NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2309-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM PITTMAN, a/k/a
WILLIAM J. HARRIS,
WILLIE PITTMAN,
WILLIAM SOLOMON
ANTHONY WATSON
WILLIAM JOHNSON,
BILL PITTMAN, and
WILLIAM L. PITTMAN,

Defendant-Appellant.
____

Argued May 10, 2023 – Decided October 19, 2023

Before Judges Accurso, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-08-1144.

Thomas P. Belsky, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora,

Public Defender, attorney; Thomas P. Belsky, of counsel and on the briefs).

Erin M. Campbell, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

ACCURSO, P.J.A.D.

Following the denial of his motion to suppress evidence seized in a warrantless search of his car, defendant William Pittman pleaded guilty to second-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1), and was sentenced to a three-year term. He appeals, raising the following issue for our consideration.

POINT I

THE TRIAL COURT ERRED IN DENYING MR. PITTMAN'S MOTION TO SUPPRESS THE EVIDENCE FOUND DURING THE WARRANTLESS SEARCH OF HIS CAR BECAUSE REASONABLE SUSPICION DID NOT EXIST TO CONDUCT THE INITIAL INVESTIGATORY STOP OF MR. PITTMAN, AND THEREFORE ALL EVIDENCE FOUND AS A RESULT OF THAT ILLEGAL DETENTION WAS FRUIT OF THE POISONOUS TREE

A. The Officers Initiated an Investigatory Stop When They Surrounded Mr. Pittman's Car with Their Badges Displayed and Announced "Police."

B. The Police Lacked Reasonable Suspicion to Initiate Their Investigatory Stop.

In a supplemental letter filed pursuant to Rule 2:6-11(d)(1) shortly before argument, defendant's counsel drew the court's attention to the Supreme Court's recent opinion in State v. Smart, 253 N.J. 156 (2023), decided two months prior, after all briefing in this appeal was complete. Defendant contended Smart clarified that the "unforeseeable and spontaneous" circumstances required by the automobile exception to the warrant requirement in New Jersey under Alston/Witt[1] are not focused on "the time between the development of probable cause and the search," as the State and the Attorney General had argued in that case. Smart, 253 N.J. at 173.

Instead, the Court in Smart made clear "the Alston/Witt test . . . requires not just that probable cause not exist long in advance of the search, but that it 'aris[e] from unforeseeable and spontaneous circumstances.'" Id. at 174 (quoting Witt, 223 N.J. at 450). Defendant argues here, just as in Smart, "the initial stop 'was deliberate, orchestrated, and wholly connected with the reason for the subsequent seizure of the evidence,'" and thus the State could not justify the search under the automobile exception to the warrant requirement.

---

[1] State v. Alston, 88 N.J. 211 (1981); State v. Witt, 223 N.J. 409 (2015).

253 N.J. at 172. We agree and thus reverse the denial of defendant's suppression motion.

Only two witnesses testified at the suppression hearing — the narcotics detective who surveilled and arrested defendant and the K-9 handler who oversaw the dog sniff of defendant's car. The detective testified he'd been with the Woodbridge Police Department for about six years when he encountered defendant in May 2018 and had worked in drug enforcement previously. At the time he arrested defendant, he was assigned to the special investigations unit, the primary function of which is narcotics enforcement. He was also assigned to the federal Drug Enforcement Agency's High Intensity Drug Trafficking Area Group Three in Newark.

The detective was on "proactive patrol" with another officer, meaning they were "driving around" in an unmarked car "looking for suspicious activity," including drug deals "in progress." He was checking convenience store parking lots in the Fords section of Woodbridge, as he'd learned over the years they are typical places for drug dealers to sell drugs, because they "blend in." The detective testified that as he pulled into the QuickChek on Egan Avenue, he saw a car parked nearby, which he recognized as belonging to

defendant, whom he knew, on the basis of information received from a reliable confidential informant, to be involved in the distribution of cocaine and heroin.

The detective positioned his car one or two car lengths behind defendant's car at about 3:45 p.m. and watched him. After about forty-five minutes, the detective saw defendant, who was alone in the car, get out of the driver's seat and go into his trunk. Defendant took a plastic bag from the trunk and returned to the driver's seat. According to the detective, a few minutes later defendant returned the bag to his trunk, brushed off his pants and returned to the car. Believing defendant was waiting to meet someone to whom he'd arranged to sell drugs, the detective testified he and his partner decided to stay where they were "and see."

Twenty-five minutes later, the detective saw a man walk up and get in the front passenger seat of defendant's car. Believing "a drug deal was taking place," the detective, his partner, and another detective who'd joined them, approached defendant's car on foot. The detective testified that as he neared the car, he saw the passenger with cash in his hand. He announced himself, showing his badge and saying "Police." According to the detective, defendant cursed and reached under his seat. The detective then drew his service weapon

and ordered both men out of the car. The detective had surveilled defendant for an hour and ten minutes before ordering him out of the car.

Not seeing any drugs, the detective called the K-9 handler for a dog sniff. After the detective made that call, the man who'd gotten in the front seat told the detectives he was there to buy $30 of "coke."[2] The K-9 handler testified he was called out at "[a]pproximately 5:10 p.m."

The K-9 handler testified the dog alerted to the odor of narcotics in defendant's car. According to the handler, he told the detective "the dog had a positive indication. I might have said, you know, the dog hit. You're good." Asked by the prosecutor what he did after being told the dog alerted, the detective responded, "We searched the vehicle." The detective testified he found "two corner knots of cocaine totaling a little over a half gram" in the center console and "a bag with fifteen corner knots of crack cocaine and ten wax paper folds of heroin as well as assorted drug paraphernalia" in the trunk.

After the hearing, the judge issued a written opinion denying the motion. After recounting the testimony set out above, the judge addressed defendant's arguments contesting the stop, his continued "detainment" while police

---

[2] The man later told the judge taking his guilty plea that he intended to buy Viagra or Cialis from defendant. The man claimed defendant offered to sell him something else, but he didn't know what it was.

summoned the dog handler for a canine sniff, and "the officers' search of his vehicle." The judge found the circumstances, specifically the detective having watched defendant's car for an hour and ten minutes, during which he only left the driver's seat to go in and out of the trunk with a plastic bag, never going into the QuickChek, and then seeing a man walk up and get into the car but it not drive away, gave the detective reasonable suspicion that a crime was taking place. See Terry v. Ohio, 392 U.S. 1, 21 (1968).

The judge found that having seen the passenger with cash in his hand as the officers approached, and defendant curse and reach under his seat as they announced themselves, the detective acted reasonably in drawing his gun and ordering both men out of the car for safety reasons. See State v. Bruzzese, 94 N.J. 210, 217 (1983) (noting "the touchstone of the Fourth Amendment is reasonableness").

Noting an officer may reasonably broaden his investigation if the circumstances surrounding the stop give rise to further suspicion, State v. Dickey, 152 N.J. 468, 479-80 (1998), the judge found the detective acted immediately in requesting a canine sniff and thus diligently pursued the "narcotics investigation," which prompted the Terry stop. See State v. Dunbar, 229 N.J. 538-40 (2017) (holding police do not need reasonable suspicion

independent of that justifying the traffic stop to conduct a dog sniff but may only extend the stop if they have independent reasonable and articulable suspicion to do so). The judge found police had an independent basis to prolong the stop here in light of the cash in the passenger's hand and defendant's reaction as the detectives approached the car, and thus the detective's decision to extend the stop by calling in the K-9 unit was reasonable. See Id. at 540. The judge rejected defendant's challenge to the dog's qualifications, based on the voluminous material documenting the dog was current in his training and certifications.

Turning to the legality of the search, the judge recited the law that presumes a warrantless search is invalid, unless it can be justified under one of the recognized exceptions to the warrant requirement. State v. Wilson, 178 N.J. 7, 12 (2003). Because the State relied on the automobile exception for its search of defendant's car, the judge noted it was the State's burden to prove by a preponderance of the evidence the search met the Alston/Witt test, that is, that "the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous." Witt, 223 N.J. at 447 (citing Alston, 88 N.J. at 233).

The judge found the State carried its burden because police searched the car only after a properly certified dog alerted to the odor of narcotics, and that, "combined with the facts amounting to reasonable suspicion," justified the search under the automobile exception, mandating denial of the suppression motion. Neither the State nor the judge, however, addressed what proofs satisfied Alston/Witt's requirement that "the circumstances giving rise to probable cause are unforeseeable and spontaneous." Ibid.

At oral argument on appeal, both defendant and the State moved off the positions asserted in their briefs. Defendant contended that Smart, which had not been decided by our court or affirmed by the Supreme Court at the time of the suppression motion, controlled the outcome here. The State, which had argued in its brief that the detective had reasonable suspicion when he approached the car, contended at oral argument the officers' approach of the car was merely a field inquiry, which only escalated to an investigative detention when defendant swore and reached under his seat for what the detective could reasonably believe was a gun.

As to Smart, the State argued defendant only challenged the stop and did not challenge the search at the suppression hearing, depriving it of the opportunity to have the detective testify as to why the search of defendant's car

was unforeseen and spontaneous. The State further argued that Smart did not change the Alston/Witt test and defendant's failure to have raised Witt in the trial court precluded defendant from raising it for the first time on appeal, relying on State v. Robinson, 200 N.J. 1, 18-19 (2009) (holding the defendant's failure to have raised the reasonableness of a "flash-bang" device in the execution of a "knock and announce" warrant at the suppression hearing prohibited the defendant from addressing it on appeal). The assistant prosecutor further argued the transcript was incomplete for our review of defendant's new argument and to consider it "would be an incentive for game-playing by counsel, for acquiescing through silence when risky rulings are made, and, when they can no longer be corrected at the trial level, unveiling them as new weapons on appeal." Robinson, 200 N.J. at 19 (quoting Frank M. Coffin, On Appeal: Courts, Lawyering, and Judging 84-85 (W.W. Norton & Co. 1994)).

We think the lawfulness of the stop is a close question, largely because the record is unclear as to the precise train of events, and no one queried the detective about where he was and the tone he used in "announcing his presence" to defendant, see State v. Rosario, 229 N.J. 263, 273 (2017) (explaining "[t]he difference between a field inquiry and an investigative

detention always comes down to whether an objectively reasonable person would have felt free to leave or to terminate the encounter with police"). Nevertheless, because we defer to the trial court's findings that it was only "after observing [defendant reach under his seat] and identifying himself" to defendant, that the detective "unholstered his weapon and asked . . . defendant to step out of the vehicle," we do not quarrel with its finding the initial stop was constitutional. See State v. Alessi, 240 N.J. 501, 517 (2020) (reiterating that "[a] trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction'") (quoting State v. Elders, 192 N.J. 224, 244 (2007)).

We cannot find the search of defendant's car, however, was likewise constitutional. Based on the detective's unrebutted testimony and the trial court's findings, this case cannot be distinguished from Smart on either the facts or the law.

In Smart, just as in this case, a detective's attention was drawn to a car the officer believed was used by a drug dealer, Smart, 253 N.J. at 161. The officer surveilled the car for over an hour, during which he saw Smart engage in what the officer believed to be a drug transaction. Ibid. Armed with reasonable, articulable suspicion, police pulled the car over, but saw no sign of

drugs. Id. at 162. Still suspecting the car contained drugs, police called for "a canine, whose positive drug 'hit' established probable cause." Ibid. Police immediately searched the car, resulting in the seizure of drugs and weapons. Ibid.

The trial court suppressed the evidence, finding police needed a warrant to search the car because the circumstances giving rise to probable cause "were not 'unforeseen and spontaneous,'" precluding application of the automobile exception under Witt — a decision affirmed by this court, State v. Smart, 473 N.J. Super. 87 (App. Div. 2022), and the Supreme Court, Smart, 253 N.J. at 174. The Court found the circumstances which ripened into probable cause in Smart could "hardly be characterized as unforeseeable" and "were anything but spontaneous." Smart, 253 N.J. at 172-73.

As to foreseeability, the Court noted the police, after a nearly two-hour surveillance, "anticipated and expected they would find drugs" in Smart's car and "made the decision to conduct a canine sniff to transform their expectations into probable cause to support a search." Id. at 173. The Court found the canine sniff could not qualify as spontaneous because it "was just another step in a multi-step effort to gain access to the vehicle to search for the suspected drugs." Ibid.

This case is virtually indistinguishable from Smart. The trial court expressly found it was the narcotics detective's "suspicions of . . . [d]efendant's narcotics activity" which prompted the lengthy surveillance of defendant's car, and formed the basis of the stop, the request for a canine sniff and the ultimate search of the car. Probable cause in this case most certainly did not "aris[e] from unforeseeable and spontaneous circumstances." Id. at 174 (quoting Witt, 223 N.J. at 450, with emphasis added).

We reject the State's assertion that defendant did not challenge the search in the trial court and, in any event, waived review of the issue by his failure to brief it. The trial court found that in addition to contesting the stop, defendant "object[ed] to the officers' search of his vehicle." And we would be hard pressed to find defendant waived application of a controlling case not issued until after all briefing was complete, especially as his counsel properly served and filed a letter calling the case to our attention pursuant to Rule 2:11-6(d)(1), and both counsel were fully prepared to, and did, address the issue at oral argument.[3]

---

[3] We also find the record is certainly complete enough to resolve the issue of whether the stop qualified under the automobile exception to the warrant requirement. The detective's testimony makes abundantly clear this was first, last, and always a narcotics investigation. And defendant's reliance on a

More important, however, is that this issue is subject to a plain error analysis. See State v. Sims, 250 N.J. 189, 196 (2022) (reviewing trial court's decision refusing to suppress defendant's statement premised on an allegedly invalid Miranda[4] waiver for plain error on argument not raised to the trial court). It was the State's burden to prove by a preponderance of the evidence that its warrantless search of defendant's car fell within the automobile exception as it contended to the trial court. State v. Goldsmith, 251 N.J. 384, 399 (2022). Although we defer to the factual findings of the trial court on a motion to suppress, "so long as those findings are supported by sufficient credible evidence in the record," State v. Ahmad, 246 N.J. 592, 609 (2021) (quoting State v. Elders, 192 N.J. 224, 243 (2007)), "we consider a ruling that applies legal principles to the factual findings of the trial court" de novo, State v. Hinton, 216 N.J. 211, 228 (2013).

Here, the trial court correctly stated that our Supreme Court has interpreted the automobile exception "to permit warrantless searches of (1)

---

controlling case the Court had yet to decide at the time of the suppression hearing dispels the State's concern about our incentivizing "gamesmanship" by addressing the "unforeseeable and spontaneous" requirement of the automobile exception here.

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

readily movable vehicles when (2) the police officers have probable cause to believe that the vehicle contains contraband or evidence of a crime and (3) the circumstances giving rise to probable cause are unforeseeable and spontaneous." And although the court concluded the State carried its burden to demonstrate the search of defendant's car fell within the automobile exception, it failed to consider or make any findings as to whether the circumstances that gave rise to probable cause here were "unforeseeable and spontaneous." Witt, 223 N.J. at 450.

Because it is beyond dispute, based on the facts the court found, that the circumstances giving rise to probable cause here were not "unforeseeable and spontaneous" but were instead, as in Smart, "deliberate, orchestrated, and wholly connected with the reason for the subsequent seizure of the evidence," 253 N.J. at 172, the court's finding that this search fell within the automobile exception was plain error. See R. 2:10-2; State v. Funderburg, 225 N.J. 66, 79 (2016). We thus reverse the trial court's denial of defendant's suppression motion and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION