Mendez testified that, in his training and in experience, people act startled when they see police 'because they have something to hide." 1T68:20-22. Officer Mendez thought Defendant accelerated because he was trying to get away. 1T68:23-69:13. Officer Mendez explained that Defendant's actions made him think Defendant was trying to hide the weapon that was described to him by dispatch. 1T69:9-13. Officer Mendez further believed Defendant was trying to hide something because he had separated himself from the group of people he was with as soon as the police arrived. 1T71:22-25 and 72:11-16.

At that point, Officer Mendez said, "hey, come – come here, I wanna talk to you, we need to talk." 1T20:1-4[5]. As soon as that happened, the suspect made eye contact with him again and then began to move faster. 1T20:5-6 and 69:24-70:1.

Officer Mendez testified that he was about five feet away from the suspect at this point, and he observed the suspect had a fanny pack around his torso and that it was swaying from left to right "like it had something heavy in it." 1T20:7-12 and 20-24. At that point, Officer Mendez went behind the suspect and detained him by wrapping his hands around his torso. 1T22:9-12 and 70:1-2. Officer Mendez conceded that the time between the moment he first saw Defendant and the time when he stopped him was about two seconds (9:24:19 – 9:24:21 on the video). 1T70:3-6. During a subsequent pat-down, police found a handgun inside the fanny pack. 1T26:10-21, 1T27:5-11 and 29:4-8. Officer Mendez also viewed a portion of the surveillance video (S-8) and confirmed that it showed the incident. 1T37:11-15.

On cross-examination, Officer Mendez confirmed that the police dispatcher who directed him to respond to the scene had received the information about the suspect from a 9-1-1 caller. 1T40:25-41:6. Defense counsel asked Officer Mendez to confirm that the information he received from the dispatcher was that there had been a 9-1-1 call reporting that a black man who was walking with crutches and

[5] It appears Officer Mendez was paraphrasing. In other portions of his testimony, Officer Mendez said that he stated, "Hey, you, stop we want to talk to you," or "something to the effect of, 'hey, you, stop walking, we need to talk to you.'" 1T80:8-10 and 1T48:20-23.

dressed in blue shorts and a white tank top had a gun in his pocket. 1T43:5-15. Officer Mendez agreed that was correct. 1T43:9 and 15. Despite having elicited this testimony, defense counsel still contended that evidence related to the 9-1-1 call was inadmissible hearsay. 1T43:22-44:13. Judge Stanton agreed. 1T43:18-21.

Officer Mendez agreed that two seconds elapsed on the video (9:24:19 – 9:24:21) between the time when the squad car came to a stop and when he wrapped his arms around Defendant. 1T45:10-19 and 1T57:11-19. Officer Mendez confirmed that, in that two-second period, he (Officer Mendez) ordered Defendant to stop, observed Defendant accelerate his pace, observed Defendant's fanny pack swaying, and then wrapped his arms around Defendant. 1T58:1-8.

On June 28, 2024, Judge Stanton found that there was no reasonable suspicion for the stop and granted Defendant's Motion. 2T40:18-20 and 46:23-24.

In her ruling, Judge Stanton acknowledged that Officer Mendez testified "without hesitation" and that "his demeanor was seemingly calm and controlled." 2T42:18-20. Still, Judge Stanton found Officer Mendez's testimony was not credible. 2T42:17-18. Judge Stanton explained that she was finding Officer Mendez not credible because she determined that his testimony was not consistent with the video surveillance. 2T42:20-22. Judge Stanton found that the two seconds that elapsed was not enough time for Officer Mendez to have ordered Defendant to stop, observed Defendant speed up, and observed Defendant's fanny pack swaying.

2T42:23-45:2. Thus, Judge Stanton found that the testimony was not reasonable and that "it can't be that this actually occurred and I don't find it credible at all." 2T50:24-51:6 and 52:9-13.

At several different points in her ruling, Judge Stanton addressed Officer Mendez's testimony that Defendant appeared startled upon observing the police. 2T44:2-7 and 48:1-3. First, Judge Stanton found that "the startled look of the defendant was that of a person on crutches trying to avoid being hit by a patrol car that had sped up so fast at the driveway that it came to an abrupt stop and jolted back as he was crossing in front of it." 2T44:2-7. Later, Judge Stanton found the testimony that Defendant looked startled "not credible." 2T48:1-3. Still later, Judge Stanton acknowledged that Defendant looked startled upon seeing police, but attributed that look to something other than criminal activity. 2T48:15-22.

Judge Stanton acknowledged that the initial report was received by police through the 9-1-1 system. *See* 2T47:8-19. Judge Stanton failed to consider or acknowledge the argument raised by the State in its May 5, 2022 letter-brief that "(t)he fact that the call was placed through the 911 system enhances reliability of the tip." Pa015. Rather, Judge Stanton simply found that the 9-1-1 call, which she acknowledged was "specific and detailed", was not "enough to justify the stop." 2T47:9-10 and Pa065-Pa066.

Judge Stanton addressed what she characterized as Officer Mendez's testimony that Defendant "scurried away at a fast pace[6]." 2T48:24-25. Judge Stanton found that Defendant took one hop to avoid being hit by the police car, and then two steps. 2T48:25-49:7. Judge Stanton did not "find credible that (Defendant) attempted to flee based on the surveillance video." 2T50:7-9. This was contrary to Judge Ramirez's earlier finding, made based on a review of the same surveillance video, that Defendant "did in fact pick up his pace in the two steps he took" after the police car pulled into the driveway, and that Defendant "accelerated his pace to nearly double what his stride was initially". Pa038.

Judge Stanton pointed out that, even if Defendant did appear nervous, "mere nervous or furtive gestures are insufficient, standing alone, to rise to the level of an articulable suspicion." 2T48:5-7. Judge Stanton also pointed out that, even if Defendant did flee the police, "(f)light alone is not enough without any to her articulable suspicion of criminal activity." 2T49:7-9.

Judge Stanton concluded that, since she did not find Officer Mendez's testimony credible, it could not "be the corroboration for a 9-1-1 call." 2T50:17-19. As such, Judge Stanton determined that she did not need to rule on whether evidence related to the 9-1-1 call was admitted as hearsay or non-hearsay. 2T50:17-23.

[6] Officer Mendez did not use that language in any portion of his testimony.

On July 5, 2024, the State filed a Motion for Leave to Appeal.

On August 15, 2024, this Court granted the State's Motion for Leave to Appeal.

LEGAL ARGUMENT

POINT I

THE ORDER SUPPRESSING EVIDENCE SHOULD BE REVERSED; THE INVESTIGATORY STOP WAS SUPPORTED BY REASONABLE SUSPICION

Reasonable suspicion exited to support the investigatory stop of Defendant.

An investigatory stop or detention (a "Terry stop") involves a temporary seizure that restricts a person's movement. State v. Elders, 192 N.J. 224, 247 (2007). A Terry stop implicates a constitutional requirement that there be specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity. Id. The State has the burden to establish that a stop was valid. State v. Mann, 203 N.J. 328, 337-38 (2010).

To determine whether reasonable suspicion existed, a judge must consider the totality of the circumstances, viewing the "whole picture" rather than taking each fact in isolation. State v. Nelson, 237 N.J. 540, 554-55 (2019) (*quoting* State v. Stovall, 170 N.J. 346, 361 (2002). Investigative stops are justified if the evidence, when interpreted in an objectively reasonable manner, shows that the encounter was preceded by activity that would lead a reasonable police officer to have an articulable

suspicion that criminal activity had occurred or would occur shortly. State v. Davis, 104 N.J. 490, 505 (1986).

> A [judge] must first consider the officer's objective observations. The evidence collected by the officer is "seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." [A] trained police officer draws inferences and makes deductions … that might well elude an untrained person. The process does not deal with hard certainties, but with probabilities." Second a [judge] must determine whether the evidence raise[s] a suspicion that the particular individual being stopped is engaged in wrongdoing. Id. at 501 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981).

An appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record. Elders, 192 N.J. at 243. An appellate court will disregard only those findings that are "clearly mistaken". State v. Hubbard, 222 N.J. 249, 262 (2015). Review of legal conclusions of the trial court are de novo. State v. Watts, 223 N.J. 503, 516 (2015).

Here, Judge Stanton's decision suppressing the evidence failed to consider the "whole picture" and should be reversed. Judge Stanton's decision (1) mischaracterized evidence related to the 9-1-1 call as inadmissible hearsay, (2) failed to consider or analyze evidence related to the 9-1-1 call. The ruling also erred by (3) considering each of the facts in isolation and requiring the State to present more

than "reasonable suspicion" to sustain its burden. Finally, Judge Stanton erred by (4) making flawed credibility findings.

Viewing the totality of the circumstances or the "whole picture", the evidence in this case supports a finding of reasonable suspicion. As such, the State respectfully asks this Court to overturn Judge Stanton's decision and deny Defendant's Motion.

1. **Judge Stanton's Errant Ruling Excluding Evidence Related to the 9-1-1 Call Prejudiced the State and Compromised The Trial Court's Decision.**

The investigatory stop occurred following a 9-1-1 call. As such, analysis of this investigatory stop should begin with an examination into that 9-1-1 call. However, that examination cannot be conducted based on this record, as Judge Stanton mischaracterizing evidence related to the 9-1-1 call as inadmissible hearsay.

It is well established that "hearsay is permissible in suppression hearings subject to N.J.R.E. 104(a)". State v. Bivins, 226 N.J. 1, 14 (2006); *quoting* State v. Watts, 223 N.J. 503, 519 n.4 (2015). A judge hearing a suppression motion relating to the admissibility of evidence may consider hearsay or other inadmissible proof. State v. Wright, 431 N.J. Super. 558, n.3 (App. Div. 2013) (overr'd on other grounds). Pursuant to N.J.R.E. 104(a)(1) the trial court is not bound by evidence rules when deciding preliminary questions of admissibility, except those on privilege and Rule 403. *See* N.J.R.E. 104(a)(1).

The State should have been permitted to elicit testimony regarding related to the 9-1-1 call during the suppression hearing. Judge Stanton's decision to exclude this important evidence prevented the State from presenting evidence related to the fact that the initial report was received via 9-1-1, the details of the call, and the response time of the police. All of those details are pertinent to the analysis, but are not part of the record due to Judge Stanton's erroneous decision.

Judge Stanton's decision suppressing the evidence was compromised by her refusal to permit the State to introduce this important evidence. Analysis of the 9-1-1 call alone, or of the totality of the circumstances including the enhanced reliability afforded to 9-1-1 calls, yields the conclusion that reasonable suspicion existed. As such, Judge Stanton's decision should be reversed.

2. <u>The 9-1-1 Call, Even if it Were Considered Alone, Established Reasonable Suspicion.</u>

Despite Judge Stanton's erroneous hearsay ruling, some evidence related to the 9-1-1 call still came into the hearing during cross-examination. 1T15:1-12 and 16:10-14. Even examination of this limited evidence will yield the conclusion that the investigatory stop was supported by reasonable suspicion.

A detailed, specific report related to a crime in progress and relayed by a citizen through the 9-1-1 system can be sufficiently reliable to establish reasonable suspicion. *See* <u>State v. Golotta</u>, 178 N.J. 205, 219-220 (2003).

Generally speaking, information imparted from a citizen directly to a police officer will receive greater weight than information received from an anonymous tipster. State v. Basil, 202 N.J. 570, 586 (2010). Thus, an objectively reasonable police officer may assume that an ordinary citizen reporting a crime, which the citizen purports to have observed, is providing reliable information. Ibid. This is so because "we assume that an ordinary citizen 'is motivated by factors that are consistent with law enforcement goals,'" Ibid. (*quoting* Davis, 104 N.J. at 506), and thus may be regarded as trustworthy. State v. Hathaway, 222 N.J. 453, 471 (2015). Information received from a person concerning a criminal event would not especially entail further exploration or verification of his personal credibility or reliability before appropriate police action is taken. Ibid.

In each of these precedents, the New Jersey Supreme Court found that even an anonymous report of criminal activity by an ordinary citizen, when considered in the context of other facts, was sufficient to give law enforcement personnel authority to enter a premises under the emergency aid exception to the warrant requirement. effectuate an arrest based on probable cause, or conduct a Terry stop. *See* State v. Frankel, 179 N.J. 586, 598 (2004), A critical element of the Court's analysis in each case was that the citizen reported criminal activity based on personal knowledge.

Such specific, detailed reports of a crime by citizens are made even more reliable when they are relayed through the 9-1-1 system.

By its nature, a call placed and processed via the 9-1-1 system carries enhanced reliability not found in other contexts. State v. Golotta, 178 N.J. 205, 218 (2003). New Jersey statutes criminalize the false reporting of emergencies and explicitly include within their ambit calls placed to 9-1-1. Id. at 219. Information imparted by a 9-1-1 caller should not be viewed with the same degree of suspicion that applies to a tip by a confidential informant. Id. at 220.

A 9-1-1 call has also some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity. *See* Navarette v. California, 572 U.S. 393, 400 (2014). A 9-1-1 call can be recorded, which provides victims with an opportunity to identify the false tipster's voice and subject him to prosecution. Id. The 9-1-1 system also permits law enforcement to verify important information about the caller. Id. at 401. None of this is to suggest that tips in 9-1-1 calls are per se reliable. Id. Given technological and regulatory developments, however, a reasonable officer could conclude that a false tipster would think twice before using such a system. Id.

Had Judge Stanton not erroneously excluded evidence related to the 9-1-1 call, the State could have prevented evidence supporting its reliability such as the specific contents of the call, the identity of the caller, the tone of the report, any details provided by the caller that might show that the report was based on the caller's personal knowledge, and the police's response time following the call.

Despite that, the evidence admitted during cross-examination still showed that the report was sufficiently reliable to reasonable suspicion. Responding to questions posed by defense counsel during cross-examination, Officer Mendez testified that the 9-1-1 caller reported there was a black male with dreadlocks walking with crutches wearing a white tank top and blue shorts who was in front of 46 Rosa Parks and with a gun in his pocket. 1T40:25-41:6; 43:5-15;15:1-12, and 16:10-14. Officer Mendez testified that he responded to the location described and found Defendant, who matched that exact description. This was not a case where the description given by the 9-1-1 caller would have allowed police to stop any African-American man in the area. *See* State v. Nyema, 249 N.J. 509, 522 (2022). Rather, the call established reasonable suspicion only to stop men wearing those clothes and that hairstyle and who were walking with crutches. Reason suggests that there would not be two people matching that description at the same location at the same time. And, in fact, the surveillance video confirms that Defendant was the only person matching that description in the area at that time. Pa077. Thus, the report established reasonable suspicion for police to stop only Defendant.

The corroboration of this detailed report shows that the 9-1-1 caller's report was based on personal knowledge and was sufficiently reliable to permit police to accurately identify Defendant as the person about whom the 9-1-1 caller made the

report. As such, the level of detail, corroborated by the responding officer, established reasonable suspicion for the investigatory stop.

In addition, not only did the caller provide specific information, and not only was that specific information corroborated by Officer Mendez, but the information provided by the caller was also provided through the 9-1-1 system. Thus, the report had additional indicia of reliability, given that it was recorded, police could identify the caller, and the caller would be aware that he/she could be arrested for providing false information through that system.

Thus, even if the detailed information in the initial report was found to be insufficient to justify the stop, reasonable suspicion would still be established by this evidence, coupled with the fact that the report was made via the 9-1-1 system.

When an anonymous tip is conveyed through a 9-1-1 call and contains sufficient information to trigger public safety concerns and to provide an ability to identify the person, a police officer may undertake an investigatory stop of that individual. State v. Gamble, 218 N.J. 412, 429 (2014).

First, the report was conveyed through a 9-1-1 call. 1T41:4-6.

Second, the 9-1-1 caller provided sufficiently detailed information such that police were able to accurately identify the suspect.

Third, carrying a handgun unlawfully in public presents public safety concerns. The New Jersey Supreme Court has acknowledged the public safety risks

associated with the unlawful carrying of firearms. *See* Florida v. J.L., 529 U.S. 266, 272 (2000) and State v. Des Marets, 92 N.J. 62, 82 (1983) (overruled on other grounds)]. In Des Marets, the New Jersey Supreme Court stated that

> "(e)ven if an individual has no intention to use a gun, 'the possession of a firearm presents definable dangers. It invites gun use by police or third parties, with attendant risks to all involved.'" State v. Des Marets, 92 N.J. at 82.

In addition, two different appellate panels have found that a 9-1-1 call reporting an individual armed with a firearm triggered public safety concerns such that reasonable suspicion was established through the 9-1-1 call itself. *See* State v. Rossman, 2014 N.J. Super. Unpub. LEXIS 1162 and State v. Bailey, 2017 N.J. Super. Unpub. LEXIS 1192; attached hereto as Pa069-Pa076. In Rossman, an appellate panel stated that "(i)t cannot be denied that unlawfully concealing a weapon poses a public-safety risk." Pa071. In Bailey, a different appellate panel stated that "(t)he caller's tip demonstrated defendant posed a threat to the public by walking in a high-crime area with a firearm." Pa075.

Given that the initial report was received through the 9-1-1 system, it contained sufficient details to allow Officer Mendez to accurately identify the suspect, and the contents of the report triggered public safety concerns, it follows that the 9-1-1 call alone established reasonable suspicion permitting Officer Mendez

to "undertake an investigatory stop of" Defendant. *See* State v. Gamble, 218 N.J. 412, 429 (2014).

The initial detailed and corroborated report made through the 9-1-1 system established reasonable suspicion for the investigatory stop. As such, Judge Stanton's ruling suppressing the evidence should be reversed.

3. The 9-1-1 Call, Considered Alongside the Other Evidence, Established Reasonable Suspicion.

Even if the 9-1-1 call were determined not to be sufficient to establish reasonable suspicion, Officer Mendez's investigation justified the stop.

Even absent a 9-1-1 call from a citizen, reasonable suspicion can still exist if "there has been some independent corroboration by the police of significant aspects of the informer's predictions." State v. Williams, 381 N.J. Super. 572, 584 (2005).

Here, before making the investigatory stop, Officer Mendez corroborated "significant aspects" of the 9-1-1 caller's report including Defendant's appearance and location. In addition, Officer Mendez observed Defendant carrying a fanny pack that was weighed down, and that Defendant was startled by police and fled. The confirmation of all details of the report, coupled with the subsequent observations, make it "objectively reasonable" for Officer Mendez to have concluded that the fanny pack was weighed down by the handgun described by the 9-1-1 caller.

Rather than consider the totality of the circumstances, Judge Stanton erred by analyzing each fact of the case in isolation. Judge Stanton stated that, even if Defendant did appear nervous, "mere nervous or furtive gestures are insufficient, standing alone, to rise to the level of an articulable suspicion." 2T48:5-7. Judge Stanton also stated that, even if Defendant did flee, "(f)light alone is not enough without any to her articulable suspicion of criminal activity." 2T49:7-9. The totality of the circumstances does not call for such an analysis. Rather, Judge Stanton should have considered whether these factors considered together, alongside the other facts of the case, established reasonable suspicion.

When the facts are considered in their totality, more than sufficient reasonable suspicion to justify the investigatory stop.

Although a mere hunch does not create reasonable suspicion, the level of suspicion required is considerably less than proof of wrongdoing by a preponderance of the evidence and obviously less than is necessary for probable cause. State v. Gamble, 218 N.J. 412, 428 (2014). Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Alabama v. White, 496 U.S. 325, 330 (1990). The fact that purely innocent connotations can

be ascribed to a person's actions does not mean that an officer cannot base a finding of reasonable suspicion on those actions as long as a reasonable person would find the actions consistent with guilt. State v. Citarella, 154 N.J. 272, 279-80 (1998). Reasonable suspicion is neither easily defined nor "readily, or even usefully, reduced to a neat set of rules." State v. Stovall, 170 N.J. 346, 356 (2002); quoting Illinois v. Gates, 462 U.S. 213, 232 (1983). In justifying an investigatory detention based on reasonable suspicion, a police officer must "be able to articulate something more than an "inchoate and unparticularized suspicion or hunch." State v. Stovall, 170 N.J. 346, 356 (2002); quoting United States v. Soklow, 490 U.S. 1, 7 (1989). But the reasonable suspicion standard involves a significantly lower degree of objective evidentiary justification than does the probable cause test. State v. Davis, 104 N.J. 490, 501 (1986).

The United States Supreme Court has defined reasonable suspicion as "a particularized and objective basis for suspecting the person stopped of criminal activity." State v. Stovall, 170 N.J. 346, 356 (2002); quoting Ornelas v. United States, 517 U.S. 690, 696 (1996). The reasonable suspicion standard requires only some minimal level of objective justification. *See* State v. Nishina, 175 N.J. 502, 511 (2003).

The State bears the burden of demonstrating by a preponderance of the evidence that it possessed sufficient information giving rise to the required level of suspicion. State v. Pineiro, 181 N.J. 13, 19-20 (2004).

Here, even though Judge Stanton prevented the admission of important evidence, the State was still able to prove that it was more likely true than not that there was a "minimal level of objective justification" supporting the investigatory stop. *See* Nishina, 175 N.J. at 511. As indicated, it would be nearly impossible for a second man with the same gender, racial background, hairstyle, and clothing to be in the same location and also be using crutches at the exact same time. And not only did Defendant match this exact description, he also reacted to the arrival of police in a way that Officer Mendez found to be indicative of guilt, and sought to leave the area once their presence became apparent. On top of all that, Defendant had a fanny pack large enough to contain a handgun that was weighed down as if contained a handgun. This information "would lead a reasonable police officer to have an articulable suspicion" that Defendant possessed a handgun, as was reported by the 9-1-1 caller. *See* State v. Davis, 104 N.J. 490, 505 (1986).

By failing to consider the totality of the circumstances, Judge Stanton reached the wrong conclusion. Her decision should be reversed and an order should be entered denying Defendant's Motion.

4. Judge Stanton's Adverse Credibility Finding Is Clearly Mistaken and Should Be Reversed.

Judge Stanton's adverse credibility finding was clearly mistaken, as it was internally inconsistent, based on an incomplete record, failed to consider pertinent facts, and failed to explain why it was so starkly different from the findings made by Judge Ramirez's based on her review of the exact same video evidence.

We give deferential review to a trial court's credibility findings, which are often influenced by matters such as observation of the character and demeanor of witnesses and common human experiences that are not transmitted by the record. State v. Locurto, 157 N.J. 463, 474 (1999). Only when we are satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interest of justice demand intervention and correction should we reverse. State v. Johnson, 42 N.J. 146, 162 (1964).

Judge Stanton's finding that Officer Mendez's testimony was not credible was not based on the trial court's "observation of the character and demeanor" of the witness, nor was it based on "common human experiences that are not transmitted by the record." *See* Locurto, 157 N.J. at 474. Oppositely, Judge Stanton affirmatively held that, based on her ability to observe his testimony live in the courtroom, Officer Mendez testified "without hesitation" and that "his demeanor was seemingly calm and controlled." 2T42:18-20. Rather than base her adverse

credibility finding on the witness's in-court testimony, Judge Stanton found Officer Mendez's testimony not credible after determining that it was not consistent with what she believed she observed on the surveillance video. 2T42:20-22. Thus, Judge Stanton's credibility findings were based on her determination that Officer Mendez could not have made eye contact with Defendant, ordered Defendant to stop, observed Defendant speed up, and observed Defendant's fanny pack swaying, all within two seconds.

Courts have long acknowledged that police officers are often called upon to make split second decisions in circumstances that are tense, uncertain, and rapidly evolving, to protect their safety and the safety of their communities. *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989). The four events described by Judge Stanton are not events that must necessarily occur back-to-back. Rather, they are events that can occur simultaneously. Judge Ramirez, a judge of equal jurisdiction to Judge Stanton, found just that – that those events occurred simultaneously – after reviewing the exact same surveillance video.

This was not the only time that Judge Stanton's findings based on the video evidence were different from Judge Ramirez's. For instance, Judge Stanton also found that Officer Mendez's police car sped up so fast at the driveway that it came to an abrupt stop and jolted back and made "an abrupt turn into the driveway that would have startled anybody." 2T22:25-23:2 and 44:4-6. Oppositely, Judge

Ramirez found that the police car's entrance into the driveway at 46 Rosa Parks was "not abrupt by any means" and that the shaking of the police car was caused by the front tire of the vehicle passing over the curb. Pa035-Pa036. In addition, Judge Ramirez Stanton found that Defendant "took one hop" and then "two more steps" to avoid being hit by the police car. 2T49:5-7. Differently, Judge Ramirez found that Defendant "accelerated his pace to nearly double what his stride was initially." Pa038.

An appellate court must defer to a trial court's factual findings when those findings are supported by sufficient credible evidence in the record. State v. S.S., 229 N.J. 360, 365 (2018). As such, it follows that Judge Stanton should have given some deference or consideration to Judge Ramriez's prior factual findings. Instead, Judge Stanton entered opposite factual findings and offered no explanation as to why she was doing so. Judge Stanton offered no explanation as to why she was finding that these four events could not have occurred simultaneously, as was found by Judge Ramirez and sworn to by Officer Mendez.

On top of that, Judge Stanton made important credibility findings based on analysis that was internally inconsistent. For instance, Judge Stanton found that Officer Mendez's testimony that looked startled was "not credible." 2T48:1-3. However Judge Stanton also found that Defendant had "the startled look" of a person who was trying to avoid being hit by a police car. 2T44:2-7.

The fact that Judge Stanton's factual findings were contradictory to Judge Ramirez's and inconsistent with her own findings can be explained by the fact that they were made based on an incomplete record. Had Judge Stanton not erred by excluding evidence related to the 9-1-1 call, her analysis of Officer Mendez's credibility would have included the fact that the 9-1-1 report was corroborative of his investigation. Had Judge Stanton had the benefit of that information, her analysis of the totality of the circumstances would likely have yielded a result that was consistent with those made by Judge Ramirez and with the sworn testimony that she found Officer Mendez offered "without hesitation" and in a demeanor that "was seemingly calm and controlled." 2T42:18-20. Judge Stanton's determination that Officer Mendez's testimony was not credible should be overturned.

CONCLUSION

For the above-stated reasons, the State respectfully requests that this Court reverse the trial court's order suppressing the evidence.

Respectfully submitted,
CAMELIA M. VALDES
PASSAIC COUNTY PROSECUTOR

By: /s/ Timothy Kerrigan
Timothy Kerrigan
Chief Assistant Prosecutor
Attorney I.D. No. 002462012
TKerrigan@passaiccountynj.org

Dated: September 20, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-000563-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Movant,	:	On Motion for Leave to Appeal From an Order of the Superior Court of
v.	:	New Jersey, Law Division, Passaic County.
JEROME L. GAYDEN,	:	
Defendant-Respondent.	:	Sat Below:
	:	Hon. Barbara Buono-Stanton, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
31 Clinton Street, 10th Floor
P.O. Box 46003
Newark, New Jersey 07101
973-877-1200

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

Of Counsel and
On the Brief
October 9, 2024

DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

Jerome Gayden was stopped and searched because an anonymous tipster called 9-1-1 and stated that a man matching his description possessed a weapon. There was no corroboration of this claim. Therefore, there was insufficient information to justify the stop or the search. The trial court properly denied the motion to suppress.

Unfortunately, it took almost two and a half years from when Mr. Gayden first moved to suppress and for an evidentiary hearing on that motion until that hearing actually happened. To get his day in court, Mr. Gayden had to appeal to this Court, which in March remanded the matter for the hearing, which should have occurred in 2022.

After the March 2024 hearing, the trial court suppressed the evidence. It found the only witness proffered by the State incredible and held that the 9-1-1 call was not corroborated by any information. The trial court's discretion is at its zenith when it makes credibility findings. As unhappy as the State may be with those findings, there is no basis to overturn them. And the trial court correctly ruled the remaining evidence in the case—the second-hand recitation of the 9-1-1 call and the surveillance video presented by the State—did not provide the corroboration necessary to give rise to reasonable suspicion.

The trial court's order is legally sound and should not be disturbed. With its affirmance, the case against Mr. Gayden—who is mere months away from completing his maximum sentence—should finally end.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[2]

Passaic County Indictment No. 21-10-676-I, issued on October 20, 2021, charged defendant Jerome Gayden with a number of offenses all stemming from the recovery of evidence during the stop and search that is the subject of this case. (Pa 1-6)[3] Mr. Gayden was detained pending resolution of these charges and has remained incarcerated throughout the entirety of the proceedings in this case, through the current day.

On February 25, 2022, Mr. Gayden requested a testimonial hearing on his motion to suppress. (Pa 7) On August 16, 2022, the motion to suppress was improperly denied by the Honorable Marybel Mercardo-Ramirez, J.S.C. without a hearing and without oral argument. (Pa 31-32) Mr. Gayden filed a brief in support of his appeal of the denial of his motion to suppress and of his hearing on that motion on March 21, 2023.

This Court issued an opinion on March 8, 2024, holding that the failure to hold a hearing on Mr. Gayden's motion to suppress was error. (Pa 30-44) This Court held that Mr. Gayden "was not given an opportunity to challenge the credibility of the officers through cross-examination, test the admissibility

[2] Due to the procedural posture of this case, the two sections have been combined for clarity.

[3] Mr. Gayden adopts the State's transcript convention and adds "Sb" for the State's merits brief before this Court and "Ma" for the appendix to Mr. Gayden's opposition to the State's motion for leave to appeal.

of the video recording, offer his view of what is depicted in the video recording, and raise objections to the trial court's manipulation of the recording by magnifying its images through 'zooming in.'" Gayden, slip op. at 14 (Pa 43) This Court therefore vacated the denial of the motion to suppress and remanded for an evidentiary hearing on that motion, further ordering that "[b]ecause the judge who decided defendant's motion has already engaged in weighing the evidence and rendered an opinion on the credibility of the defendant and officers, the hearing should take place before a different judge." Id. at 14-15 (Pa 43-44).

On May 30, 2024, an evidentiary hearing on the motion to suppress was finally held before the Honorable Barbara J. Buono-Stanton, J.S.C. The only witness called by the State was Officer Hector Mendez of the Paterson Police Department. Officer Mendez testified that on August 13, 2021, at approximately 9:25p.m., he received a call from dispatch stating that "there was an individual in front of 46 Rosa Parks who was wearing a white tank top, blue shorts, dreadlocks and waling with crutches who was armed with a firearm" in his pocket. (1T 10-13 to 15-9, 43-10 to 15) Officer Mendez testified that dispatch received information from a 9-1-1 caller and the dispatcher in turn relayed the information to Officer Mendez. (1T 41-4 to 16) The State did not call the dispatcher and did not play the 9-1-1 call.

Officer Mendez testified that he located Mr. Gayden, who matched the description, Mr. Gayden "made eye contact" and "started walkin' [sic]" away "at a faster pace." (1T 19-19 to 22) Officer Mendez testified that he advised Mr. Gayden to stop, that Mr. Gayden "continued to accelerate his speed" while on crutches, that he "observed a fanny pack across his torso" that was "swaying . . . like it had something heavy in it" so Officer Mendez then "immediately went behind him" and "detained him by wrapping my hands around his torso." (1T 19-19 to 2224) When Officer Mendez did so, he felt something hard in the fanny pack, and searched it, revealing a gun. (1T 49-14 to 50-8) Officer Mendez, and now the State, agreed that everything that happened from the moment the car stopped to the moment Officer Mendez wrapped his arms around Mr. Gayden—the eye contact, the acceleration, the order to stop—had to have occurred within 2.5 seconds, based on surveillance footage that depicted the scene. (1T 57-11 to 19, 70-6; Sb 5-6) Despite the fact that the body-worn camera statute had already passed and Officer Mendez should have been wearing a camera, he testified that he did not have one. (1T 30-3 to 17)

Judge Buono-Stanton granted Mr. Gayden's motion to suppress. She found Officer Mendez's testimony not credible and "wholly unreasonable." (2T 42-17 to 22) The court found that there was not enough time for any of the

things Officer Mendez said occurred to have actually occurred—the eye contact, the acceleration, the order to stop, and the refusal to stop. The trial court found that "it can't be that this actually occurred and I don't find it credible at all." (2T 51-5 to 6) The trial court found that the "startled look" on Mr. Gayden's face came at the time Officer Mendez's car came to an "abrupt stop and the defendant hopped to avoid being hit[,]" rather than to attempt to flee. (2T 43-24) The trial court found that there was no support for the State's contention that the events occurred at a high crime area: "under the Goldsmith case all I have are conclusory terms that it was a high crime area." (2T 49-14 to 15)

In short, the trial court found that nothing "corroborated" the 9-1-1 call. (2T 50-2 to 19) Without any such corroboration, the police action was illegal.

After the trial court granted the motion to suppress, Mr. Gayden moved to withdraw his plea. On July 11, the Honorable Imre Karaszegi, Jr., J.S.C., denied Mr. Gayden's motion to withdraw his plea, despite the fact that Judge Stanton's decision and order to suppress was not stayed. (Ma 1-2) On August 15, this Court granted the State's motion for leae to appeal. (Sb 9) Mr. Gayden remains incarcerated despite having prevailed on this dispositive motion. He completes his sentence in February. (1T 81-24 to 82-5)

LEGAL ARGUMENT

THE ANONYMOUS, UNCORROBORATED 9-1-1 CALL DID NOT GIVE RISE TO REASONABLE SUSPICION TO STOP DEFENDANT.

There was no reasonable suspicion to stop Mr. Gayden, neither from the second-hand recitation of the contents of the 9-1-1 call nor from the officer's incredible testimony. The trial court's credibility findings and its legal conclusions were sound and should not be disturbed. The motion to suppress must be upheld.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution both guarantee "[t]he right of the people to be secure . . . against unreasonable searches and seizures[.]" U.S. Const. amend. IV; N.J. Const. art. I, par. 7. Pursuant to these constitutional protections warrantless stops are presumptively invalid. State v. Edmonds, 211 N.J. 117, 129 (2012). As a result, the State bears the burden of establishing by a preponderance of the evidence that any such stop or search is justified by one of the "well-delineated exceptions to the warrant requirement." Id. at 128-30. One of those exceptions allows for an investigatory stop. State v. Rosario, 229 N.J. 263, 272 (2017). An investigatory stop can be sustained only if there is "reasonable and particularized suspicion . . . that an individual has just engaged in, or was about to engage in, criminal activity." State v. Stovall, 170

N.J. 346, 356 (2002). A person may not be detained "based on arbitrary police practices, the officer's subjective good faith, or a mere hunch." State v. Coles, 218 N.J. 322, 343 (2014).

Tips from various sources can provide reasonable suspicion if the circumstances surrounding the tip, including the content of the information and its degree of reliability, provide "a particularized and objective basis for suspecting the person stopped of criminal activity." Navarette v. California, 572 U.S. 393, 395 (2014). In evaluating whether a tip establishes reasonable suspicion, courts look at three factors: (1) the informant's reliability and veracity; (2) the informant's basis of knowledge of the alleged criminal activity at issue; and (3) independent corroboration of the informant's information by the observations of law enforcement. State v. Smith, 155 N.J. 83, 93-96 (1998). The test for how much weight should be attributed to a tip is a totality of the circumstances analysis. Id. at 92-93.

The Supreme Court of the United States has long made clear that a tip that allows only for the identification of its target is insufficient to support a stop or frisk. In Florida v. J.L., an anonymous caller reported that a young black male was standing at a particular bus stop, wearing a plaid shirt, and carrying a gun. 529 U.S. 266, 268 (2000). Two officers were dispatched, arriving shortly thereafter, and saw three black males, including one, J.L., who

was wearing a plaid shirt. Ibid. The officers saw no gun or anything else unusual. Nevertheless, one officer told J.L. to put his hands up, frisked him, and seized a gun from his pocket. Ibid.

The Supreme Court held that the investigatory stop was unreasonable and suppressed the gun. The Court emphasized that the call to the police was made "from an unknown location by an unknown caller." Id. at 270. Moreover, the call did not contain the sort of detailed predictive information that might have suggested that a reliable basis of knowledge existed. Id. at 270-71. "All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." Id. at 271. Even though J.L. was at the bus stop and matched the physical description, the tip was not adequately corroborated because "[a]n accurate description of a subject's readily observable location and appearance" does help police "correctly identify the person whom the tipster means to accuse[,]" but it "does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Id. at 272. Thus, J.L. makes clear that corroboration of illegality is necessary even when the target is clearly described.

In this case, the State argues that there was reasonable suspicion to stop Mr. Gayden either considering the relayed contents of the 9-1-1 call, Officer Mendez's testimony, and the video, or just based on the relayed contents of the 9-1-1 call and the video. No matter what is considered, the failure to corroborate an assertion of illegality that stems from a 9-1-1 call is fatal to the State's case. The order granted suppression must be affirmed.

A. There was insufficient cause to justify the warrantless police action when considering all the proofs set forth by the State.

In order to support the police action in this case the State, who bears the burden of justifying the warrantless police action, relied on testimony about the 9-1-1 call and the observations of Officer Mendez to provide the necessary corroboration of the information in that call. Specifically, the call supposedly said a man on crutches had a gun in his pocket. (1T 10-13 to 15-9, 43-10 to 15) When officers located Mr. Gayden, who the defense agreed was the man who was the subject of the call, it was his eye contact, nervousness, and attempted flight that supposedly gave rise to reasonable suspicion to stop him. (2T 32-3 to 37-4) The eye contact, nervousness, and attempted flight were only supported by the officer's report and testimony. Thus, the only corroboration that the man in crutches was engaged in criminal activity came from the officer who testified.

The officer, however, wasn't credible. In the words of the trial court: "This Court does not find Officer Mendez's testimony credible." (2T 42-17 to 18) His testimony contradicted the video evidence in this case and was "wholly unreasonable." (2T 42-21 to 22) As the trial court explained, "And so if I don't find any of those things credible, right, they can't be the corroboration for a 9-1-1 call[.]" (2T 50-17 to 19) No corroboration of criminality requires suppression under J.L.

Contrary to the State's arguments, the trial court considered the 9-1-1 call in suppressing the evidence in this case. It is true that the defense objected to the reliance on the third-hand recitation of facts from the 9-1-1 call by the officer, who did not hear the 9-1-1 call. The State's failure to bring in the most reliable hearsay to ascertain the facts relayed by the caller—the 9-1-1 call itself—is a decision to present less reliable hearsay than was available to the State to the trial court. That decision does not help the State establish the basis for the police action. The State now complains that it "could have prevented [sic] evidence supporting its reliability such as the specific contents of the call, the identity of the caller, the tone of the report, any details provided by the caller that might show that the report was based on the caller's personal knowledge, and the police's response time following the call[.]" (Sb 14) There was nothing stopping the State from putting forth highly relevant information in order to meet its burden

to justify the police action in this case. Failing to put before the court information to help meet its burden is a failure of the State's, not the court's. When the State doesn't put forward the information necessary to meet its burden, the evidence must be suppressed. See State v. Nyema, 249 N.J. 509, 534 (2022) (suppressing evidence found in a search following a car stop in part because the State failed to put in the record how long after long after a robbery a 9-1-1 call was made and how far after that call the officers arrived).

Further, it is the State, when asked how it was using the 9-1-1 call, who argued that it was not being used for the truth of the matter asserted. (1T 13-5 to 11) This response is arguably a waiver of any reliance on the 9-1-1 call as substantive evidence on the part of the State.

Nonetheless, the trial court considered it substantively. The court explicitly wrote in its opinion that it considered the call, explaining that "[t]he dispatcher call, which the officer relied on, was not enough to justify the stop." (Pa 65) The court explained plainly that "the 9-1-1 call has no corroboration," which is why evidence must be suppressed. (Pa 66, n.5) See also 2T 47-9 to 10 ("The dispatcher call which the officer relied on, I don't believe was enough to justify the stop.") Despite the claims in the State's brief, what happened here is simple: the trial court considered the contents of the 9-1-1 call presented by

the officer and found it insufficiently corroborated to justify a stop because the corroborating testimony was put forth by a whole incredible witness.

The trial court's credibility finding, which is at the core of this case, is entitled to great deference. An appellate court's review of a trial court's judgment is restricted to the test of whether the findings made by the trial court could reasonably have been reached on sufficient credible evidence present in the record. State v. Locurto, 157 N.J. 463, 472 (1999). A reviewing court should defer to a trial court's credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record. Id. at 474. Overturning the trial courts' assessment of credibility is an extraordinary step, since "trial court findings [concerning issues of fact] are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice,' and are upheld whenever 'they are supported by adequate, substantial and credible evidence.'" Meshinsky v. Nicholas Yacht Sales, Inc., 110 N.J. 464, 475 (1988) (quoting Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974)). Appropriate deference to the trial court's credibility findings requires denial of the State's motion for leave to appeal.

Nor does the fact that the trial court noted that Officer Mendez was calm and controlled mean that it was somehow inappropriate for him to be found

incredible. People can be calm and untruthful. There is no law nor edict of common sense that suggests otherwise.[4]

The fact that a prior judge had perceived the video differently is completely irrelevant: "When more than one reasonable inference can be drawn from the review of a video recording . . . then the one accepted by a trial court cannot be unreasonable[.]" State v. S.S., 229 N.J. 360, 380 (2017). The State does not argue that the finding that it is impossible for the officer to have, in two and a half seconds, gotten out of the car, told Mr. Gayden to stop, made eye contact with him, had Mr. Gayden attempt to flee, and then physically restrain Mr. Gayden was unreasonable. (Sb 9) The State cannot claim it is unreasonable for the trial court to have found that Mr. Gayden was startled by a car coming to an abrupt stop right in front of him or that Mr.

[4] Unfortunately, instances of police misconduct, including lying, are well-documented. See, e.g., Christopher Slobogin, Testilying: Police Perjury and What to Do About It, 67 U. Colo. L. Rev. 1037, 1041 (1996) (citing a survey in which "defense attorneys, prosecutors, and judges estimated that police perjury at Fourth Amendment suppression hearings occurs in twenty to fifty percent of the cases"); Russell Covey, Police Misconduct as a Cause of Wrongful Convictions, 90 Wash. U. L. Rev. 1133 (2013) (reviewing two mass exonerations based on police officer misconduct). Given the documented history of the problem of "testilying," particularly in cases involving contraband, courts should start viewing officers' assertions with a certain degree of skepticism. See Joseph Goldstein, 'Testilying' by Police: A Stubborn Problem, New York Times (March 18, 2018) ("In many instances, the motive for lying was readily apparent: to skirt constitutional restrictions against unreasonable searches and stops."). Nonetheless, it is unusual for a court to find an officer incredible and surely was not undertaken lightly in this case.

Gayden hopped on his crutches to avoid being hit. (2T 43-24) These are reasonable findings. The fact that they are different than what a judge who had predetermined the case before hearing from the officer or from the defense attorney—having denied oral argument on the motion to suppress as well as an evidentiary hearing—does not make this trial court's findings unreasonable.[5] Unfavorable to the State and unreasonable are two different things.[6]

B. There was insufficient cause to justify the warrantless police action even if the officer's testimony is not considered.

The State's alternative argument to support its claim on the merits seems to be that even if the officer is not credible—which he is not, as the trial court found—the 9-1-1 call alone is enough to sustain the police action. That position is contrary to well-established law, which requires corroboration of criminality even when an anonymous tip is made through the 9-1-1 system.

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[5] The original trial court's prejudgment is why this Court ordered that the remand hearing occur in front of a new judge. (Pa 44-45)

[6] Nor does the supposed "contradiction" in Judge Buono-Stanton's credibility findings survive any scrutiny. (Sb 24) The State's attempt to paint the Judge as inconsistent only works when full sentences are not quoted, which is the technique used in that brief. Judge Buono-Stanton first found: "this Court gives no weight to his testimony that the startled look of Defendant was that of a person involved in a crime. Instead, the startled look of the defendant was that of a person on crutches trying to avoid being hit by a patrol car that had sped up so fast at the driveway that it came to an abrupt stop and jolted back as he was crossing in front of it." (2T 43-1 to 44-6) Then she says: "The officer testified he observed the defendant looking startled which the Court already found not credible." (2T 48-1 to 2) Together, in context, Judge Buono-Stanton found that Mr. Gayden was not startled in any way that is an indication of criminality.

The fundamental analysis undertaken to determine whether the tip gives rise to reasonable suspicion does not change merely because the anonymous call purportedly came in from the 9-1-1 system; corroboration of illegality is still required. It is true that in State v. Golotta, 178 N.J. 205, 218-19, 225-26 (2003), our Supreme Court held that a 9-1-1 call "carries enhanced reliability" because it is automatically traced and because a false report can be prosecuted. Enhanced reliability does not mean that reliability is sufficient to establish reasonable merely by the call coming from 9-1-1; the reasonable suspicion inquiry is still a totality of the circumstances inquiry with three prongs. In fact, in Golotta our Supreme Court acknowledged that anonymous 9-1-1 calls are not always equivalent to reports from identified citizen informants; a malicious 9-1-1 caller, for example, might use a public phone to make a report. Id. at 219. In other words, a 9-1-1 call made by an unidentified caller is still an anonymous tip. See also State v. Gamble, 218 N.J. 412, 429-34 (2014) (declining to determine whether "anonymous 9-1-1 calls" are a sufficient basis for a stop outside of the intoxicated driving context) (emphasis added).

Golotta demonstrates that the stop in this case was unlawful. In Golotta, circumstances absent in this case demonstrated that the target of the tip presented an immediate threat to public safety, which justified a stop without corroboration of illegality. In that case, our Court upheld the stop of a motor

vehicle based on a 9-1-1 call made from a personal cellphone, which has a registered owner. That tip clearly identified a specific car that was being driven erratically. Id. at 209. The most important factor in upholding the stop was the "risk of imminent death or serious injury" implicated by the call. Id. at 221-22. This risk "relieves the police of the verification requirements normally associated with an anonymous tip" because of the immediate threat to public safety presented by people who are driving under the influence. Id. at 222 (emphasis added). In Golotta our Supreme Court specifically rejected the idea that a report of a man with a gun rises to the same level of urgent threat:

> Perhaps most important, here the officer was confronted with a risk of imminent danger to defendant and to the public, a circumstance that allowed the officer less corroboration time than if the tip had alleged that an individual standing passively on a street corner was carrying a concealed weapon. Although unlawfully concealing a weapon poses a public-safety risk, driving a pickup truck erratically on a highway such as Route 206 is a more immediate threat.

Id. at 226. See also J.L., 529 U.S. at 272 (rejecting "an automatic firearm exception to our established reliability analysis").

None of the cases the State cites to argue that the 9-1-1 call itself is sufficient to uphold the police action in this case condoned a stop and search on the basis solely of a 9-1-1 call about anything other than drunk driving. In State v. Basil, 202 N.J. 570, 578 (2010), police responded to reports of a man with a shotgun at a certain location. When they arrived at that location a

woman, who refused to give her name for fear of retaliation, told officers that defendant had pointed a shotgun at her and then threw that gun beneath a car. Ibid. Police immediately recovered that gun from underneath that car. Ibid. In holding that there was probable cause to arrest defendant, the Court relied on multiple factors not present in this case: (1) the police-officer witness was found to have "excellent" credibility by the trial court; (2) the conversation with the woman was a "face-to-face encounter that allowed the officer to make an on-the-spot credibility assessment of the citizen informant"; and (3) the "[i]mportantly, the young woman's reliability was immediately corroborated by the discovery of the shotgun in the precise location where she said it was discarded." Id. at 587 (emphasis added). In contrast, the officer in this case was not credible, did not speak to the caller (face-to-face or otherwise) so he could not make any credibility assessment and, importantly, there was no corroboration of the allegation of criminality before Gayden was stopped. Finding a handgun where a witness told you that is a handgun corroborates the assertion of criminality and it corroborates the witness's credibility. No such corroboration was present in this case.

Similarly, in State v. Hathaway, 222 N.J. 453 (2015), a face-to-face citizen tip was corroborated before any police action was taken. In Hathaway, "[a] patron reported an armed robbery in a face-to-face conversation with

casino personnel," and was thus "more akin to an eyewitness citizen informant than an anonymous tipster." Id. at 475. "Moreover," the citizen's "report was not taken at face value. [The officer] directed security personnel to call the surveillance department to corroborate the patron's report." Id. at 475-76. The surveillance showed the victim with three other people going to the place indicated by the tip, and then saw the "panicked" victim leaving. Ibid. These facts gave rise to probable cause to conduct a search. As in Basil, J.L., and other cases discussed above, the assertion of criminality was corroborated, not just the fact of a person's location.[7]

[7] For the sake of completeness, Mr. Gayden addresses State v. Frankel, 179 N.J. 586, 608–09 (2004), which the State cites in support of the claim that a 9-1-1 call on its own is equivalent to probable cause, although that case is entirely irrelevant. In Frankel, the Court address the scope of the emergency aid exception when dispatch received a 9-1-1 call, called the number back but received no response, and an officer who came to the location had a face-to-face interaction with a resident that seemed very nervous. The Court concluded that "[a] 9–1–1 call is tantamount to a distress call even when there is no verbal communication over the telephone to describe the nature of the emergency. The responding police officer is not required to accept blindly the explanation for the 9–1–1 call offered by the resident answering the door but must base his decision on the totality of the circumstances." Ibid. In Frankel, the officer "was entitled to conclude that the person who attempted to make the 9–1–1 call may have been prevented from completing the call and was in need of emergency assistance. We find that Officer Gelber had an objectively reasonable and good-faith basis to believe that an emergency was at hand that could not brook delay." Id. at 610. In this case, the 9-1-1 system was not used to signal any distress, there was no claim of an emergency, and there was no face-to-face interaction to assess.

In sum, while a 9-1-1 call may be more considered more reliable than an informant's tip it is not so reliable that the traditional inquiry for anonymous calls and the requirement of corroboration of those calls are dispensed with, other than when the tip refers to a potentially intoxicated driver. See also Golotta, 178 N.J. at 228 ("[A]s a general rule, an anonymous tip, standing alone, is rarely sufficient to establish a reasonable articulable suspicion of criminal activity. This case, however, falls within that narrow band of cases in which a 9-1-1 call carries sufficient reliability to sustain a motor vehicle stop when the purpose of that stop is to prevent imminent harm to the vehicle's driver or to the public.") (internal citations and quotation marks omitted) (emphasis added). Because the tip was uncorroborated before officers stopped Mr. Gayden, and because the special public safety interests involved in stopping intoxicating drivers is not present in this case, the stop was illegal.

CONCLUSION

The order suppressing the evidence in this case must be upheld.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: ___/s/ Tamar Lerer_____
Deputy Public Defender

Dated: October 9, 2024

County of Passaic
Administration Building
401 Grand Street - Paterson, New Jersey 07505

Passaic County Prosecutor's Office
(973) 881-4800

CAMELIA M. VALDES
Passaic County Prosecutor

NEIL J. CLEARY
First Assistant Prosecutor

Timothy Kerrigan
Chief Assistant Prosecutor
Of Counsel and On the Letter-Brief
N.J. Attorney I.D. 002462012

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Appellant)
v. Jerome L. Gayden (Defendant-Respondent)
Docket No. A-003940-23

Criminal Action: On Leave to Appeal an Order Partially Suppressing Evidence Entered by the Superior Court of New Jersey, Law Division, Passaic County.

Sat Below: Hon. Barbara Buono-Stanton, J.S.C.

REPLY LETTER IN LIEU OF BRIEF FOR PLAINTIFF-APPELLANT

Submitted: October 18, 2024

Your Honors:

Pursuant to R. 2:8-1, the State of New Jersey, through the Office of the Passaic County Prosecutor, respectfully submits the instant letter-brief in lieu of a formal reply brief, in support of Plaintiff-Appellant's appeal of the trial court's July 5, 2024 order granting Jerome L. Gayden's motion to suppress evidence.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The State adopts the statement of facts and procedural history contained in its initial brief dated September 20, 2024.

LEGAL ARGUMENT

Defendant's response brief contains mis-statements as to both law and fact regarding both (1) the trial court's erroneous evidentiary ruling that prevented the State from admitting evidence related to the 9-1-1 call, and (2) the application of the reasonable suspicion standard.

POINT I – THE TRIAL COURT'S ERRONEOUS EVIDENTIARY RULING PREVENTED THE STATE FROM PRESENTING IMPORTANT EVIDENCE RELATED TO REASONABLE SUSPICION.

First, Defendant's argument that the State failed to present certain evidence during the suppression hearing disregards the fact that the State was prevented from presenting that evidence by the trial court's incorrect evidentiary ruling.

Specifically, Defendant errs when he argues that the State failed to sustain its burden to present "the most reliable hearsay" related to the 9-1-1 call. (Db[2], p. 11). In fact, the trial court prevented the State from presenting any substantive evidence

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[1] Because of their interrelated nature and for the ease of the reader, these sections have been combined.

[2] "Db" refers to the Defendant's response brief.

at all related to the 9-1-1 call. *See* 1T12:2. As the trial court prevented the State from presenting any substantive evidence related to the 9-1-1 call, it was thus impossible for the State to present the audio of the 9-1-1 call.

As outlined in the State's initial brief dated September 20, 2024, Defendant lodged a hearsay objection as soon as the State began to present evidence related to the 9-1-1 call. 1T11:20-12:1. "(H)earsay is permissible in suppression hearings subject to N.J.R.E. 104(a)." State v. Bivins, 226 N.J. 1, 14 (2006); *quoting* State v. Watts, 223 N.J. 503, 519 n.4 (2015). Despite that, the trial court erroneously sustained Defendant's meritless hearsay objection. 1T12:2. This error, invited by defense counsel, prevented the State from presenting substantive evidence related to the 9-1-1 call that was both vital and admissible. Although we cannot guess exactly how the hearing would have progressed had the trial court not made this error, it is reasonable to think that the State would have presented the audio of the 9-1-1 call in order to establish its content, details, and the response time of police. As such, Defendant's contention that the State erred by not presenting "the most reliable hearsay" holds the State to an impossible standard. The State cannot present evidence that the trial court has erreonously deemed inadmissible. The Defendant cannot have it both ways. He cannot lodge a meritless objection to the admission of certain evidence and then, when the trial court wrongfully excludes that evidence in reliance on that objection, argue that the State erred by not presenting it.

After the State was unjustifiably prevented from presenting evidence related to the 9-1-1 call, the trial prosecutor was forced to change strategy and argue that the 9-1-1 call was not being admitted for the "effect on the listener". 1T14:4-7. The trial prosecutor's argument, although forced by the circumstances, is inaccurate – in fact, the 911 call should have been admitted substantively pursuant to New Jersey Rules of Evidence, which permit substantive admission of hearsay during suppression hearings. [The trial court is not bound by evidence rules when deciding preliminary questions of admissibility, except those on privilege and Rule 403. *See* N.J.R.E. 104(a)(1)]. But the hearing had already begun at the time that the trial court made this ruling, and, as such, the trial prosecutor was forced to make this argument in a desperate attempt to admit the relevant evidence despite the trial court's error.

In his response brief, Defendant claims that this effort by the trial prosecutor – who had already been told by the trial judge that evidence related to the 9-1-1 call was inadmissible hearsay - was "arguably a waiver of any reliance on the 9-1-1 call as substantive evidence." Db p. 12. That position is without merit. Defendant cannot persuade the trial court to make an incorrect evidentiary ruling excluding evidence and then argue that the State's efforts to work around that incorrect ruling bar it from pursuing an appeal. The trial prosecutor would have been within her rights to end the hearing at that very moment and pursue an appeal. However, it is preferable to handle matters on the trial court level. If the trial court had reached the

correct ultimate conclusion and denied the suppression motion despite its incorrect evidentiary ruling, the State would not need to pursue this appeal. The State should not be penalized because the trial prosecutor, hampered by an erroneous evidentiary ruling, attempted to argue a different theory with the intent of avoiding an appeal.

In addition, Defendant argues that the State's failure to present the police's response time amounts to a failure to establish reasonable suspicion. Db, p. 11. Defendant fails to mention the fact that the trial court's erroneous evidentiary ruling – which the State challenges in this appeal – precluded the State from offering this vital evidence. Given that the State was prevented from admitting any substantive evidence of the 9-1-1 call, the State was unable to present evidence related to when that call was received. As the State could not present evidence related to the time at which the 9-1-1 call was placed, the State could thus not present evidence as to how soon police responded to the scene after the call was placed – i.e. the response time of police. Defendant cannot argue both that the evidence was properly excluded, but also that the State cannot sustain its burden without that evidence.

Defendant attempts to explain his position by suggesting that the State could have presented evidence related to the 9-1-1 call by compelling testimony from the actual 9-1-1 caller. Defendant fails to point to any caselaw, statute, Rule of Evidence, or Court Rule that compels the State to call a 9-1-1 caller to testify during a suppression hearing. Rather it is proper, under the New Jersey Rules of Evidence,

for the State to rely on hearsay evidence, and it is clear that the trial prosecutor in this matter intended to do just that. The trial court's erroneous evidentiary ruling could not have been anticipated, and the trial prosecutor's strategy could not be amended mid-hearing based on it. The trial prosecutor could not produce the 9-1-1 caller out of thin air.

In addition, the State cannot be compelled to alter its strategy due to an incorrect evidentiary ruling. People providing tips about members of their community are often reluctant to testify. They may feel intimidated, fear retribution from a defendant or his family, or being labeled a "snitch" in the community. Or they may simply be reluctant to come into court and confront an accused. Given that, and given that this was a preliminary proceeding regarding admission of evidence that, in itself, could not result in the imprisonment of a defendant, the State is permitted to proceed using hearsay evidence. The State did not have to call the 9-1-1 caller – rather, the State had the right to present details of the 9-1-1 call through hearsay pursuant to the Rules of Evidence. *See* N.J.R.E. 104(a)(1).

This Court has, in the past, found that the State can present hearsay evidence in order to sustain an arrest. *See* State v. Bynum, 259 N.J. Super. 417 (App. Div. 1992). In Bynum, this Court acknowledged that the rules of evidence generally do not apply in suppression hearings, and also pointed that "(w)e emphasize that we are

not concerned with hearsay information relied upon by a police officer in making an arrest". Id. at 420.

If this Court "is not concerned with hearsay information relied upon by a police officer in making an arrest", it stands to reason that it would also not be concerned with the admission of hearsay information that was relied upon by a police officer in establishing reasonable suspicion to support an investigatory stop. This is particularly true in this case in which the hearsay is the contents of a 9-1-1 call, given that information received via a 911 call is "treated as more reliable than other anonymous tips." *See* State v. Gamble, 218 N.J. 412, 429 (2014). Notably, Bynum is the case that Defendant relied upon when arguing to the trial court that Officer Mendez's testimony related to the 911 call was inadmissible hearsay. Bynum, in fact, stands for the opposite proposition.

POINT II – DESPITE THE UNJUSTIFIABLE EXCLUSION OF IMPORTANT EVIDENCE, THE EVIDENCE STILL SUPPORTED A FINDING OF REASONABLE SUSPICION

Second, Defendant's contentions misinterpret the law related to reasonable suspicion.

Defendant contends that a 9-1-1 call alone cannot create reasonable suspicion under these circumstances. As support, Defendant relies on Florida v. J.L. 529 U.S. 266 (2000). In J.L., the United States Supreme Court found that an anonymous

report of a person with a firearm, standing alone, is insufficient to justify an investigatory stop. Florida v. J.L., 529 U.S. 266, 273 (2000).

However, J.L. did not involve a tip made through the 9-1-1 system. And since the publication of J.L., both the United States Supreme Court and the New Jersey Supreme Court have held that this is an important distinction. *See* Navarette v. California, 572 U.S. 393 (2014); State v. Golotta, 178 N.J. 205 (2003); and State v. Gamble, 218 N.J. 412, 429 (2014).

In Navarette, the United States Supreme Court affirmed a decision by the California Court of Appeals that a police officer had reasonable suspicion to conduct an investigatory stop based on a 9-1-1 call alone when the content of the 9-1-1 call indicated that it came from an eyewitness victim of reckless driving and the officer corroborated the vehicle's description, location, and direction of travel. Id. at 396

The Navarrete Court acknowledged that an officer had to confirm the veracity of a tip before acting on it, but also pointed out that an "indicator of veracity is the caller's use of the 911 emergency system." Id. at 400.

The Navarette Court explained:

> A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity. *See* J. L., supra, at 276, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) (Kennedy, J., concurring). As this case illustrates, see n.

> 1, *supra*, 911 calls can be recorded, which provides victims with an opportunity to identify the false tipster's voice and subject him to prosecution, see, *e.g.*, Cal. Penal Code Ann. § 653x (West 2010) (makes "telephon[ing] the 911 emergency line with the intent to annoy or harass" punishable by imprisonment and fine); see also § 148.3 (2014 West Cum. Supp.) (prohibits falsely reporting "that an 'emergency' exists"); §148.5 (prohibits falsely reporting "that a felony or misdemeanor has been committed"). The 911 system also permits law enforcement to verify important information about the caller. In 1998, the Federal Communications Commission (FCC) began to require cellular carriers to relay the caller's phone number to 911 dispatchers. 47 CFR § 20.18(d)(1) (2013) (FCC's "Phase I enhanced 911 services" requirements). Beginning in 2001, carriers have been required to identify the caller's geographic location with increasing specificity. §§ 20.18(e)-(h) ("Phase II enhanced 911 service" requirements). And although callers may ordinarily block call recipients from obtaining their identifying information, FCC regulations exempt 911 calls from that privilege. §§ 64.1601(b), (d)(4)(ii) ("911 emergency services" exemption from rule that, when a caller so requests, "a carrier may not reveal that caller's number or name"). Navarette v. California, 572 U.S. 393, 400-401 (2014).

After engaging in this detailed analysis, the Navarette Court specified that "(N)one of this is to suggest that tips in 911 calls are *per se* reliable." Id. at 401 However, the Naverette Court pointed out that, considering the technological and regulatory developments, "a reasonable officer could conclude that a false tipster would think twice before using such a system." Id. As such, the Navarette Court concluded, "(T)he caller's use of the 911 system is therefore one of the relevant

circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." Id.

The Navarette Court also acknowledged that a caller's veracity can be verified through presentation of evidence that the report was made contemporaneously to the crime, or through evidence that the tipster utilized the 911 system. Id. at 399-401. The Court in Navarette acknowledged that a "contemporaneous report has long been treated as especially reliable." Id. at 399.

In this case, the trial court's mistaken evidentiary ruling precluded the State from presenting evidence related to the response time of the police. However the fact that Defendant was leaving the scene upon the arrival of police suggests that he was not at the scene for very long. As such, the 9-1-1 report was likely made contemporaneously and, thus, is entitled to enhanced reliability.

Given that the initial report in this case was made contemporaneously and through the 9-1-1 system – both indicators of veracity as identified by the Navarette Court – it follows that it established reasonable suspicion.

The New Jersey Supreme Court has adopted a similar view as the United States Supreme Court. *See* State v. Golotta, 178 N.J. 205 (2003) and State v. Gamble, 218 N.J. 412, 429 (2014). In Golotta, the New Jersey Supreme Court held that, "(w)hen an anonymous tip is conveyed through a 9-1-1 call and contains

sufficient information to trigger public safety concerns and to provide an ability to identify the person, a police officer may undertake an investigatory stop of that individual." Id. at 219.

The New Jersey Supreme Court has also held that, even an anonymous tip, when placed through the 9-1-1 call system and contains sufficient information to trigger public safety concerns and provides an ability to identify the person, can be sufficient to establish reasonable suspicion for an investigatory stop of that person. State v. Gamble, 218 N.J. 412, 429 (2014).

Defendant argues that a 9-1-1 call can only form the basis for a finding of reasonable suspicion in the context of a motor vehicle stop. Db20. Defendant is incorrect. *See* State v. Rossman, 2014 N.J. Super. Unpub. LEXIS 1162 and State v. Bailey, 2017 N.J. Super. Unpub. LEXIS 1192[3].

In Rossman, a police officer conducted an investigatory stop based on a dispatch report relaying the contents of a 9-1-1 call. Pa070. The 9-1-1 caller, who was later determined to have given a false name, indicated that he/she had witnessed an argument between two men at a specific location, one of whom was carrying a handgun. Pa070. The caller described the man carrying the handgun as a "white male with a beard and ponytail wearing a black shirt and long shorts with the color

[3] Copies of these unpublished decisions were included in the appendix submitted alongside the State's September 20, 2024 brief. See Pa069-Pa076.

yellow on them." Pa070. The officer drove to the area and saw no signs of an argument, but effectuated an investigative detention on a man whose clothing and hair matched the description given by the 9-1-1 caller. Pa070.

The appellate panel sustained the investigatory stop, distinguishing J.L. based on the fact that, "the description here was not limited to a suspect's race and shirt, but included a description of facial hair and a ponytail, and more detailed information about attire," as well as the "location and direction the person was walking." Pa072. Based on that description, the appellate panel concluded that the description "was unlikely to apply to an indeterminate number of males the officer might encounter at the location" and indicated that it was "therefore satisfied that the 9-1-1 call had sufficient indicia of reliability and was adequately corroborated to justify the investigative stop." Pa072-Pa073.

In addition, in Bailey, police received a 9-1-1 call reporting that a bald black man wearing a white t-shirt and blue jeans walking with a pit-bull had a gun. Pa073. Police responded to the area, identified the man with the pit-bull, and performed an investigatory stop. Pa073. An appellate panel sustained the stop, distinguishing J.L. based on the fact that the caller in Bailey "is not anonymous." Pa076. The panel pointed out that its conclusion that the investigatory stop was justified was also supported by "defendant's startled behavior, his disobedience to the detectives'

commands, his location in a high-crime area, and the caller's description of defendant with a firearm." Pa076.

In this case, like the officers in Rossman and Bailey, Officer Mendez received a report of a 9-1-1 call from dispatch that a specific man in a particular location was unlawfully armed with a handgun. In this case, the description was particularly specific – the suspect was described by the 9-1-1 caller as a black male with dreadlocks wearing blue shorts and a white tank top and using crutches, and was identified as being in front of a specific address on Rosa Parks Boulevard in Paterson with a gun in his pocket. 1T15:1-12 and 16:10-14. Like in Rossman, the description of the suspect in this case "was not limited to the suspect's face and shirt" but included more detailed information that "was unlikely to apply to an indeterminate number of males" that police might encounter at that location. *See* Pa071. An appellate panel found that the 9-1-1 call was sufficient to establish reasonable suspicion in Rossman. Likewise, this panel should find that the 9-1-1 call was sufficient to establish reasonable suspicion in this case.

Third, Defendant's response brief conveys a misunderstanding of the State's contentions regarding the trial court's credibility findings. Here, the trial court blurred the line between factual and legal findings. The trial court used language typically associated with factual findings (i.e., "I find the office not credible") to make legal findings.

For instance, the State's witness testified that Defendant appeared startled when he first observed him. 1T48:15-19. The trial court judge agreed with this testimony and also found that the Defendant appeared startled when he was first observed by the State's witness. 2T44:2-7[4]. Thus, although the trial court judge explicitly stated the opposite, the trial court judge actually found that the testimony of the State's witness that the Defendant appeared startled was credible.

The trial court then – after making a factual finding that was consistent with the factual testimony of the State's witness – stated that it was finding the State's witness not credible. 2T48:1-3[5]. The trial court sought to explain that, although it agreed that the witness saw what he testified to having seen – the startled look – it disagreed with the witness's conclusion that the startled look was due to criminal activity. 2T43:25-44:2. Instead, the trial court found that the Defendant appeared

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[4] Defendant contends that the trial court judge did not find that Defendant appeared startled, and accuses the State of using a "technique" to make it seem as if that were the case. The State relies on the following quote from the trial court judge to support its contention that the trial court judge made a factual finding that Defendant appeared startled upon Officer Mendez's arrival: "This Court gives no weight to (Officer Mendez's) testimony that the startled look of Defendant was that of a person involved in a crime. Instead, the startled look of the defendant was that of a person on crutches trying to avoid being hit by a patrol car that had sped up so fast at the driveway that it came to an abrupt stop and jolted back as he was crossing in front of it." 2T43:25-44:6.

[5] The exact words used by the trial court were as follows: "The officer testified that he observed the defendant looking startled which the Court already found not credible." 2T48:1-4.

startled not because he was involved in a crime, but rather because of the way the police car pulled towards him. 2T44:2-6.

Whether or not the Defendant appeared startled is a factual determination. However whether or not the Defendant's startled appearance is an indicator of criminality is a legal finding. Thus, the trial court found the witness's factual testimony that Defendant appeared startled to be credible. The trial court then found the witness's legal conclusion that the startled look was an indicator of criminality to be incorrect. The trial court incorrectly deemed the witness's testimony not credible, when what it meant was that it was disagreeing with his legal conclusion.

The trial court addressed Defendant's flight in a similar way. Officer Mendez testified that, after he and Defendant made eye contact, Defendant "started walkin' away." 1T19:19-22. The trial court judge agreed that, after Officer Mendez arrived, "defendant took one hop to avoid being hit by the police car, and then two steps." 2T48:25-49:7. Thus, the trial court found that the testimony of the State's witness that the Defendant "started walkin' away" after the arrival of police was credible.

The trial court then – after again making a factual finding that was consistent with the factual testimony of the State's witness – stated that it was finding the witness not credible. The trial court sought to explain that, although it agreed that Defendant moved away from the police after their arrival, it disagreed with the

witness's conclusion that this action constituted flight. Instead, the trial court found that Defendant moved away from the police "to avoid being hit by the police car." 2T48:25-49:7.

Like the determination as to the Defendant's startled look, whether or not the witness moved away from the police after their arrival is a factual determination. However whether or not the Defendant's decision to move in the opposite direction of the police constituted "flight" is a legal finding. Thus, the trial court judge found the witness's factual testimony that Defendant moved away from them after their arrival to be credible. The trial court judge then found the witness's legal conclusion that the Defendant's actions constituted flight to be incorrect. The trial court incorrectly deemed the witnesses testimony not credible, when what it meant was that it was disagreeing with his legal conclusion that Defendant engaged in flight.

The fact that the trial court conflated factual conclusions with legal conclusions is important because a different standard of review applies to factual findings and to legal findings.

An appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record. State v. Elders, 192 N.J. 224, 243 (2007). An appellate court will disregard only those findings that are "clearly

mistaken". State v. Hubbard, 222 N.J. 249, 262 (2015). Review of legal conclusions of the trial court are de novo. State v. Watts, 223 N.J. 503, 516 (2015).

Thus, this Court should review the trial court's determinations regarding Defendant's startled look and alleged flight court de novo. Under that standard, this Court should find that these factual determinations, coupled with the 9-1-1 call, support a finding of reasonable suspicion.

The reasonable suspicion standard requires only "some minimal level of objective justification". State v. Nishina, 175 N.J. 502, 511 (2003). It involves a significantly lower degree of objective evidentiary justification than does the probable cause test. State v. Davis, 104 N.J. 490, 501 (1986). The level of suspicion necessary to establish reasonable suspicion is "considerably less than proof of wrongdoing by a preponderance of the evidence." Gamble, 218 N.J. at 428.

Here, police received a 9-1-1 call reporting a man with a gun, and describing the man's clothing, location, hairstyle, and even the fact that he was on crutches. 1T16:10-14. That call is significant because it is entitled to enhanced reliability due to the fact that it was received via the 9-1-1 system, and can establish reasonable suspicion if it triggered public safety concerns and provided an ability to identify the person. *See* State v. Gamble, 218 N.J. 412, 429 (2014).

Police responded to the location described by the 9-1-1 caller and found Defendant, who matched the description provided by the 9-1-1 caller exactly – Defendant had the same hairstyle, the same clothing, and was on crutches, as described by the caller. 1T15:6-17. In fact, a review of the surveillance video shows that Defendant – in addition to matching the hair and clothing description – was the only man using crutches in that area at that time. Pa077.

Upon observing the police, Defendant – in the words of the trial court judge – has a "startled look" and then took "two steps" in a direction away from the police before Officer Mendez grabbed him. 2T44:1 and 49:6-7. Defendant – who matched the exact description and was in the exact location described by the 9-1-1 caller – took those actions immediately after the arrival of the police. Pa077. The fact that purely innocent connotations can be ascribed to a person's actions does not mean that an officer cannot base a finding of reasonable suspicion on those actions as long as a reasonable person would find the actions consistent with guilt." State v. Citarella, 154 N.J. 272, 279-80 (1998). Despite that, the trial court disregarded how a reasonable person would have interpreted Defendant's actions and ascribed to them an innocent explanation that did not fit into the totality of the circumstances.

The trial court thus erred not only in its evidentiary ruling, but also by failing to assign the 9-1-1 enhanced reliability as directed by the New Jersey Supreme Court, failing to recognize and appreciate the significance of the fact that Defendant

matched the exact description and was in the exact location provided by the 9-1-1 caller, and failing to view Defendant's actions objectively.

Thus, this Court should consider, under a de novo standard, the fact that this case involves a detailed 9-1-1 call, a Defendant who matched the exact description and was in the exact location given to police by the 9-1-1 caller, and also consider that Defendant responded to the police presence in a way that a reasonable person in Officer Mendez's situation would find consistent with guilt. The State asks that this Court perform a de novo review of the trial court's legal conclusions and find that Defendant's actions, coupled with the inherently reliable and corroborated 9-1-1 call, establish more than the "minimal level of objective justification" necessary to justify the investigative detention. State v. Nishina, 175 N.J. 502, 511 (2003).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court overturn the trial court's decision granting Defendant's motion to suppress evidence.

Respectfully submitted,
CAMELIA M. VALDES
PASSAIC COUNTY PROSECUTOR

By: /s/ Timothy Kerrigan
Timothy Kerrigan
Chief Assistant Prosecutor
Attorney I.D. 002462012
TKerrigan@passaiccountynj.org

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