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SUPREME COURT OF NEW JERSEY
DOCKET NO. 089786

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Certification Granted from a
Plaintiff-Respondent,	:	Final Judgment of the Superior Court
v.	:	of New Jersey, Appellate Division.
	:	Sat Below:
SHAWN M. FENIMORE, a/k/a SHAWN FENIMORE	:	Hon. Michael J. Haas, J.A.D.; Hon. Arnold Natali, J.A.D.
Defendant-Petitioner.	:	

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-PETITIONER

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[1] Dsa 1-35 were included in the appendix to Mr. Fenimore's Appellate Division brief. These documents are reproduced here for ease of reference.

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PRELIMINARY STATEMENT

In 2015, this Court took the exceptional step of not following stare decisis and overruling its own precedent in order to grapple with a particular problem: the dangers to motorists and police officers during roadside stops. Roadside stops are often dangerous, with cars speeding by the officer at the driver's side window, resulting in increased risk of collisions when the stops are prolonged. Roadside stops are also fraught with the potential for coercion—isolated on the side of the road, faced with physical risk, a motorist may consent to a search in order to avoid a ticket, end the police interaction, and go home. And the benefits to the motorist of waiting for police to obtain a warrant are not apparent; the delay created by the warrant process increased the dangers and the potential of coercion without a concomitant benefit.

So, in 2015, in State v. Witt, this Court overturned its precedent that defined the parameters of the automobile exception. This Court held that the existing standard, which required exigent circumstances to justify a warrantless search of a car, was insufficient to safeguard the physical safety of police and motorists and to guard against potentially coercive consent searches. To alleviate these concerns, this Court recrafted the automobile exception. Under the new standard articulated by this Court, when a car is "stopped" on the "roadside," it may be searched without a warrant if there is

probable cause that there is contraband in the car and the circumstances that gave rise to probable cause arose spontaneously and unforeseeably. Thus, police need not face an actual exigency in order to conduct a warrantless search of a car stopped on the roadside under the automobile exception.

In this case, the State relied upon the automobile expetion to search a car parked at police headquarters that was going to be impounded for at least 12 hours. A car not on the roadside and on police property. A car that had not been stopped en route to its destination. A car whose motorist was not going anywhere in it any time soon. These are not the circumstances in which the automobile exception applies. The search was illegal.

Further, even if the automobile exception could allow for the search of a car not on the roadside, which has not been stopped, and which is going to be in the custody of the police for long enough to get a warrant, the other requirements of the automobile exception were not met in this case for two reasons. First, there was no probable cause that there was contraband in the car. Although there was probable cause that Shawn Fenimore had ingested drugs and had driven while under the influence of those drugs, there was nothing to suggest that those drugs were in his car. People ingest substances in all sorts of places. The mere fact that a person has consumed drugs does not give police probable cause to search their cars or their homes or their purses or

their offices. There has to be an actual connection between the place to be searched and the contraband sought. There was no such connection in this case. The search was illegal.

Second, even if there was probable cause to search the car, the circumstances that gave rise to that probable cause were not spontaneous and unforeseeable. To the contrary, the circumstances were the result of a deliberate, thorough, multi-step investigation into an allegation that Fenimore had previously driven his car while under the influence. Before Fenimore even arrived at the police station, officers not only knew about that allegation, they knew that he sounded intoxicated and was driving himself to the police station. That when he arrived at the police station Fenimore was in fact driving and was in fact intoxicated was as foreseeable as it gets. The search was illegal.

A search warrant is a constitutionally mandated requirement. There are some exceptions to that requirement, and the automobile exception is one of them. But the automobile exception is not a shortcut that allows police to enter any car they are interested in without a warrant. Just like every other exception, it is narrowly defined and must be carefully adhered to. The Appellate Division failed to recognize the limits of this exception when it upheld the search in this case: the search of a car parked at the police station that was set to be impounded. The decision must be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[2]

This case stems from a harassment investigation. (1T 6-8 to 9)[3] One of the allegations made by the complainant was that Fenimore had hit someone with his car while driving under the influence of drugs. (1T 101-8 to 11) Trooper Daniel Radetich undertook that investigation. He began by calling Fenimore and telling him that the police "just need you to come into the station to provide a statement for us[.]" (1T 6-13 to 16) After speaking with Fenimore, Radetich "actually hung up the phone and told the other troopers, 'I think—I think he's intoxicated, possibly,' because his voice was raspy and he was slurring his words on the phone." (1T 86-3 to 6) Radetich offered to pick Fenimore up, but Fenimore said he would drive in. (1T 101-23 to 102-3)

When Fenimore arrived at the police station, Radetich watched him pull into the parking lot. (1T 8-21) When he got out of the car, Fenimore "stumble[d] . . . almost into the station wall." (1T 7-21 to 25, 9-5 to 19)

Radetich brought Fenimore into an interview room and Mirandized him. (1T 9-25 to 10-2) For reasons unexplained, the interview that followed,

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[2] These two sections have been combined for ease for reading.

[3] The following abbreviations will be used:

Dsa – appendix to defendant-appellant's supplemental brief
1T – February 4, 2022 (suppression motion)
2T – May 23, 2022 (plea)
3T – February 10, 2023 (sentencing)

allegedly about the harassment complaint, was not recorded. (1T 10-14 to 21) During that interview, Radetich observed signs that Fenimore was under the influence of drugs: "his voice was raspy"; "his eyes were pinpoint"; he had "white stuff" on the side of his mouth; and "he had a fresh track mark" on his arm. (1T 11-12 to 17) Radetich asked him about the track mark. (1T 11-19, 97-7 to 12) Based on his observations during the interrogation, Radetich "believed that [Fenimore] was under the influence of a narcotic, possibly." (1T 12-5 to 6) Radetich "didn't feel confident with [Fenimore] leaving the station, knowing that I felt he was under the influence," so he decided to conduct a battery of field sobriety tests. (1T 15-23 to 25)

First, Radetich, who is a Drug Recognition Expert, conducted the Horizontal Gaze Nystagmus test. (1T 16-10 to 11, 77-3 to 4) Then he performed the walk-and-turn test, which Fenimore "failed." (1T 16-19 to 24) Fenimore lost his balance in the starting position and failed to walk in a heel-to-toe manner. (1T 17-25 to 18-1) Fenimore also failed the one-leg stand test. (1T 18-13 to 14) During that test Fenimore failed to count out loud, failed to keep his foot up, and swayed side to side. (1T 19-8)

After Fenimore failed the field sobriety tests, Radetich "placed him under arrest" for driving while intoxicated. (1T 19-19 to 20) The arrest occurred around 8:57p.m., 28 minutes after Fenimore entered the interview

room. (Dsa26) Fenimore was placed in a holding cell, secured to a bench. (1T 19-21 to 23, 65-11) Radetich testified that when someone is arrested for driving while intoxicated, it is police procedure to impound the car. (1T 72-2 to 4) He agreed that "this car"—Fenimore's car—"wasn't going anywhere for at least 12 hours" after he arrested Fenimore. (1T 72-7 to 10) Radetich also testified that it was his belief that police are automatically entitled to a warrantless search of a vehicle any time anyone is arrested for driving while intoxicated. (1T 72-11 to 24) He made clear that "every time you arrest someone for a DUI," their car is searched for intoxicants. (1T 73-9 to 11)

Radetich and four other troopers went outside to search the car while Fenimore was inside the station. (1T 20-1 to 7) Nicholas Luzzo was asleep inside the passenger seat. (Dsa 32) He exited the car without incident and was directed to sit in the station. (1T 21-21 to 22-8) Luzzo could apparently barely stand up and had to use the car for support as he was frisked. (1T 24-18 to 25-25) After Luzzo was removed and the keys for the car were in police possession, the car search began. (1T 27-4 to 28-25, 106-1 to 5)

As a result of the car search, Fenimore was charged with second-degree possession of a weapon, third-degree possession of a controlled dangerous substance, and fourth-degree possession of a prohibited device. (Dsa 1-3)

In its ruling, the trial court found that Radetich had probable cause that Fenimore was driving under the influence from the moment he arrived at the station: "When he arrived at the barracks, it became immediately apparent to the trooper that the defendant appeared to be under the influence. And that was spontaneous and unforeseeable[.]" (1T 117-3 to 9) The court also recognized that this case presented a setting unlike any automobile exception case because the car "was not on the roadway" but was "in a parking lot of a police barracks." (1T 117-9 to 24)

The trial court found that police would have custody of the car for 12 hours because it was "going to be impounded pursuant to John's Law." (1T 119-2 to 13) "Certainly," the court found, the 12 hours during which the police would have custody of the car, "would be long enough to" get a warrant. (1T 119-2 to 13)

Nonetheless, the trial court held that the automobile exception applied to a car parked at a police station and that the fact that the car was going to be impounded was irrelevant. (1T 119-23 to 120-4) The court found that there was probable cause to believe that Fenimore operated the car while intoxicated and that therefore the officers were justified in searching the vehicle without a search warrant. (1T 119-23 to 120-4)

After that decision, Fenimore pleaded guilty to unlawful possession of a weapon. (2T 10-7 to 13-11) On February 10, 2023, Fenimore was sentenced to five years in prison with one year of parole ineligibility. (3T 13-10 to 14-14) [4] Fenimore appealed the denial of his motion to suppress.

On July 26, 2024, the Appellate Division affirmed the denial of the motion to suppress in an unpublished opinion. State v. Fenimore, Docket No. A-2246-22 (App. Div. July 26, 2024) (Dsa 36-70) The panel "acknowledge[d that] Witt made several references to roadside stops," but declined to hold that that plain language limited the scope of the automobile exception. Id. slip op. at 20. In support of this decision, the panel noted that ruling in favor of Fenimore would mean that Witt "overruled cases in which the automobile exception was applied to parked vehicles[;]" the panel "decline[d] to conclude the Court would do so only implicitly." Id. at 20-21. The panel also held that the fact that the vehicle was going to be impounded was irrelevant because the police conducted an "on-scene search." Id. at 21. As to the fact that that "scene" was a police station, the panel held that as long as the car is not in a "police impound lot," the automobile exception applies. Id. at 22. The panel also held that the signs of Fenimore's intoxication gave "rise to probable cause

[4] Fenimore was charged with and pleaded guilty to third-degree possession of a controlled dangerous substance in an unrelated indictment. (Dsa 4-5, 16-18)

to believe defendant was under the influence of narcotics and that evidence of that use was in defendant's vehicle." Id. at 27. Last, the panel held that although Radetich "suspected defendant was possibly under the influence when he called defendant" to come to the police station, because "that suspicion was not the animating reason he requested defendant come to the police station[,]" the circumstances giving rise to probable cause were spontaneous and unforeseeable."[5] Id. at 30-31.

Fenimore filed a petition for certification to this Court, which was granted on October 29, 2024. (Dsa 71)

[5] The panel asserted that Radetich spoke with Fenimore "an hour or two" before he arrived. There is no record basis for that assertion. Radetich was asked how long it was between the call and the arrival, and he said he did not know. (1T 84-1 to 85-5) As defense counsel said during argument before the trial court "[t]hey call him there; he arrives. It's questionable about the timing from when he said he would arrive to when he did arrive. Was it minutes? Was it an hour? It's completely unclear. That information is also not available in any of the discovery." (1T 114-23 to 115-3)

LEGAL ARGUMENT

THE AUTOMOBILE EXCEPTION DOES NOT JUSTIFY THE WARRANTLESS SEARCH IN THIS CASE.

The Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution protect against warrantless searches. The most fundamental principle of search and seizure jurisprudence is that a warrantless search is presumed to be invalid. State v. Patino, 83 N.J. 1, 7 (1980). As a general matter, the State must obtain a warrant from a neutral judicial officer before searching someone's personal property. Ibid. When the State seeks to justify a warrantless search, it bears the burden of demonstrating that the search falls within one of "only a few narrowly circumscribed exceptions" to the warrant requirement. Ibid.

"A defendant's constitutional right to privacy in his vehicle and personal effects cannot be subordinated to mere considerations of convenience to the police[.]" State v. Keaton, 222 N.J. 438, 450 (2015) (internal quotation marks and alterations omitted). That right to privacy means that cars are protected by the warrant requirement just like all other personal property. There is, however, an exception to the warrant requirement specific to cars: the automobile exception. In reviewing the legality of the warrantless search in

this case, the automobile exception is the only potentially relevant exception.[6] It is important to bear in mind that the exigency exception would allow for the search of a parked car with probable cause and exigent circumstances that make getting a warrant impractical. See State v. Nishina, 175 N.J. 502, 515-518 (2003) (describing the factors that are considered in an exigency exception analysis). The State has never claimed that there was an exigency that justified the warrantless search in this case, nor would such a claim be supported by the record.

Thus, this case presents only the issue of in what situations the automobile exception applies. In State v. Witt, 223 N.J. 409 (2015), this Court crafted the current automobile exception to the warrant requirement. A reading of the plain language of Witt reveals that the automobile exception justifies a search only when three requirements are met:

(1) The car has been subject to a "stop" on the "roadside." Id. at 414, 420, 435,427, 441-450.

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[6] In the Appellate Division, the State raised for the first time that the search could be justified as a search incident to arrest. As explained in Fenimore's reply brief, that argument is wrong because it does not comport with well-established precedent from this Court interpreting our state constitutional protections against unreasonable searches and seizures. (Reply Brief Pages 2-6) He relies on that brief to address the argument, should the State attempt to raise it again. He also notes that the State waived that argument by not raising at the suppression hearing. Witt, 223 N.J. at 419 ("[T]he points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review.").

(2) There is probable cause to search the vehicle. Id. at 450.

(3) That probable cause developed from "unforeseeable and spontaneous circumstances." Ibid.

The threshold requirement—that the car be subject to a roadside stop—is not met in this case. In addition, even if the automobile exception does apply to this situation, Witt's second requirement is not met in this case because there was no probable cause that Fenimore's car contained contraband. Finally, even if there were probable cause, the circumstances giving rise to probable cause were not spontaneous or unforeseeable—Witt's third requirement. The Appellate Division decision must be reversed.

A. The Search Was Unlawful Because The Car Was Not Subject To A Roadside Stop And Was, Instead, On Police Property And About To Be Impounded.

In Witt, this Court redefined the automobile exception to the warrant requirement by eliminating the requirement that exigent circumstances be present before a car can be searched without a warrant under that exception. The Witt Court took the unusual step of overruling its precedent, which had held that in order to warrantlessly search a car under the automobile exception, exigency had to be present that made it impracticable to get a warrant. State v. Pena-Flores, 198 N.J. 6 (2009); State v. Cooke, 163 N.J. 657 (2000). This Court removed the exigency requirement, holding that the automobile

exception instead requires probable cause to search and that the circumstances giving rise to probable cause to search are unforeseeable and spontaneous. Witt 223 N.J. at 447.

But those are not the only two conditions that must be met before the automobile exception can justify a warrantless search of a car. The plain language and the purpose of Witt make clear that the automobile exception laid out in Witt applies only to cars stopped at the roadside. Subsection 1, infra. In addition to the plain language of the decision, the purposes animating Witt exist only at the scene of a roadside stop. Subsection 2, infra. The Appellate Division's reliance on pre-Witt law to hold otherwise was misplaced. Subsection 3, infra Therefore, the warrantless search of Fenimore's car was illegal because the automobile exception does not apply to cars that are parked on police property and which the police have already decided to impound. The decision must be reversed.

1. Witt explicitly stated that the automobile exception can justify warrantless searches only in the context of a roadside stop.

The plain language of Witt makes clear that the automobile exception applies only to cars stopped on the roadside. The holding is explicit: "Going forward, searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible." Witt, 223 N.J. at 450 (emphasis added). This Court also emphasized that it was addressing

concerns peculiar to stops that occur on the side of the road, explaining the uniqueness of New Jersey's automobile exception in part by the "fast-flowing traffic on crowded highways that pose such a special danger to protracted motor-vehicle stops in New Jersey." Id. at 427. (emphasis added). In fact, Witt referred to "roadside searches" or "roadside stops" or "on the roadway" or "roadside" at least nine times. Id. at 414, 420, 435, 441, 442, 444, 445, 446, 450. One need not look further than the words this Court used in Witt to understand that the automobile exception applies only to cars stopped on the side of the road.

Not only does the plain language of Witt make clear that the automobile exception applies only to roadside stops, but the plain language of the case that first delineated the standard that Witt proclaimed a return to, State v. Alston, 88 N.J. 211, 216 (1981), does as well. Witt, 223 N.J. at 447 ("We return to the automobile exception standard set forth in Alston.") In Alston, this Court explained that "the primary rationale" for the automobile exception is "the inherent mobility of an automobile stopped on an open highway[.]" 88 N.J. at 216 (emphasis added); see also id. at 233 ("Because of its inherent mobility, a motor vehicle that has been stopped on a highway may be searched without a warrant when probable cause exists to believe that the vehicle contains articles that the police are entitled to seize.") (emphases added); id. at 234-35

("[W]hen there is probable cause to conduct an immediate search at the scene of the stop, the police are not required to delay the search by seizing and impounding the vehicle pending review of that probable cause determination by a magistrate.") (emphasis added). In other words, in both Alston and Witt, this Court made clear where the automobile exception applied: to roadside stops. Mr. Fenimore's car was not stopped and it was not at the roadside. Therefore, the automobile exception does not justify the warrantless search of his car.

2. The justifications for the automobile exception standard set forth in Witt apply only in the context of a roadside stop.

In addition to the plain language of Witt and Alston, the reasoning underlying Witt makes clear that the automobile exception allows for the warrantless search only of cars that have been stopped on the roadside. Witt redefined the automobile exception, removing the exigency requirement, which this Court felt was unduly restrictive given the inherent exigencies that exist during searches that stem from roadside stops. The exception exists only to serve the purposes set forth in Witt and do not apply to any context other than to roadside stops. For cars in all other situations, the regular rules apply: police must get a warrant or rely on a different warrant exception, such as the exigency exception, to conduct a warrantless search.

The first justification for redefining the automobile exception was to avoid the dangers attendant to roadside stops. As this Court explained, "[p]rolonged encounters on the shoulder of a crowded highway—even within the range of 30 to 45 minutes—may pose an unacceptable risk of serious bodily injury and death." Id. at 441-42. Altering the automobile exception was necessary to "reduce the perils of roadside stops." Id. at 441 (emphasis added). See also ibid. ("[C]learly, the use of telephonic search warrants has not resolved the difficult problems arising from roadside searches . . . . The Supreme Court Special Committee on Telephonic and Electronic Search Warrants was greatly concerned about the safety of police officers and a car's driver and occupants detained on the side of a heavily traveled highway or road while a telephonic warrant is secured." (emphasis added)).

The concerns about driver or officer safety do not exist when the police desire to search a car that is not on a roadway. Without the danger of cars whizzing by, there's no justification to skip the warrant and head right to a search. The warrantless search of Fenimore's car, which was not at the roadside, was thus not justified by the concerns about driver and officer safety that underlie the Witt automobile exception.

Not only was Fenimore not at the roadside, but he was at a location specifically exempted from the automobile exception in Witt: police

headquarters. This Court held in Witt that warrants would be required for searches conducted at police stations, by "part[ing] from federal jurisprudence that allows a police officer to conduct a warrantless search at headquarters merely because he could have done so on the side of the road." Id. at 448. This Court explicitly took the step of explaining that the safety concerns outlined above "cannot justify the failure to secure a warrant after towing and impounding the car at headquarters when it is practicable to do so." Id. at 448-49 (emphasis added). Fenimore's car was at police headquarters.

The Fenimore panel refused to apply this plain language because Fenimore's car was not at the impound lot. Fenimore, slip op. at 22. But this Court did not say "at the impound lot" in Witt. It said "headquarters." Witt, 223 N.J. at 448-449. The dangers that animated Witt are at their nadir for a car in the police station parking lot. A police station is a place where officers can ensure that they and any civilians are safe and that the car is secured before undertaking any search. There is no justification for a warrantless search in that setting. Therefore, the search of Fenimore's car, which was not on the roadside, but in a police station parking lot, was not justified by the automobile exception.

The second justification for redefining the automobile exception was to avoid potentially coercive consent searches, a concern that arises only during

roadside stops. Despite the requirement that an officer have reasonable suspicion before he requests to search a car, this Court feared "'the inherently coercive predicament of the driver who is stopped on the highway and faced with the perceived choice of either refusing consent to search and therefore increasing the likelihood of receiving a traffic summons, or giving consent to search in the hope of escaping with only a warning.'" Id. at 443 (quoting State v. Domicz, 188 N.J. 285, 306 (2006)) (emphasis added). See also ibid. (the requirement that police must have reasonable suspicion before asking a motorist for consent "does not remove the coercive effect of a search request made to a motorist stopped on the side of a road") (emphasis added).

The concern that police would coerce a person into consenting to a vehicle search in order to escape a traffic summons does not exist when getting a traffic summons is not on the table. For a person whose car was parked and the interaction with the police started for some reason other than investigating a motor vehicle violation, the fear of getting or the hope of avoiding a motor vehicle ticket is irrelevant. That source of coercion that justified the holding in Witt does not exist when there was no roadside stop.[7]

[7] The Witt majority also highlighted concerns with the history of racially biased stops and searches by the New Jersey State Police as a reason to avoid any policy that incentivized consent searches. 223 N.J. at 442-43. Unfortunately, racial disparity in NJSP policing on our highways is not a thing of the past. In 2023, a report authored at the request of the New Jersey

The third justification, the increased delay a motorist might suffer through while waiting for a warrant, applies only if the motor-vehicle stop is still ongoing at the time of the search. If the stop is still ongoing, this means that there is a chance the stop might terminate after the search and the motorist will be on his way with his car. As this Court asked, "[w]hen a police officer has probable cause to search a car, is a motorist better off being detained on the side of the road for an hour (with all the accompanying dangers) or having his car towed and impounded at headquarters while the police secure a warrant?" Id. at 446 (emphasis added). In such a situation, "[i]s not the seizure of the car and the motorist's detention more intrusive than the actual search itself?" Ibid. (internal quotation marks omitted). Thus, this Court concluded, when a person is stopped on the side of the road and can either be subject to a warrantless search or wait for a warranted one, "we do not perceive any real benefit to our citizenry by the warrant requirement in such cases—no discernible advancement of their liberty or privacy interests." Ibid.[8]

Attorney General found that between 2006 and 2021, the disparity in stops, consent searches, and the results of those searches "suggest that the New Jersey State Police apply a lower threshold for searching minority occupants, which is indicative of potential discrimination." Matthew B. Ross, New Jersey State Police Traffic Stops Analysis, 2009-21 7 (July 5, 2023). Removing oversight from the police decision to search can only exacerbate this problem.

[8] Fenimore suggests that the Witt dissent was correct when it argued providing a motorist with the choice of whether or not they would like to stand on their

But a concern about delay is relevant only if the motorist would actually be delayed by the time it takes to obtain a search warrant. If the police have determined that the car is going to be impounded, the motorist isn't going anywhere with that car. Getting a warrant adds no cost to the motorist. As a practical matter, the police decision to impound the car transforms the police investigation from a motor-vehicle stop to something else.

Particularly relevant to this case is that when someone is arrested for driving while intoxicated, that new investigation involves the police possession of the car for at least 12 hours. N.J.S.A. 39:4-50.22 and -50.23. The delay for the motorist is no longer about waiting at the side of the road for a warrant, but about the police seizing custody of the car for much longer than necessary to get a warrant. The automobile exception, designed in part to avoid unnecessary and potentially dangerous delays for the motorist, no longer applies. Therefore, the search of Fenimore's car, which was never stopped to begin with and which was not going to continue on its journey any time soon,

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constitutional rights is sounder than simply eliminating their constitutional rights. See Witt, 223 N.J. at 470 (LaVecchia, J., dissenting) ("The majority relies on the State's asserted concern for motorists' constitutional rights in the wake of an increase in consent searches. However, that concern is suspect in light of the fact that the State's solution is to take away all motorists' ability to first choose to consent by instead giving officers a nearly automatic right to search by way of a rote automobile exception to the warrant requirement based on unreviewed officer belief that probable cause exists.").

was not justified by the automobile exception. See also State v. Glavan, 198 A.3d 254, 256 (N.H. 2018) (the state constitutional automobile exception applies only to a car that is stopped "in transit," which means "passing or journeying through"); State v. Andersen, 390 P.3d 992, 996 (Or. 2017) (the state constitutional automobile exception applies when the police interaction stops "an otherwise mobile car from resuming its journey" or "caus[es] a moving car to come to a stop.") (internal quotation marks omitted).

In sum, this Court explained in Witt that the above-described combination of concerns about roadside stops leads to the necessity of an automobile exception standard that does not require actual exigency. It explained that an "inherent exigency justifies a warrantless search at the scene under the automobile exception[.]" Witt, 223 N.J. at 448. In justifying its abandonment of an actual exigency requirement, this Court explained that this prior requirement was unworkable for roadside stop situations, in which the dangerous context short-circuits officers' ability to parse the nuances of the exigency standard. Id. at 444 ("For a law enforcement officer responding to rapidly evolving events on the side of a road, the exigency formula requires the processing of such confounding and speculative information that we cannot expect uniform and consistent decision-making.") (emphasis added). In lieu of such a parsing of actual exigency, a categorial exigency arose for the situation

addressed in Witt. In order to protect motorists and officers from dangerous traffic, to protect motorists from coercive police tactics and delay, and to ease the burden of complex thinking during these unsafe situations, this Court decided to reformulate the automobile exception for roadside stops.

But reformulating this exception—an exception which, as with all exceptions, is supposed to be carefully and narrowly drawn—based on a judicially constructed exigency inherent to roadside stops was as far as this Court went. This Court explicitly explained that where that categorical exigency does not exist, a warrant is required to search a car. That is why this Court held that a warrant was required at the police station even if a warrantless search could have occurred at the roadside. Inherent exigency is, in effect, a legal fiction created by a careful balancing of various concerns and expediencies. Where none of those concerns nor expediencies exist, the State cannot resort to an inapplicable legal fiction to go around the warrant requirement.

This Court has declined, again and again, including in Witt, to adopt the federal standard for the automobile exception, justified only by probable cause and the fact that the object of the search is a car. "[M]obility alone does not justify unbridled search of those parts of a vehicle where one has a reasonable expectation of privacy." Patino, 83 N.J. at 10 (internal quotation marks

omitted). "One operating or travelling in an automobile does not lose all reasonable expectation of privacy simply because the vehicle is mobile and subject to government regulation." Ibid. (internal quotation marks omitted). New Jersey can and does give greater constitutional protections to its citizenry and it has affirmed that greater protection in this particular context consistently for decades: New Jerseyans' right of privacy in their vehicles cannot be discarded with mere probable cause, despite the general mobility of vehicles and despite the "somewhat" lesser expectation of privacy. Ibid. The automobile exception to New Jersey's warrant requirement exists only to allow for warrantless on-scene searches of cars stopped on the side of the road.

Indeed, the clear language and purpose of Witt has led other panels of the Appellate Division to craft what it calls a "location restriction" for the automobile exception. In the words of the appeals court, Witt allows for searches only at the scene of a roadside stop: "the search must be conducted while the vehicle is still at the scene of the stop. This requirement, which we refer to as the location restriction, is a per se bright-line rule based on the inherent exigency associated with roadside stops." State v. Courtney, 478 N.J. Super. 81, 94 (App. Div.) (emphases added), leave to appeal denied, 257 N.J. 413 (2024), and leave to appeal denied, 257 N.J. 417 (2024). See also State v. Rodriguez, 459 N.J. Super. 13, 15, 22 (App. Div. 2019) ("In State v. Witt, the

Supreme Court revised the standards under New Jersey law governing police searches of motor vehicles that have been lawfully stopped at the roadside . . . . [T]he current law of this State now authorizes warrantless on-the-scene searches of motor vehicles" if there is probable cause that developed spontaneously and unforeseeably) (emphases added) (internal citation omitted).

Although other panels of the Appellate Division were correct to recognize that Witt limits the use of the automobile exception to roadside stops,[9] the Fenimore panel entirely missed that point. The Fenimore panel held that any car, mobile or parked, even if it is about to be impounded, can be searched under the automobile exception. This is incorrect. As set forth above, Witt requires that, in order for the automobile exception to apply:

- The car must be at the roadside.
- The car must be subject to an ongoing motor-vehicle stop. The necessity of a stop means two things:
    - Parked cars are not permitted to be searched under the automobile exception because a car that was not going anywhere cannot be stopped; and

[9] Despite correctly recognizing that Witt applies only to roadside stops, Rodriguez's holding that the automobile exception applies even when police have determined that a car will be towed and impounded is incorrect for the reasons discussed above.

- The police must not have decided to tow the vehicle before the search because a car that cannot go anywhere is no longer subject to a stop.

Even if this Court were to hold that only one of the above conditions must be met in order for the automobile exception to apply, the evidence must still be suppressed. None of the conditions described above apply in this case. Mr. Fenimore's car was neither on the roadside, nor was it subject to a stop at the inception of the police interaction, nor was it subject to a stop at the time the police searched the car, as they had already decided to impound the car.

In sum, the Fenimore panel got it wrong when it held that the automobile exception encompasses situations in which none of the concerns animating Witt even plausibly applied. Not only is the plain language of Witt (and Alston) clear that the automobile exception applies only to cars stopped on the side of the road, but the rationale of Witt makes clear a roadside car stop is the only situation in which the concerns animating our automobile exception exist. The automobile exception does not allow for the search of Fenimore's car because it was not at the roadside, it was at the police station; it was never stopped, it was parked when the police came upon it; and it was going to be impounded. The Appellate Division decision must be reversed.

3. Pre-Witt car search cases do not justify applying the post-Witt automobile exception outside the context of roadside stops.

In addition to being wrong about the meaning of Witt itself, the Appellate Division was wrong when it concluded that pre-Witt car search cases justify the search in this case. In rejecting Fenimore's argument, the panel reasoned that "if defendant's interpretation of Witt was correct, the Court's decision would have overruled cases in which the automobile exception was applied to parked vehicles . . . and we decline to conclude the Court would do so only implicitly." Fenimore, slip op. at 21. The panel's reasoning seems to be that (1) under Alston parked cars could be searched without exigency; (2) Witt returned to the Alston standard; and therefore (3) after Witt, parked cars can be searched without exigency. This argument is incorrect from its inception: it is far from clear that under Alston this Court ever condoned a warrantless search of a parked car without exigency.

The fact that this Court had never condoned the search of a parked car without exigency under the Alston standard means one of two things about that standard. One option is that, as the Witt dissent argued, the automobile exception under Alston required exigency and Witt is actually the first time this Court crafted a standard without exigency. The other is that while the Alston standard did not require exigency for the automobile exception to apply, as the Witt majority asserted, the automobile exception applied only to

warrantless searches that stemmed from a roadside stop; the parked car cases decided before Cooke involved a true exigency that otherwise justifies a warrantless search under the exigency exception. Either way, the cases decided by this Court between Alston and Cooke do not support the assertion that parked cars have ever been allowed to be searched without exigency. And even if they could be read that way, it does not matter, because Witt is the case that created the new legal standard that must be adhered to.

The Witt dissent argued that before exigency was explicitly made a requirement of the automobile exception in Cooke, it was already a requirement under Alston. In support of that argument, the dissent noted that this Court had never allowed a warrantless search of a vehicle without exigency under the Alston standard. Witt, 223 N.J. at 454-56 (LaVecchia, J., dissenting). In Cooke, the Supreme Court "noted that it 'has repeatedly looked to exigent circumstances to justify warrantless automobile searches.'" Id. at 455 (quoting State v. Cooke, 163 N.J. 657, 667 (2000)). "To substantiate that statement, the Court provided a detailed discussion of three cases" in which this Court "'held that the warrantless automobile searches were reasonable only because they were supported by probable cause and exigent or emergent circumstances.'" Ibid. (quoting Cooke, 163 N.J. at 667) (emphasis added in Witt). This Court's Alston-standard cases thus do not stand for the

proposition that parked cars were allowed to be warrantlessly searched under any circumstances under that standard. Rather, these cases stand for the proposition that under Alston, parked cars could be searched without a warrant if there was probable cause and exigent circumstances—that is still the case now, because exigency is a separate exception to the warrant requirement.

The two cases the Appellate Division cited—State v. Colvin, 123 N.J. 428 (1991) and State v. Paturzzio, 292 N.J. Super. 542 (App. Div. 1996)—to assert that the Alston standard (and therefore, presumably, the Witt standard,) allowed for warrantless searches of parked cars without exigency do not support that assertion. Colvin, decided at the time that Alston was the controlling law, certainly had exigent circumstances for the search: after arresting a person involved in a drug transaction, "an informant told the police that drugs had been stashed in defendant's car, which was parked within a block of the arrest site, and that other people knew about the arrest and would attempt to remove the drugs from the car." 123 N.J. at 430. This Court reviewed its prior precedent and concluded: "if the police have probable cause sufficient to seize the vehicle in order to prevent the loss of the evidence, they have justification to conduct the search at the scene." Id. at 434. In other words: probable cause and exigency allow for a warrantless search. Although discussing the relevance of whether the car was parked or not parked in

passing, this Court specifically reaffirmed that real exigency was the deciding factor:

> The justification to conduct a warrantless automobile search does not turn on whether the vehicle is parked or moving. The justification turns on the circumstances that make it impracticable to obtain a warrant when the police have probable cause to search the car. When, as here, the police have no advance knowledge of the events to unfold, no warrant is required to search a parked car if the police have probable cause to believe that the car contains criminal contraband and have articulable reasons to search the vehicle immediately to prevent the loss or destruction of the evidence.
>
> Id. at 437 (emphasis added).

Thus, Colvin does not stand for the proposition that under Alston, this Court allowed for warrantless searches of parked cars without a real exigency. It stands for the proposition that under Alston, this Court allowed for warrantless searches of parked cars with a real exigency. Whether that was under an automobile exception that required exigency or under the exigency exception to the warrant requirement is immaterial.

It is unclear why the Appellate Division cited Paturzzio, because the car in that case was not parked, but rather it was subject to a motor vehicle stop. 292 N.J. Super. at 545. Further, there were also exigent circumstances to justify the search in that case: "the information provided by the source which was sufficiently corroborated by the officers' independent investigation and

exigent circumstances, justified the warrantless search." Id. at 549. Although it is unclear what those exigent circumstances were, that conclusion was clearly central to the holding.

It is possible that the Fenimore panel cited Paturzzio because of the following line in a block quote of boilerplate about the automobile exception: "This exception applies to situations involving parked and unoccupied vehicles encountered by police in public parking lots or on city streets as well as to moving vehicles stopped on the open highway." Id. at 547 (internal quotation marks omitted) (emphasis added). In support of that proposition, Paturzzio cited State v. Martin, 87 N.J. 561 (1981), a case not cited by the Appellate Division. This Court explained in Cooke that Martin was a case in which officers faced an exigency that necessitated a warrantless search. Cooke, 163 N.J. at 669. See also Witt, 223 N.J. at 457-58 (LaVecchia, J., dissenting) (explaining that the Cooke court held that "factual features presented exigency" and justified the warrantless search). Therefore, neither Paturzzio nor Martin provide support for the proposition that a parked car could be warrantlessly searched without exigency under the Alston standard, which Witt claimed to return to.

But if Martin could be read to stand for the proposition that under Alston it was lawful to warrantlessly search a parked car without a warrant, then

Martin has been overruled by Witt. In Martin, a car that fit the description of a car involved in a robbery was towed and then searched without a warrant. 87 N.J. at 565 ("Believing that the glove in the back of the parked station wagon was the mate of the glove found outside the store, and suspecting that this was the vehicle involved in the robbery, Officer Franchak had the station wagon towed to police headquarters in South Plainfield, where it was searched without a warrant."). After Witt, that search is undoubtedly unlawful unless there was an exigent circumstance present. Witt, 223 N.J. at 450 ("[W]hen vehicles are towed and impounded, absent some exigency, a warrant must be secured."). Thus, either Martin does not stand for what the Appellate Division asserted it stood for, or Martin was overruled by Witt.

The undeniable fact that at least some automobile exception precedent was overruled by Witt—that is, after all, what departing from stare decisis does—is why there is no justification here to rely on pre-Witt cases to divine the contours of the automobile exception post-Witt. The more reasonable course is to look to the decision in Witt and the reasons justifying that decision and apply them in this circumstance. When doing so, as explained above, it is clear that the current automobile exception does not apply to a car that is parked in a police station parking lot whose driver has been arrested and which

the police have already determined will be impounded.[10] The Appellate Division decision must be reversed.

B. The Search Was Unlawful Because There Was No Probable Cause That The Car Contained Contraband.

Not only does the automobile exception not apply to a car parked at a police station that is going to impounded, but neither of the other two requirements of the automobile exception were met in this case: there was

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[10] One part of Witt's reasoning has been eroded by subsequent case law from the Supreme Court of the United States. In defense of its holding in Fenimore, the Appellate Division cited to this Court's statement in Witt that the newly formulated automobile exception would allow for a warrantless search of a car parked in a driveway, whose owners are on vacation, only if the circumstances that gave rise to probable cause to search that were spontaneous and unforeseeable. Fenimore, slip op. at 21. Because of the suggestion in Witt that such a car could be searched under those circumstances, the panel reasoned that cars that are both parked and not at the side of the road may be searched under the automobile exception. But the holding of the Supreme Court of the United States in Collins v. Virginia, 584 U.S. 586 (2018), throws the validity of this part of Witt's reasoning into doubt.

In Collins, an officer walked up a private driveway to lift a tarp off of a motorcycle, revealing the license plate and vehicle identification numbers. Id. at 590. The Supreme Court held that the officer's actions constituted an unlawful warrantless search. Id. at 593. The Supreme Court explicitly held that the automobile exception does not justify "the invasion of the curtilage" of a home because "the scope of the automobile exception extends no further than the automobile itself." Id. at 594. In other words, "[t]he automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." Id. at 596. In the case of Witt's hypothetical vacationers, Collins strongly suggests that a warrant would be needed to enter their driveway and search their car. Insofar as that part of Witt was relied on by the Appellate Division to justify the search in this case, that reliance was misplaced.

neither probable cause that there would be contraband in the car nor, if there was probable cause, did it arise spontaneously and unforeseeably.

The Appellate Division mistakenly conflated the probable cause that Fenimore was driving while intoxicated with probable cause to search his car. But "[p]robable cause to arrest and probable cause to search involve distinct and not necessarily identical inquiries." State v. Chippero, 201 N.J. 14, 31 (2009). Because they are two distinct inquiries, "[a] finding of probable cause as to one does not mean that probable cause as to the other must follow, nor does the lack of one compel a finding that there is a lack of support for the other." Ibid. As this Court has explained, "[a]lthough a probable cause determination that an individual committed a crime may increase the likelihood that the individual's residence contains evidence of the crime," one kind of probable cause did not automatically mean that the other exists. Ibid. (emphasis added). Thus, probable cause that Fenimore drove while intoxicated—probable cause to arrest—does not automatically give rise to probable cause that there was evidence of that offense in his car—probable cause to search.

To justify the search of a place, the police must supply specific, objective, and particularized facts which, taken together, reasonably support the conclusion that evidence or proceeds of criminal activity will be

discovered in the premises to be searched. State v. Basil, 202 N.J. 570, 585-86 (2010). When determining whether there is probable cause to search a specific place, this Court must "assess the connection of the item sought to be seized . . . to the location to be searched as its likely present location." Chippero, 201 N.J. at 29. In other words, there must be a nexus between the place to be searched and the evidence sought.

That nexus was missing in this case. A person who is intoxicated does not necessarily have intoxicating substances in his car, just like a person who is high does not necessarily have drugs in his home, and just like a person who leaves a bar drunk and gets behind the wheel does not necessarily have alcohol in his car. Like all probable-cause inquiries, it is a fact-specific question. Chippero, 201 N.J. at 27-30. And no facts in this record point to a particular reason to believe there were drugs in Fenimore's car.[11] Fenimore was already intoxicated when he spoke to Radetich on the phone. Drugs, therefore, had already been consumed. There was no objective basis to believe they had been consumed in the car, as opposed to somewhere else. There was no objective basis to believe that any evidence remained of the consumption that had

[11] Perhaps the lack of probable cause that there were drugs in the car is why an officer said during the search that he "knew" there was a gun in the car: there was some sort of gut feeling that there would be evidence of other crimes in the car. (1T 29-8 to 9) Such a fishing expedition is unlawful.

already occurred. The police had not seen any drug use or paraphernalia when Fenimore got out of the car. There was nothing but an automatic association between a person under the influence of drugs and his car. That is insufficient to establish probable cause.[12]

Although this Court has not passed on this exact question, other courts have correctly held that the fact of intoxication does not automatically establish a nexus to search the intoxicated person's car. In State v. Bauder, 924 A.2d 38, 48 (Vt. 2007), the Vermont Supreme Court explained that probable

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[12] It is true that, 60 years ago in State v. Boykins, 50 N.J. 73, 77 (1967), this Court said that "if an officer has reason to believe the driver is under the influence of liquor or drugs, he may search the car for alcohol or narcotics[.]" As this Court has since recognized, however, this statement simply does not reflect the current state of the law. This statement neither requires probable cause to believe there is contraband in the car nor does it reflect the other requirements of the automobile exception (unforeseeable and spontaneous circumstances giving rise to probable cause). Moreover, as observed in the Appellate Division's opinion in Lark, which this Court approved of, this language is "dictum" in part because the search in Boykins itself was based on probable cause. See State v. Lark, 319 N.J. Super. 618, 625-26 (1999), aff'd, 163 N.J. 294 (2000). See also State v. Terry, 232 N.J. 218, 236, 257 (2018) (explaining that Boykins provides support for "the limited registration exception to the warrant requirement," not for an automatic, full search of a vehicle without specific probable cause that evidence would be found in the car); id. at 399-400 (Rabner, C.J., dissenting) (questioning the current vitality of Boykins); State v. Hayburn, 171 N.J. Super. 390, 396 (App. Div. 1979), certif. denied, 84 N.J. 397 (1980) (rejecting the State's argument that it could search defendant's vehicle with less than probable cause and explaining that Boykins was "written when the Fourth Amendment was thought to afford less protection against automobile searches. The United States Supreme Court has recently reminded us that the automobile incantation does not have the magical power to dissolve the Fourth Amendment.").

cause to arrest someone for driving under the influence does not automatically support probable cause to search their car for intoxicants:

> A driver arrested for DUI may have been drinking at home, at a friend's, in a restaurant or bar, or at a sporting event, but not necessarily in his or her car. While the facts—e.g., the strong odor of intoxicants coming from inside the vehicle or an actual admission by the suspect—might indicate the presence of alcohol in the vehicle, the arrest itself does not invariably establish the requisite nexus to search. Nothing about the fact that the search occurs in a vehicle, moreover, would justify a reduced probable-cause standard. Indeed, while we have acknowledged that vehicles support a somewhat diminished expectation of privacy, this is not to say—and we have never held—that they carry no expectation of privacy, or that an arrest of the driver obviates the need to establish specific probable cause to search.

Bauder represents the correct analysis: the offense of driving while intoxicated does not provide probable cause to search the vehicle driven without further information that suggests contraband is in the car. Undertaking that analysis in this case, the State failed to establish any facts to support a belief that there were drugs in the car. Therefore it failed to justify the search.

Fenimore stands in contrast to cases in which there was actual evidence indicating that there was contraband currently in a car, such that it could be searched for that contraband. For instance, in State v. Cohen, 254 N.J. 308, 320 (2023), this Court reaffirmed that the smell of raw marijuana emanating from a car provides probable cause that there is marijuana inside that car. This makes sense: the smell is evidence that there is marijuana currently inside the car that

has not been consumed. In contrast, Fenimore's state of intoxication is evidence only that he consumed a drug. Absent specific reason to believe that there were more drugs in the car, or that evidence of prior drug use would be found in the car, there is no probable to search that car. Cf. id. at 324-25 (the smell of raw marijuana in passenger compartment of a car did not justify a search of the engine compartment absent specific facts to justify a belief that there was more marijuana in that compartment).

Cases in which courts have found probable cause to search a vehicle after a motorist is stopped and is suspected of driving under the influence contain facts that demonstrate that there are intoxicants presently in the car. As one court has explained, "[m]any different facts may provide a law enforcement officer with reason to believe that evidence of DUI is located inside the passenger compartment of a vehicle." United States v. Reagan, 713 F. Supp. 2d 724, 733 n.7 (E.D. Tenn. 2010). Examples of such facts include observing a person drinking while driving, observations of an intoxicant in plain view, statements by the occupants of a car that suggest that there is an intoxicant in the car, or the smell of alcohol emanating from within the passenger compartment. Ibid. See also United States v. Grote, CR-08-6057-LRS, 2009 WL 2068023, at *2 (E.D. Wash. July 15, 2009) (making clear that there is no "per se rule" that "probable cause to arrest for DUI always means

there will be probable cause to search the vehicle for evidence of DUI," and explaining that instead a court must assess "the totality of the circumstances" in any given case, including officer observations of suspected intoxicants in a vehicle).

In sum, there was no probable cause to believe that Fenimore's car would contain drugs. Probable cause that he had ingested drugs and had driven his car is not a sufficient substitute for the required probable cause to search his car. The Appellate Division erred in holding otherwise. The decision must be reversed.

C. The Search Was Unlawful Because If There Was Probable Cause, The Circumstances That Gave Rise To It Were Not Spontaneous And Unforeseeable.

Not only was there not probable cause that Fenimore's car would contain contraband, insofar as probable cause existed, it was not the result of spontaneous and unforeseeable circumstances. It was entirely foreseeable that Fenimore would arrive at the police station driving while intoxicated. Even if it was not, when Fenimore got out of the car clearly intoxicated, the police immediately had probable cause that that he was driving while under the influence. By sitting on that probable cause instead of searching the car immediately, the officers lost the opportunity to avail themselves of the automobile exception. Last, even if probable cause did not develop until after

the field sobriety tests, because that probable cause was the result of a deliberate, multi-step police investigation, it did not arise spontaneously and unforeseeably. No matter how one looks at the question of when the police had probable cause, the spontaneous and unforeseeable requirement was not met. Therefore, the warrantless search was unlawful.

In Witt, this Court held that in order to justify a warrantless search under the automobile exception, the "circumstances giving rise to probable cause must be unforeseeable and spontaneous." 223 N.J. at 447-48. This requirement is one of the core ways this Court provided "enhanced protection" of our citizenry's privacy in their vehicles. State v. Smart, 253 N.J. 156, 171 (2023).

The claimed probable cause to search the car in this case was not spontaneous or unforeseeable because Fenimore's driving himself to the police station while intoxicated was the expected outcome of him, a clearly intoxicated person, telling the police that he would drive himself to the police station. Radetich called Fenimore and asked him to come to the station because it was alleged that Fenimore had hit a woman with his car while high on drugs. Radetich thought Fenimore sounded intoxicated when he spoke with him. Fenimore told Radetich he would drive himself to the station. When Fenimore arrived at the station, he was driving, and he was intoxicated. Fenimore driving while intoxicated is exactly what Radetich expected based on his prior

conversation with and information about Fenimore. Thus, the circumstances giving rise to probable cause to search the car, if such cause existed, were not spontaneous and unforeseeable.

Although the Appellate Division recognized that the officers knew it was quite possible that Fenimore would drive to the police station while intoxicated, it nonetheless held that Fenimore driving to the police station while high was spontaneous and unforeseeable. The Appellate Division reasoned that "[w]e acknowledge Trooper Radetich suspected defendant was possibly under the influence when he called defendant an hour or two before defendant arrived at the station, but that suspicion was not the animating reason he requested defendant come to the police station." Fenimore, slip op. at 29. That reasoning does not survive scrutiny because it imports a non-existent intent requirement into the automobile exception. There is no loophole in Smart that if the police foresaw that probable cause for a crime would develop, but they did not intend for that probable cause to develop, while taking steps for the probable cause to develop, the foreseeability does not constitutionally count. Adding this loophole would significantly undermine Smart. If Fenimore driving under the influence gave rise to probable cause that there was contraband in his car, that probable cause was eminently

foreseeable. Therefore, the requirements of the automobile exception were not met.

And even if there were some doubt that Fenimore would make good on his word and drive himself to the police station while intoxicated, such that his arrival at the police station while driving while intoxicated was spontaneous and unforeseeable, the police violated the requirements of the automobile exception by sitting on the probable cause that developed immediately after his arrival instead of immediately searching the car. The trial court found that probable cause to search Fenimore's car existed the moment Fenimore got to the police station, clearly intoxicated, almost falling over himself and stumbling into the wall. In the words of the trial court, "[w]hen he arrived at the barracks, it became immediately apparent to the trooper that the defendant appeared to be under the influence." (1T 117-3 to 6 (emphasis added)) Yet, officers did not immediately search the car. Instead they interrogated Fenimore and conducted field sobriety tests. This delay prevents the State from justifying a warrantless search well after probable cause developed.

As this Court explained in Smart, "police officers who possess probable cause well in advance of an automobile search should get a warrant." 253 N.J. at 174. "'Police officers could not sit on probable cause and later conduct a warrantless search, for then the inherent mobility of the vehicle would have no

connection with a police officer not procuring a warrant.'" Ibid. (quoting Witt, 223 N.J. at 431-32). Here, even if Fenimore's arrival while driving while intoxicated was spontaneous or unforeseeable, probable cause developed the second he got out of the car. By failing to search at that moment, and instead sitting on probable cause, the State does not get the shortcut of a warrantless search after further investigation.

In the alternative, if police did not have probable cause until after the field sobriety tests, then Smart clearly demonstrates that the deliberate investigation to develop that probable cause defeats the spontaneity requirement. In Smart, police received information from a confidential informant that "Killer," a person described with some detail, was dealing drugs out of a specific vehicle. Id. at 160. One month later, an officer was conducting surveillance outside of an area known for drug activity when he saw the suspect car. Id. at 161. Further research revealed that defendant was known as Killer. Ibid. At that point, the officer suspected that defendant had used that car to deal drugs. Ibid. The officer surveilled the car for 30 minutes, at which point he saw multiple people, including defendant, enter the car. Ibid. The officer followed the car and saw behavior consistent with drug dealing. Ibid. Officers correctly determined they had reasonable suspicion that defendant had dealt drugs and performed a motor vehicle stop about 76 minutes after first spotting

the car. Ibid. Twenty-three minutes later, a drug dog was brought to the scene and alerted to the car. Id. at 162. Officers believed they had probable cause and conducted a search, purportedly pursuant to the automobile exception to the warrant requirement. Ibid.

This Court disagreed that the automobile exception justified the search, holding that the events giving rise to probable cause were not unforeseeable or spontaneous. This Court noted that "officers reasonably anticipated and expected they would find drugs" in the car. Id. at 172. They spent almost two hours conducting their investigation and "made the decision to conduct a canine sniff to transform their expectations into probable cause to support a search." Ibid. Nor did the fact that the canine sniff was necessary to develop probable cause make the circumstances giving rise to that probable cause spontaneous: "The fact that the canine sniff is what culminated in probable cause does not eviscerate the steps that led to the sniff. The sniff did not exist in a vacuum, but rather served to confirm and provide evidentiary support for the investigators' suspicions. The canine sniff was just another step in a multi-step effort to gain access to the vehicle to search for the suspected drugs." Id. at 173.

If there was only reasonable suspicion that Fenimore was driving under the influence when he first arrived at the station, then just as in Smart, the

officers here carefully and deliberately investigated to support their suspicions. Fenimore's arrival was the first moment of the investigation, not the last. There was then a "multi-step effort" to support "gain[ing] access to the vehicle": observations of Fenimore's arms and pupils; interrogating him about his state; and three separate field sobriety tests. Officers "made the decision to conduct" these final steps, the field sobriety tests, "to transform their expectations into probable cause to support a search." Ibid. Just as in Smart, there is nothing wrong with officers taking these steps to ripen their suspicion into probable cause. But, just as in Smart, once that probable cause was painstakingly developed, it was incumbent upon officers to get a warrant before searching the car.

In sum, this was an investigation about an allegation that Fenimore had hit someone with a car he was driving while intoxicated, and every step undertaken in that investigation was designed to develop probable cause to support that allegation. There was nothing spontaneous or unforeseeable about Fenimore's driving to the police station while under the influence, no matter what moment in time that probable cause developed. First, Radetich decided to call Fenimore because he suspected him of driving under the influence at a prior occasion and wanted to discuss that allegation with him. Next, while speaking with Fenimore, he discerned that Fenimore sounded like he was

under the influence of drugs. Next, Fenimore, who was seemingly under the influence of drugs, told Radetich he would drive to the police station. Next, Fenimore did, in fact, drive himself to the police station. Next, Fenimore got out of the car and could barely walk, clearly under the influence of drugs. Next, Fenimore was brought into an interrogation room where Radetich observed many telltale signs that Fenimore was under the influence of drugs. Next, Radetich subjected Fenimore to three different sobriety field tests, which Fenimore failed. Then—and only then—did Radetich search the car. This was a meticulous and deliberate investigation of an accusation of driving while intoxicated from start to finish. There was nothing spontaneous or unforeseeable about probable cause developing. The Appellate Division's decision must be reversed.

CONCLUSION

The warrant requirement is a constitutional mandate. Any exceptions to that requirement are just that—exceptions. They cannot be allowed to swallow the rule. In Witt, this Court redefined the parameters of New Jersey's automobile exception to the warrant requirement to accommodate concerns that arise in the context of roadside stops. That exception, by the plain language of that decision as well as its purposes, applies only in that specific context. Because this case does not involve a roadside stop, but instead involves a car parked in a police station lot that is about to be impounded, the automobile exception does not apply. Further, because there was no probable cause to search the car and because, if there were, that probable cause did not develop spontaneously and unforeseeably, the search was invalid.

It is important to bear in mind that the automobile exception addresses only the right to conduct a warrantless search without exigency. Nothing stops the police from seeking a warrant to search a parked car. And nothing stops the police from warrantlessly searching a car with probable cause if exigent circumstances make getting a warrant impracticable. The automobile exception, as properly interpreted, does not "significantly burden[] the legitimate function of law enforcement in policing our roadways." Lark, 163 N.J. at 297. "Even if we assume that there is some inconvenience to the police,

that inconvenience is not an objectively reasonable basis to justify 'nibbling away' at our constitutional rights." Ibid. (some internal quotation marks omitted). The decision of the Appellate Division must be reversed.

Respectfully submitted,

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