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Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-2246-22T2

STATE OF NEW JERSEY,	CRIMINAL ACTION
Plaintiff-Respondent,	On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Salem County.
v.	Sat Below:
SHAWN M. FENIMORE, A/K/A SHAWN FENIMORE,	Hon. Linda L. Lawhun, P.J.S.C.
Defendant-Appellant.	

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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"Da" refers to the appendix to defendant's brief.
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"1T" refers to pretrial-motion proceedings on February 4, 2022.
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"3T" refers to sentencing proceedings on February 10, 2023.

PRELIMINARY STATEMENT

This case arises because defendant chose to drive a car, while intoxicated and impaired, to a police station to be interviewed about a harassment complaint. Upon his arrival, an officer saw him pull in and exit from the driver's door, stumble over his feet, and almost fall into a wall when trying to enter the station's front entrance. During the ensuing interview for the harassment complaint, the officer also observed a fresh track mark on defendant's arm. And based on his years of law-enforcement experience, the officer recognized that the fresh track mark, defendant's slow and raspy voice, pinpoint eyes, and white stuff on the side of his mouth were signs of recent narcotics use.

To solidify that well-grounded suspicion, the officer had defendant perform sobriety tests. Defendant failed the one-leg stand and walk-and-turn test, confirming that he was intoxicated. The result of defendant's HGN test was normal for narcotics use. As a result, defendant was arrested for driving while intoxicated (DWI).

These same circumstances that provided probable cause for defendant's arrest also provided probable cause to believe that there was evidence of defendant's drug use, such as additional narcotics or other drug paraphernalia, in the car that he had just been seen operating, which circumstances arose

unforeseeably and spontaneously. Indeed, the circumstances giving rise to probable cause swiftly unfolded during an unplanned DWI investigation and did not exist prior to defendant's arrival to the station. Because both prongs of the automobile exception had been met, the judge properly found that the car search was justified under the automobile exception.

Contrary to defendant's assertion, the automobile exception does not solely apply to roadside searches. It is a long-standing, well-settled principle that the automobile exception is applicable to parked cars where the circumstances giving rise to probable cause arise unforeseeably and spontaneously. And this well-settled principle should be applied to the car defendant parked at the police station here, which had yet to be impounded. As this Court has recognized, the anticipated impoundment of a vehicle does not revoke the permissiveness of a car search under the automobile exception.

Because the circumstances giving rise to probable cause arose unforeseeably and spontaneously, the police permissibly searched defendant's car under the automobile exception. The car search was also justified under the search-incident-to-arrest exception—as per Arizona v. Gant it was reasonable to believe under the totality of circumstances that evidence relevant to defendant's DWI arrest would be found in the car he had just been seen operating. This Court should affirm the denial of the motion to suppress.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On August 25, 2021, a Salem County Grand Jury returned Indictment No. 21-08-0541-I, charging defendant Shawn Fenimore and co-defendant Nicholas Luzzo with crimes related to drugs and a loaded handgun that were seized during a car search following Fenimore's arrest for driving while intoxicated (DWI). (Da1 to 3). Defendant was charged with three crimes: second-degree unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5(b)(1), under Count One; third-degree possession of a controlled dangerous substance (CDS), in violation of N.J.S.A. 2C:35-10(a)(1), under Count Two; and fourth-degree unlawful possession of a large-capacity magazine, in violation of N.J.S.A. 2C:39-3(j), under Count Three.[1] (Da1 to 2).

On June 16, 2021, defendant filed a motion to suppress. After an evidentiary hearing on February 4, 2022, the Honorable Linda L. Lawhun, P.J.S.C., denied the motion, finding the search was lawful under the automobile exception. (1T116-17 to 121-14; Da6).

On May 23, 2022, defendant entered into a global plea agreement for Salem County Indictment Nos. 21-08-0541-I and 21-03-0256-I. (Da7; 2T3-2

[1] Co-defendant Luzzo was also charged with unlawful possession of the handgun (Count Four), unlawful possession of the large-capacity magazine (Count Five), and a second-degree certain persons offense (Count Six). (Da2 to 3). Those charges were dismissed on the State's motion on October 17, 2022, after defendant pleaded guilty to unlawfully possessing the handgun.

to 4-13). As for Indictment No. 21-08-0541-I, relating to this case, defendant pleaded guilty to second-degree unlawful possession of the handgun (Count One) in exchange for the State's sentencing recommendation of five years in prison, with only one year of mandatory parole ineligibility, following its filing of a Graves Act waiver under N.J.S.A. 2C:43-6.2. (Da9; 2T3-2 to 6-5). As for Indictment No. 21-03-0256-I, defendant pleaded guilty to third-degree possession of CDS in exchange for the State's sentencing recommendation of a concurrent three-year sentence.[2] (Da4; Da9; 2T3-2 to 6-5). The State also agreed to dismiss defendant's remaining charges in this case, and to recommend his sentences run concurrently with another fourth-degree theft case that was pending. (Da9; 2T13-14 to 14-3; 3T14-15 to 20).

On January 12, 2023, the State filed a motion for a Graves Act waiver, which Judge Lawhun granted at sentencing on February 10, 2023. (3T4-5 to 14; 3T13-9 to 14). Defendant was then sentenced in accordance with the plea agreement. (3T13-10 to 16-24; Da13 to 18). On the same date, defendant also pleaded guilty to his DWI offense and was sentenced to the mandatory minimum penalty without jail. (3T4-22 to 9-16; 3T14-25 to 15-7; Da13).

On August 15, 2023, defendant filed a Notice of Appeal solely challenging his conviction under Indictment No. 21-08-0541-I. (Da19 to 23).

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[2] This CDS offense occurred before the car search. (2T11-15 to 12-18; Pb12).

COUNTERSTATEMENT OF FACTS

This case stems from the seizure of a loaded handgun, found in a car that defendant had driven, while intoxicated and impaired, to a police station. Following his arrest for a DWI, the police searched the car and discovered the handgun inside the passenger compartment, along with folds of heroin and a hypodermic needle.

A. The motion-to-suppress hearing.

The following facts are derived from Trooper Daniel Radetich's motion testimony and the judge's fact-findings. On June 2, 2021, Trooper Radetich was investigating a harassment complaint against defendant. (1T5-16 to 6-18). In reporting the complaint, the female victim showed the police text messages sent by defendant, including ones noting that he had hit someone with his car while high. (1T98-6 to 101-14).

Trooper Radetich called defendant's home phone number and left a message with defendant's mother. (1T5-16 to 7-12; 1T39-25 to 40-1; 1T42-2 to 21; 1T85-6 to 11). When defendant called him back, Radetich asked defendant to come down to the station so he could provide a statement to explain his side of the story.[3] (1T5-16 to 7-12; 1T39-25 to 40-1; 1T40-23 to

[3] The Computer Aided Dispatch abstract showed an entry at 6:04 p.m. (Da35; Da37).

24; 1T85-6 to 11; 1T97-18 to 24). While speaking with defendant, Radetich noted that defendant's voice was "raspy" and that he was "slurring his words." (1T86-2 to 6). Radetich told other troopers, "I think he's intoxicated, possibly." (1T86-2 to 6).

Defendant agreed to speak with Trooper Radetich and chose to drive himself to the station, instead of accepting Radetich's offer to pick him up from work, taking a taxi, or arranging for a friend or family member to drive him there. (1T6-19 to 8-19; 1T39-25 to 41-4; 1T101-21 to 102-6). When defendant arrived at the station around 8:30 p.m., Radetich was inside the lobby and saw defendant pull into the parking lot and exit from the driver's door. (1T7-20 to 9-19; 1T66-21 to 67-2; 1T84-1 to 84-22; 1T87-11 to 88-14). As defendant was walking towards the station's front entrance, Radetich saw defendant "stumbl[e] over his own feet" and appear to fall, or almost fall, into the station wall right next to the door. (1T7-20 to 9-19).

Defendant then walked into the station and said that he was there to speak with Radetich, who brought defendant into an interview room. (1T7-20 to 9-25). There, Radetich read defendant his rights and "started talking about the reason that [he] was investigating [him] at that time"—the harassment case. (1T9-25 to 11-11; 1T103-24 to 104-7). While Radetich was doing so, he noted that defendant's voice was "slow" and "raspy," his eyes were "pinpoint,"

and he was "slouched in his chair." (1T11-7 to 14). He also noticed that defendant had a "fresh track mark" (i.e., "an injection site, from a needle") on his forearm, which he had seen before during his six years as a State Trooper. (1T11-7 to 17; 1T102-11 to 103-5). Defendant also had "white stuff" on the side of his mouth indicating that his mouth was dry, which Radetich also recognized as a sign of narcotic use. (1T97-4 to 11).

Based on these observations, and Trooper Radetich's six years of law-enforcement experience, during which he had encountered people under the influence of drugs and alcohol, he believed that defendant may have been under the influence of a narcotic. (1T4-21 to 5-19; 1T11-7 to 12-11). Radetich asked defendant about the fresh track mark and whether defendant had taken anything; but defendant stated, "I'm just tired." (1T11-12 to 15-16). Nonetheless, because Radetich "did[not] feel confident with [defendant] leaving the station," believing that he was under the influence, he conducted field-sobriety tests—the Horizontal Gaze Nystagmus (HGN) test, the walk-and-turn test, and the one-leg test—with the assistance of another trooper. (1T15-20 to 19-15; 1T89-4 to 22; Da31).

Trooper Radetich had conducted more than twenty field-sobriety tests. (1T68-1 to 7). He was also certified as a Drug Recognition Expert (DRE). (1T77-3 to 4). In watching defendant perform the tests, he saw defendant fail

the one-leg stand, swaying from side to side when he picked up his foot and having to place it back down on the ground. (1T18-12 to 19-15). He also saw defendant fail the walk-and-turn test, losing his balance at the starting position and being unable to walk heel-to-toe. (1T15-20 to 18-14). Though Radetich did not notice anything odd with the HGN test, he explained that was "normal with a narcotic[.]" (1T15-20 to 19-15; 1T89-4 to 13).

Consequently, defendant was arrested for driving while intoxicated based on Trooper Radetich's observations of defendant's arrival driving into the station, his intoxicated behavior during the interview, and his failed field-sobriety tests. (1T19-16 to 20). Troopers, including Radetich, then searched defendant's car for intoxicants, in places where a driver or passenger of the car could reach and intoxicants could be located. (1T19-16 to 20-15; 1T30-19 to 31-9; 1T89-23 to 90-12).

Trooper Radetich believed that the probable cause to arrest defendant for a DWI also provided probable cause to search the vehicle defendant had been operating for intoxicants. (1T72-2 to 24). In addition to the foregoing circumstances, defendant's violent, hysterical reaction to being arrested also caused Radetich to believe that there was something in the car, or that defendant "was afraid that there was something" in the car. (1T65-3 to 18).

The car had a front passenger—co-defendant Luzzo—who the troopers

had exit the car.[4] (1T20-19 to 28-1). The officers then began the search in the front-passenger area, finding four wax folds of heroin, labeled "Jackpot," and a needle in the center console. (1T27-25 to 29-1; 1T31-6 to 18; 1T90-13 to 91-3).

The officers also searched the rear-passenger area and found a handgun, wrapped inside a towel, in a plastic bag. (Da31; 1T29-2 to 15; 1T31-23 to 6; 1T91-4 to 11). After feeling a metal object when moving the towel, (Da31; 1T91-12 to 14), Radetich said, "I knew it," upon finding the gun. (1T29-2 to 15). The gun was loaded with at least sixteen rounds. (1T30-9 to 15).

In the rear-compartment area of the car, which was a Jeep Grand Cherokee, the officers also found items that they suspected were stolen—including seven iPhones and four car keys for different makes of cars—two bolt cutters, and an item used to break windows. (1T29-15 to 23; Da31).

After the car search, Detective Radetich spoke with defendant, who again waived his rights before being interviewed. (1T32-19 to 33-18; 1T37-21 to 39-15). Defendant disclaimed ownership of the gun in the bag, which he brought up on his own, without Radetich mentioning to him that one had been

[4] Luzzo was sleeping and "difficult to awaken." (Da31). He appeared disoriented, did not know where he was, and "struggled to keep his eyes open." Ibid. Like defendant, Luzzo's speech was "raspy, slow, and slurred" and his pupils were "pinpoint." Ibid.

found in the car. Defendant claimed that Luzzo had brought a black book bag into the car and claimed that he did not know that a gun was in the bag. (1T34-3 to 36-10; 1T37-21 to 44-20; 1T53-24 to 54-22; 1T56-22 to 58-13). After Radetich asked defendant what in the car belonged to him, defendant admitted that he owned work clothes in a plastic bag and the heroin found in the center console. (1T33-21 to 35-21; 1T45-15 to 48-21; 1T50-20 to 52-21). He also admitted that he used heroin that morning, though he denied using it before coming to the police station. (1T46-15 to 17; 1T48-22 to 49-14).

Neither Luzzo nor defendant claimed ownership of the gun. (1T55-6 to 58-13). They were therefore both charged with unlawfully possessing the gun. (1T65-24 to 66-10). Defendant was only indicted with crimes related to the drugs, loaded handgun, and large-capacity magazine seized from the passenger area, not the items seized from the rear-compartment area. (Da1 to 3). Though he was charged with a disorderly persons offense for possessing burglary tools, it was dismissed at sentencing. (Da13).

1. Motion Judge's Ruling.

Following Trooper Radetich's testimony, the judge denied defendant's motion to suppress. (1T116-17 to 121-14). Based on Radetich's testimony, the judge found that Radetich's "observations alone were sufficient for there to be probable cause to believe . . . defendant had operated [his] motor vehicle

while under the influence." (1T118-10 to 15; 1T121-1 to 9). The judge also found that the search of the car after defendant's DWI arrest was justified under the automobile exception, even though the car was going to be impounded under John's Law, N.J.S.A. 39:4-50.23, and the car was parked in a police-station parking lot. (1T115-17 to 120-4).

The judge found that defendant parking his car at the State Police barracks and arriving under the influence was "totally dissimilar" from a warrantless search of a car in a private driveway. (1T116-17 to 117-16). And the judge noted that there are cases applying the automobile exception to parked cars, such as those in store parking lots, and not just those stopped on the side of the roadway—though "[m]ost of the case law concerns roadway stops." (1T117-9 to 118-4).

The judge rejected defendant's argument that the automobile exception's spontaneity-and-unforeseeability requirement was not met due to defendant being invited to the police station to discuss the harassment incident, or because defendant parked his car in the station's parking lot. (1T116-17 to 118-4). The judge found that defendant's arrival at the station under the influence was what was "spontaneous and unforeseeable," and ruled that "the police troopers were justified in searching the vehicle without a search warrant" and seizing the gun contained inside the plastic bag. (1T116-17 to

117-8; 1T119-23 to 120-13).

B. Defendant's guilty pleas.

On May 23, 2022, defendant entered into a global plea agreement for Indictment Nos. 21-08-0541-I and 21-03-0256-I. (2T3-2 to 13-8; Da7 to 12). As to Indictment No. 21-08-0541-I, defendant pleaded guilty to second-degree unlawful possession of the loaded handgun that was seized from his car and admitted the following facts under oath: that he was aware of the firearm recovered from his vehicle and that he did not have a permit for it.[5] (2T4-15 to 17; 2T10-17 to 11-10).

As to Indictment No. 21-03-0256-I, defendant pleaded guilty as charged to third-degree unlawful possession of CDS, admitting that he illegally possessed heroin in Pennsgrove Borough on August 21, 2019, and January 13, 2020. (2T11-15 to 12-18). This drug charge did not stem from the car search on June 2, 2021, and is thus unrelated to the denial of the motion to suppress that defendant is challenging on this appeal.

On February 10, 2023, before being sentenced, defendant also pleaded guilty to driving while intoxicated to the police station on June 2, 2021. (3T4-22 to 9-16; Da13). Defendant admitted, under oath, that before driving to the

[5] For defendant's factual basis, defense counsel mixed up which indictment numbers pertained to which charges. Compare (2T10-17 to 13-8) with (Da7).

police barracks that day, he had used a narcotic that impacted his ability to safely operate the car he drove there. (3T5-24 to 6-1; 3T8-2 to 9-16). This appeal follows.

LEGAL ARGUMENT

POINT I

THE JUDGE CORRECTLY UPHELD THE SEARCH OF DEFENDANT'S CAR.

The judge properly denied defendant's motion to suppress. Because the circumstances giving rise to probable cause arose unforeseeably and spontaneously, the car search was appropriate under the automobile exception. The car search was also permissible pursuant to the search-incident-arrest exception under Arizona v. Gant, 556 U.S. 332, 343 (2009), as it was reasonable to believe, under the totality of circumstances, that evidence relevant to defendant's DWI arrest would be found in the car he had just been seen operating. For these reasons, this Court should affirm.

A. The judge properly found the search of defendant's car was lawful under the automobile exception.[6]

The Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guarantee the right of people to be secure against unreasonable searches by requiring warrants issued upon probable cause. Although "[o]ur jurisprudence under both constitutional provisions expresses a preference that police officers secure a warrant before they execute a search," "[w]arrantless searches are permissible . . . if 'justified

[6] This section addresses Point I.A, I.B, I.C, and I.D of defendant's brief.

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

The automobile exception is one such exception to the warrant requirement. In New Jersey, the warrantless search of a vehicle is permissible where (1) "the police have probable cause to believe that the vehicle contains contraband or evidence of an offense," and (2) "the circumstances giving rise to probable cause are unforeseeable and spontaneous." Witt, 223 N.J. at 414, 422, 447 (citing State v. Alston, 88 N.J. 211, 233 (1981)). The automobile exception is premised on the following rationales: (1) that a readily mobile vehicle can be quickly moved; (2) that an individual has a "lesser expectation of privacy in an automobile compared to a home" because of the pervasive government regulation of vehicles; (3) that "the process of seizing a car and detaining the driver while securing a search warrant 'would be more intrusive than the actual search itself'"; and (4) that the unforeseeable and spontaneous circumstances giving rise to probable cause occur swiftly. State v. Terry, 232 N.J. 218, 233-35 (2018); Witt, 223 N.J. at 422-24, 431 (citing Alston, 88 N.J. at 234) (other citations omitted); see also Collins v. Virginia, 584 U.S. __, 138 S. Ct. 1663, 1669-70 (2018).

1. The circumstances leading up to defendant's DWI arrest, which included a fresh track mark on his arm, established probable cause to believe that evidence of his recent drug use was inside the car he had just been seen operating.

Here, the circumstances leading up to defendant's DWI arrest also gave the officers probable cause to believe that evidence of defendant's recent drug use, such as additional narcotics or other drug paraphernalia, were inside the car he was driving when he arrived at the police station. Probable cause exists when, under the totality of circumstances, there is a fair probability that criminality is afoot; "it does not demand any showing that such belief be correct or more likely true than false." See Illinois v. Gates, 462 U.S. 213, 238 (1983); State v. Moore, 181 N.J. 40, 46-47 (2004); State v. Johnson, 171 N.J. 192, 214-15 (2002).

A variety of factors determine whether probable cause exists, including an officer's firsthand observations and the conclusions drawn from those observations in light of his "common and specialized experience." Johnson, 171 N.J. at 215, 217 ("[I]n determining the reasonableness of [an officer's] actions[,] . . . consideration must be given to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."); Moore, 181 N.J. at 46-47; see also District of Columbia v. Wesby, 583 U.S. 48, 58 (2018) (recognizing that officers are "allowed . . . to make . . . 'common-sense conclusions about human behavior'") (quoting Gates, 462 U.S. at 231). "[T]he

very same facts that constitute probable cause to arrest a vehicle's occupant often will afford police officers probable cause to believe that a vehicle contains evidence of crime or contraband." State v. Pierce, 136 N.J. 184, 204 (1994).

Such was the case here. Trooper Radetich saw defendant's arrival, exiting from the driver's door of his car, stumbling over his own feet, and almost falling into a wall when trying to enter the station. During his initial interview, Radetich also noticed a fresh track mark on defendant's arm; and, based on his years of law-enforcement experience, recognized that defendant's slow and raspy voice, pinpoint eyes, and white stuff on the side of his mouth were signs that defendant was under the influence of a narcotic. To confirm that fair probability as a certainty, Radetich conducted field-sobriety tests with another trooper. Defendant failed the one-leg stand and walk-and-turn test, which confirmed that he was intoxicated; and defendant's HGN test was normal for narcotic use. (Pb7 to 8).

Similar to what this Court found in State v. Irelan, 375 N.J. Super. 100, 118-19 (App. Div. 2005), the salient facts that were known to the officers—that defendant reasonably appeared intoxicated due to narcotic use, that he had recently consumed a narcotic based on the fresh track mark on his arm, and that he had recently occupied the vehicle he drove to the station for some

unknown period of time—provided probable cause to believe that a narcotic, by way of a hypodermic needle, had been used in the vehicle, and that the vehicle may have contained more narcotics or other drug paraphernalia. Indeed, the Supreme Court implicitly acknowledged in Pierce, 136 N.J. at 210, that evidence of a DWI offense, or operating a vehicle while possessing CDS, is often ordinarily found in the implicated car. See Irelan, 375 N.J. Super. at 118 (rendering this conclusion from Pierce). The probable-cause prong of the automobile exception was thus met here.

Defendant's reliance on State v. Jones, 325 N.J. Super. 234 (App. Div. 1999), is misplaced. There, unlike Irelan and here, Jones did not appear intoxicated to the officer. See Irelan, 375 N.J. Super. at 118 (summarizing Jones). Thus, as this Court found, the alcohol on his breath and admission to drinking one beer—which is not a per se violation of law—during an otherwise minor traffic stop for failing to signal a lane change, did not give rise to probable cause to search his car for open containers. See Jones, 325 N.J. Super. at 237-45. Defendant's case is different, and more like Irelan, because defendant physically appeared intoxicated to the officer, as verified by his failed sobriety tests, and entered the station with a fresh track mark on his arm. This established a well-grounded suspicion that there may have been evidence of defendant's recent drug use in the car that he had just been operating.

2. The circumstances establishing probable cause to search arose unforeseeably and spontaneously during an unplanned, swiftly unfolding DWI investigation.

The circumstances establishing probable cause also arose unforeseeably and spontaneously. Defendant appeared intoxicated when he arrived at the police station to speak with the police about an unrelated harassment complaint. This sparked an unplanned DWI investigation due to defendant's choice to drive himself there while impaired. The probable cause to search defendant's car did not develop before his arrival, but during the unplanned DWI investigation that led to his DWI arrest. The unforeseeable-and-spontaneous prong of the automobile exception was thus satisfied. And because both prongs of the automobile exception were met, the officers appropriately searched the car under this exception to the warrant requirement.

This is not a case where officers were sitting on probable cause they had developed beforehand, lying in wait for defendant to show up in a car so they could search it without a warrant. See Witt, 223 N.J. at 447-448 (noting that "if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so") (emphasis added). Nor is this a case involving prior, discrete police surveillance that developed probable cause in advance before the encounter. See State v. Smart, 253 N.J. 156, 171-73 (2023). Indeed, this

case is wholly unlike Smart, where the police had been surveilling the defendant for hours at various locations, unbeknownst to him, for drug trafficking before conducting a deliberate investigative stop of his car and then calling a K9 officer to develop probable cause to search that car when he did not consent to the search. See id. at 171-73. Smart is thus inapposite to this case's circumstances.

Instead, this case is more like Irelan. There, like here, the circumstances giving rise to probable cause did not arise in advance of the police encounter—they developed during an unplanned DWI investigation. See Irelan, 375 N.J. Super. at 118-19. And like here, the circumstances that unfolded during that unplanned investigation, as this Court astutely found, unforeseeably and spontaneously gave rise to probable cause to search the implicated vehicle under the automobile exception. Ibid. Similar to here, probable cause to search was based on the troopers' observations "that defendant reasonably appeared intoxicated, that he therefore had recently consumed a substantial quantity of alcohol, and that he had recently occupied the vehicle for some unknown period of time." Ibid.

Neither Witt nor Smart held that, if the information accumulated at any phase of an investigation could be predicted to yield more incriminating facts, the police must halt their efforts and pursue a search warrant. That argument,

if carried to its logical conclusion, would virtually eliminate the automobile exception since police work, in general, is usually gathered step-by-step. Nothing in Witt or Smart supports such a strained interpretation of the law.

Consequently, because there was probable cause that the car contained narcotics or other drug paraphernalia based on Trooper Radetich's observations during the unplanned DWI investigation, the police permissibly searched the car's interior and the containers therein that may have been concealing the object of the search, such as the plastic bag containing the loaded handgun. See United States v. Ross, 456 U.S. 798, 821-23, 825 (1982) (holding that, just as a container that may conceal the object of a search authorized by a warrant may be opened immediately, so too can containers and compartments that may conceal the object of a warrantless car search when the police have probable cause to believe it contains contraband); State v. Esteves, 93 N.J. 498, 508 n.3 (1983); State v. Guerra, 93 N.J. 146, 151 (1983). "The scope of a warrantless search of an automobile is defined by the object of the search and the places where there is probable cause to believe that it may be found." Esteves, 93 N.J. at 508 (citing Guerra, 93 N.J. at 151; Alston, 88 N.J. at 217). And here, the plastic bag certainly could have been holding narcotics or other evidence of defendant's drug use. The officers thus properly seized from the passenger compartment the heroin and hypodermic needle found in

the center console, and the handgun loaded with a high-capacity magazine found in the plastic bag, under the automobile exception.

3. The automobile exception is not limited to roadside car searches and was appropriately applied to this case's circumstances.

Contrary to defendant's assertion, the automobile exception does not solely apply to roadside car searches. (Db1; Db8). Importantly, the practical reasons that the Supreme Court explained in Witt—to excise the showing that exigent circumstances making it impracticable to obtain a warrant need to exist before the automobile exception can apply—were not meant to limit the automobile exception to roadside searches. They were meant to illustrate the unworkability of the exigent-circumstances requirement set forth in State v. Cooke, 163 N.J. 657 (2000), and State v. Pena-Flores, 198 N.J. 6 (2009). See Witt, 223 N.J. at 441-47.

Rather than limiting the automobile exception solely to roadside searches, Witt specifically held that the automobile exception may apply to parked cars where the circumstances giving rise to probable cause are unforeseeable and spontaneous. 223 N.J. at 447-48. It thus continued the well-settled principle, under the Alston standard, as well as the more-restrictive standard under Cooke and Pena-Flores, that the automobile exception is not limited to cars encountered on the roadside, but also applies to parked cars elsewhere. See, e.g., Pena-Flores, 198 N.J. at 43 (recognizing that

"[t]he justification to conduct a warrantless automobile search does not turn on whether the vehicle is parked or moving"); Cooke, 163 N.J. at 664-65 (holding automobile exception "applies equally to vehicles stopped on the highway and vehicles parked on a public street or in a parking lot"); State v. Colvin, 123 N.J. 428, 437 (1991); Esteves, 93 N.J. at 501, 504-09 (upholding search of car in public parking lot); State v. Martin, 87 N.J. 561, 567 (1981) (holding automobile exception applies to parked and unoccupied cars encountered by police in public parking lots or on city streets as well as to moving vehicles stopped on open highways).

This well-settled principle should be applied to the car defendant parked at the police station. At the time of the search, defendant's car had not been impounded by police.[7] Though the car was going to be impounded under John's Law, N.J.S.A. 39:4-50.23, this Court has recognized that Witt, 223 N.J.

[7] Witt only precluded the automobile exception from applying to cars that have already been impounded, thereby departing from federal jurisprudence. 223 N.J. at 448-49. In using the term "headquarters" to refer to a police's impoundment lot, the Court in Witt was not contemplating the situation presented here, where a car was in a station parking lot because a defendant drove it there while intoxicated. See ibid. Defendant's broad assertion that Witt held warrants would be required for searches conducted at police stations is thus inaccurate. (Db10). Additionally, the Court's term "on-scene warrantless searches" was not used to limit the automobile exception to roadside searches, but as a shorthand to distinguish searches of impounded vehicles from those conducted while a vehicle is still on the scene. See Witt, 223 N.J. at 449.

at 428, affords "police officers at the scene the discretion to choose between searching the vehicle immediately if they spontaneously have probable cause to do so, or to have the vehicle removed and impounded and seek a search warrant later."[8] See State v. Rodriguez, 459 N.J. Super. 13, 23 (App. Div. 2019).

In other words, the anticipated impoundment of a vehicle does not revoke the permissiveness of a car search under the automobile exception provided that probable cause to search the motor vehicle arose spontaneously and unforeseeably. When police have probable cause to conduct a car search under the automobile exception, officers should be able to do so at the place where they first encounter the vehicle. See Esteves, 93 N.J. at 505.

Finally, Witt also held that the police are not required to secure a warrant "merely because 'the particular occupants of the vehicle may have been removed from the car, arrested, or otherwise restricted in their freedom of movement.'" 223 N.J. at 428. The fact that defendant was detained for the DWI arrest at the time of the car search thus did not alter the applicability of the automobile exception. Because the circumstances giving rise to probable

[8] In describing the legal issue facing the motion court, quoted in defendant's brief at Db12, the judge was not recognizing that circumstances justifying a warrantless search under the automobile exception did not exist in this case. (1T118-16 to 120-4). To the contrary, the judge upheld the search of defendant's car under the automobile exception. (1T116-17 to 120-4).

cause to search defendant's car arose unforeseeably and spontaneously, the officers appropriately searched it under the automobile exception.

B. The motor-vehicle search also was justified under the search-incident-to-arrest exception.

In addition to the automobile exception, the car was properly searched under the search-incident-to-arrest exception. The search-incident-to-arrest exception is based on two rationales: "interests in officer safety and evidence preservation that are typically implicated in arrest situations." Gant, 556 U.S. at 338; Irelan, 375 N.J. Super. at 107-08.

Under Arizona v. Gant, the police may search a vehicle incident to a recent occupant's arrest in two scenarios. First, the police may search the vehicle if the "arrestee is unsecured and within the reaching distance of the passenger compartment at the time of the search." Gant, 556 U.S. at 343 (based on Chimel v. California, 395 U.S. 752 (1960), and the narrowed holding of New York v. Belton, 453 U.S. 454 (1981)). And second, the police may search the vehicle incident to arrest "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Ibid. (based on Justice Antonin Scalia's concurrence in Thornton v. United States, 541 U.S. 615, 632 (2004)). This second scenario does not depend on whether the arrestee is secured at the time of the search. Id. at 343-44.

Before Gant, our Supreme Court had already rejected the broader

reading of Belton and similarly narrowed it as Gant did later. Compare State v. Eckel, 185 N.J. 523, 540-41 (2006) (rejecting broad reading of Belton and holding it does not apply where arrestee is removed and secured elsewhere and thus cannot endanger police or destroy evidence) with Gant, 556 U.S. at 343, 347 n.8 (noting Eckel reached the same conclusion). Our Supreme Court has not yet had the opportunity to address the second scenario of Gant—which, importantly, is based on Justice Scalia's concurrence in Thornton, and not on the broad reading of Belton that our Supreme Court rejected in Eckel, which was decided before Gant. Such is an open question.

A majority of states are already following the second scenario of Gant, allowing an arrestee's implicated vehicle, within his immediate control, to be searched incident to arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.[9] Gant's second scenario is

[9] At least twenty-eight states have already adopted the second Gant scenario. See, e.g., State v. Jamison, 66 So. 3d 832, 847 (Ala. Crim. App. 2010); Pitka v. State, 378 P.3d 398, 400-01 (Alaska Ct. App. 2016); Harris v. State, 2012 Ark. App. 674, at *5-6 (Ark. Ct. App. 2012); People v. Johnson, 230 Cal Rptr. 3d 869, 875, 877-78 (2018); People v. Crum, 312 P.3d 186, 187-88 (Colo. 2013); Johnson v. United States, 40 A.3d 1, 11 (D.C. 2012); State v. Gardner, 72 So. 3d 218, 220 (Fla. Dist. Ct. App. 2011); State v. Hargis, 756 S.E.2d 529, 537 (Ga. 2014); State v. Smith, 266 P.3d 1220, 1224-25 (Idaho Ct. App. 2011); People v. Bridgewater, 918 N.E.2d 553, 558 (Ill. 2009); Meister v. State, 933 N.E.2d 875, 878 (Ind. 2010); State v. Ewertz, 305 P.3d 23, 26-28 (Kan. Ct. App. 2013); Hinchey v. Commonwealth, 432 S.W.3d 710, 713-14 (Ky. Ct. App. 2014); State v. Guillory, 21 So. 3d 945, 949 (La. 2009); Taylor v. State, 137 A.3d 1029, 1032-34 (Md. 2016); Commonwealth v. Perkins, 989 N.E.2d

fully consistent with the search-incident-to-arrest exception's historic rationales of officer safety and evidence preservation that are typically implicated in arrest situations. Gant, 556 U.S. at 338. And apart from Eckel (which is no longer in conflict with federal law because of Gant), our Supreme Court has generally applied the same search-incident-to-arrest test under the New Jersey Constitution as the Fourth Amendment. See State v. Oyenusi, 387 N.J. Super. 146, 153 (App. Div. 2006). This Court should similarly do so here by applying Gant—as most other jurisdictions have done.

It follows that the search of defendant's car was justified not only under the automobile exception. The search also was justified under the search-incident-to-arrest exception because it was reasonable to believe intoxicants, or other evidence relevant to defendant's DWI offense, would be found in the vehicle he had driven to the police station given how intoxicated he was upon his arrival. See, e.g., People v. Quick, 210 Cal. Rptr. 3d 256, 260-61 (Ct. App.

854, 858 (Mass. 2013); People v. Mead, 908 N.W.2d 555, 562 (Mich. Ct. App. 2017); State v. Richardson, 313 S.W.3d 696, 699 (Mo. Ct. App. 2010); State v. Sanders, 855 N.W.2d 350, 358-59 (Neb. 2014); People v. Livigni, 906 N.Y.S.2d 782, 782 (2009); State v. Mbacke, 721 S.E.2d 218, 221-22 (N.C. 2012); State v. Price, 986 N.E.2d 553, 557-59 (Ohio Ct. App. 2013); Robinson v. State, 754 S.E.2d 862, 873 (S.C. 2014); State v. Fischer, 873 N.W.2d 681, 690-92 (S.D. 2016); Daves v. State, 327 S.W.3d 289, 292-93 (Tex. Ct. App. 2010); Armstead v. Commonwealth, 695 S.E.2d 561, 564-66 (Va. Ct. App. 2010); State v. Noel, 779 S.E.2d 877, 883-84 (W. Va. 2015); State v. Dearborn, 786 N.W.2d 97, 105 (Wis. 2010).

2016) ("It is certainly logical and reasonable to expect that items related to alcohol or drug consumption, such as alcoholic beverage bottles or drug paraphernalia, might readily be contained in the intoxicated driver's car."); People v. Kessler, 436 P.3d 550, 555-57 (Colo. App. 2018) (upholding search of car incident to DWI arrest under second scenario of Gant); State v. Cantrell, 233 P.3d 178, 183-86 (Idaho Ct. App. 2010) (same); State v. Ewertz, 305 P.3d 23, 26-28 (Kan. Ct. App. 2013) (same); Taylor v. State, 137 A.3d 1029, 1030-34 (Md. 2016) (same); State v. Washington, 335 P.3d 877, 878-83 (Or. Ct. App. 2014) (applying standard similar to second scenario of Gant and holding firearm in center console was lawfully seized during search of car incident to DWI arrest); State v. Coffee, 943 N.W.2d 845, 846-47, 850-59 (Wis. 2020) (upholding search of passenger compartment and bag under second Gant scenario).

Trooper Radetich had seen defendant exit the driver's side of the car that was searched, stumble over his own feet, and almost fall into the station's wall right next to the front entrance upon his arrival. And during defendant's interview, Radetich saw a fresh track mark on defendant's forearm and recognized, based on his years of law-enforcement experience, that defendant's slow and raspy voice, pinpoint eyes, and white stuff on the side of his mouth were signs of narcotic use. Under the totality of these

circumstances, it was more than reasonable to believe that intoxicants, or other related evidence, would be contained in the car he was just seen driving and thus search the passenger compartment incident to his DWI arrest as the second Gant scenario permits.

In searching the vehicle incident to arrest, the police could permissibly search for evidence of intoxicants in the car's passenger-compartment area, including in closed containers that could contain such evidence. Gant, 556 U.S. at 344 ("[T]he offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein."). Because intoxicants could have reasonably been in the plastic bag and towel containing the loaded gun, it was thus reasonable for the officers to look inside them and seize the gun contained therein. The handgun, loaded with the large-capacity magazine, was therefore properly seized as part of the search incident to arrest in addition to the automobile exception. And so were the drugs found in the center console.

Though the search-incident-to-arrest exception was not raised below, the record here is fully developed and contains sufficient facts on which this Court can decide that the car search was proper under the search-incident-to-arrest exception. See State v. Scott, 229 N.J. 469, 480 (2017) (holding that State was permitted to raise different justification for admissibility on appeal because

"[e]ven a cursory review of the record reveal[ed] sufficient facts upon which the State [could] base its . . . argument"). "It is a long-standing principle underlying appellate review that 'appeals are taken from orders and judgments and not from opinions . . . or reasons given for the ultimate conclusion.'" Id. at 479 (other citations omitted). And here, the record is not "'barren of facts that would shed light on [the] issue'" of whether the search of the passenger compartment was proper. Id. at 480 (quoting Witt, 223 N.J. at 418). On the contrary, the record supports the search of the car incident to arrest.

"'The question is not whether the police could have done something different, but whether their actions, when viewed as a whole, were objectively reasonable'" under the law. State v. Minitee, 210 N.J. 307, 323 (2012) (quoting State v. O'Donnell, 203 N.J. 160, 162, cert. denied, 562 U.S. 1094 (2010)). And here, under the totality of circumstances, the officers permissibly searched the car under the automobile exception and incident to defendant's DWI arrest. This Court should accordingly affirm the denial of defendant's motion to suppress.

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's convictions and the denial of his motion to suppress.

Respectfully submitted,

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