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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3644-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ARNOLD L. GAINEY, a/k/a
ALFRED GAINEY, and
HENRY HUDSON,

Defendant-Appellant.

Argued October 16, 2023 – Decided November 2, 2023

Before Judges Sabatino, Mawla and Vinci.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 21-05-0334.

Samuel S. Carrigan, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Samuel S. Carrigan, of counsel and on the briefs).

Monica do Outeiro, Assistant Prosecutor, argued the cause for respondent (Raymond S. Santiago,

Monmouth County Prosecutor, attorney; Monica do Outeiro, of counsel and on the briefs).

PER CURIAM

This appeal concerns a warrantless police search of a car, which revealed drugs and drug paraphernalia in the car's passenger compartment and a firearm in the wheel well of the trunk. Defendant was charged with possessory drug and firearm offenses. He moved to suppress the incriminating items found in the car and the trunk. After an evidentiary hearing, the trial court denied his motion. Defendant entered into a plea agreement, preserving his right to appeal the suppression denial. For the reasons that follow, we affirm.

On January 23, 2020, a concerned citizen called the police at approximately 2:00 p.m. to report that he had seen a Toyota Avalon failing to stay in its lane, driven by a possibly intoxicated or medically incapacitated driver. The citizen reported the Toyota's license plate number. About eight minutes later, the citizen called the police again, reporting he had followed the Toyota from the Garden State Parkway to Jacob Drive in Howell Township.

Officer Brett Kyle of the Howell Township Police Department received the report while on routine patrol in the area. Officer Kyle was in uniform driving an unmarked police car. He drove to Jacob Drive and Newtons Corner Road in Howell and found the concerned citizen, who had last seen the erratic

driver heading east on Jacob Drive with heavily tinted windows. Officer Kyle canvassed the area and found the Toyota with the reported New Jersey license plate and tinted windows. The car was parked on the wrong side of the street, facing oncoming traffic, idling in front of a house.

At 2:14 p.m., Officer Kyle parked his squad car behind the Toyota and searched its license plate number, discovering the owner was defendant Arnold L. Gainey. Officer Kyle got out of his car and began walking towards the Toyota when its front passenger got out. Officer Kyle ordered the passenger back in the car and to roll down the window because "it was a motor vehicle stop." Under protest, the passenger, later identified as Ryan Chapman, complied.

Officer Kyle then approached Chapman's window. He asked Chapman and the driver to present their driver's licenses, and tell him their origins and destinations that day. Neither occupant produced identification, but defendant, the driver, confirmed that he was the owner of the car. Officer Kyle told both occupants to "sit tight for a minute."

Officer Kyle walked back to his car to tell Patrolman Jeffrey Mann, who had arrived as backup, that he planned to remove the occupants from the car

because he observed "a bunch of Chore Boy"¹ and "two or three" small rubber bands, their behavior was erratic, and their stories were inconsistent. He also observed in the car "Blunteffects" air freshener, which is commonly used to mask the odor of marijuana.

The officer ordered defendant to get out of the Toyota, which he did. He noticed that defendant's "belt was off," his "pants were loose on his person," and he "couldn't stand still." Officer Kyle, who had been an EMT for ten years, further observed that defendant "was unsteady on his feet." He also noted additional "obvious signs of impairment," including "slurred speech" and "very glassy" eyes. He "believed it was more than just alcohol" causing his behavior, and that defendant "was under the influence of some type of narcotic."

Officer Kyle asked defendant again where he was coming from and if he had consumed anything intoxicating that day. Defendant replied that he had come from Jersey City to give his friend a ride to Lakewood. He denied having consumed drugs or alcohol, adding that his sciatica was affecting his gait and hurting his legs. Officer Kyle asked why defendant had Chore Boy and he claimed it was for cleaning his house. Defendant refused to answer Officer

¹ As explained by Officer Kyle, "Chore Boy is commonly used in a glass pipe as a filter for smoking crack cocaine" and the rubber bands are "commonly used with packaging of narcotics, specifically bundles of heroin."

Kyle's next question about why he had "blunt spray in the door."

Officer Kyle asked defendant for consent to search the car "based on what [he'd] heard so far," but defendant declined. Officer Kyle then informed defendant that he had called for a canine to come out, and if it indicated the presence of drugs, the police would search the car.

Defendant was directed to sit on the curb. He asked for a cigarette and "one of [his] pain pills." Officer Mann retrieved a cigarette from the front passenger door of the Toyota and gave it to Officer Kyle, who passed it to defendant.

Officer Kyle walked to the car's front passenger door and asked Chapman to identify himself. Chapman refused to give his name until Officer Kyle said he would arrest him if a name was not provided. Chapman gave his name as "Jeffrey" Chapman. Officer Kyle ordered Chapman out of the car and to have a seat on the curb and questioned him further about his identity and why he was in the car. Chapman then stated for the first time that his name is actually Ryan Chapman.

Upon learning through the police radio that Chapman had three outstanding warrants, Officer Kyle handcuffed him. While searching Chapman incident to the arrest, Officer Kyle found a scale in Chapman's pants pocket.

Based on Officer Kyle's "training and experience," he "suspected at that point that [Chapman] was purchasing narcotics from [defendant]."

While Officer Kyle was speaking with Chapman, defendant told Officer Mann that he was cold and asked for his jacket from the back seat of the car. Officer Mann retrieved the jacket for defendant, spending "approximately two seconds or less" in the car to do so.

Sergeant Nicholas Bondarew, who had arrived with the canine approximately twenty-five minutes after the initial stop, asked defendant for consent to search his car and defendant at that point said yes. When Officer Kyle explained the corresponding form for defendant to sign and confirm his consent, defendant balked. Based on defendant's reaction, he did so because the form authorized a search of bags and compartments, beyond things in plain view of the car's interior.

While Officer Kyle was going over the consent form, defendant asked for another cigarette. Sergeant Bondarew accordingly opened the front passenger door to retrieve a cigarette box. He discovered a burnt marijuana cigarette in the box and gave the box to Officer Kyle out of defendant's sight.

Approximately ten minutes after arriving on the scene, roughly thirty-three minutes after the initial stop, Sergeant Bondarew walked the dog around

the Toyota. The dog alerted to the presence of drugs by sitting outside the front passenger window.

Officer Kyle then began to search the front passenger area and discovered drug paraphernalia, along with "full wax folds of heroin that were individually separated along the floor of the vehicle." Officer Kyle also found a bag of marijuana, a crack pipe, and a digital scale in the center console.

After searching the front passenger area, Officer Kyle handcuffed defendant, searched him, and found "money that was located on [defendant] . . . in separate denominations." Officer Kyle testified that the money "would contribute to [the] distribution of narcotics . . . [because] cash is used certainly because it cannot be tracked." A seller "would take that money from whoever he was selling to and force it into his pocket, which was the way that it was located on his person."

The officers then searched the rear passenger compartment of the car before searching the trunk. A backpack found on a rear passenger seat contained seventeen bricks of heroin, which Officer Kyle testified represents 850 wax folds (a brick of heroin is five bundles, and each bundle contains ten wax folds). The backpack also contained a clear bag of crack cocaine and sixteen suboxone films. The officers also found a denim jacket on the back seat containing heroin

and crack cocaine.

The officers then proceeded to search the trunk. They discovered in the spare tire well a small black bag containing a nine millimeter handgun loaded with hollow nose bullets.

Sergeant Bondarew administered field sobriety tests to defendant at the police station to confirm whether he was intoxicated. Defendant failed the standard field sobriety tests, provided a urine sample revealing cocaine and fentanyl, and was evaluated by a drug recognition expert. The Toyota was towed back to police headquarters.

At the ensuing suppression hearing, Officer Kyle and Sergeant Bondarew both testified. The motion judge found both officers to be credible. Defendant presented no witnesses. The judge also reviewed video footage from Officer Kyle's body-worn camera and patrol car dashboard camera.²

In an oral ruling, the judge concluded the warrantless search was proper in all respects. As analyzed by the court, the traffic stop was justified by the multiple observed motor vehicle violations. Next, the officer's direction to defendant and Chapman to get out of the car was proper, and only a "minor

² We have also reviewed the video footage, which was supplied by counsel on the appeal.

inconvenience" to their personal liberty.

Turning to the search of the car's interior, the court found the automobile exception to the warrant requirement applied, because police obtained probable cause to search the car from "unforeseeable and spontaneous" circumstances. To the extent the canine sniff prolonged the stop, Officer Kyle's "reasonable articulable suspicion that narcotics were involved" justified the sniff. Although the defense had not challenged the scope of the search, the trial court ended its ruling by explaining "the search here did not exceed the balance of reasonableness and was certainly within the scope of the object that the officers had reason to search."

On appeal, defendant argues:

POINT I

THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE WARRANTLESS VEHICLE SEARCH WAS NOT BASED ON "UNFORESEEABLE AND SPONTANEOUS" CIRCUMSTANCES. ALTERNATIVELY, THE SEARCH OF THE TRUNK WAS UNREASONABLE.

A. THE CIRCUMSTANCES GIVING RISE TO PROBABLE CAUSE WERE NOT UNFORESEEABLE OR SPONTANEOUS.

B. ALTERNATIVELY, EXTENDING
THE SCOPE OF THE SEARCH TO THE
TRUNK WAS UNREASONABLE.

In assessing these arguments, we apply well settled principles. We recognize that under the United States and New Jersey Constitutions, a warrantless search by police officers is invalid unless it is justified by an established exception to the warrant requirement. State v. Cohen, 254 N.J. 308, 319 (2023). If the State fails to prove such an exception applies, the evidence seized must be suppressed. Ibid.

Further, we must afford deference to the factual and credibility findings of the suppression judge. "Although a trial court's legal conclusions are reviewed de novo, . . . an appellate court must defer to the factual findings of the trial court on a motion to suppress so long as its findings are supported by sufficient credible evidence in the record." State v. Erazo, 254 N.J. 277, 297 (2023).

Defendant's arguments on appeal are divided into two phases: (1) the justification for the search of the passenger compartment that uncovered the drugs and related paraphernalia, and (2) the scope of the search that uncovered the gun in the trunk. It is clear that both phases of the search were constitutional.

With respect to the search of the car's interior, the State relies on the automobile exception to the warrant requirement. That long-standing exception applies "when the police have probable cause to believe that [a] vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous." State v. Witt, 223 N.J. 409, 447 (2015). The requirements of unforeseeability and spontaneity ensure that police "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." Id. at 431-32.

Here, the requirement of probable cause to search the Toyota was strongly established by multiple facts and is not a focus of defendant's arguments on appeal. Among other things, probable cause was apparent by the observation of erratic driving, the officers' detection of the odor of marijuana,³ the observation

³ The search at issue predates the 2021 passage of the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:61-31 to -56, which added a new section in the Criminal Code stating that neither "the odor of cannabis or burnt cannabis," nor the "possession of marijuana or hashish without evidence of quantity in excess of any amount that would exceed the amount . . . which may be lawfully possessed," "shall, individually or collectively, constitute reasonable articulable suspicion of a crime" except on school property or at a correctional facility. N.J.S.A. 2C:35-10(a), (c). "[G]oing forward [after CREAMMA], we anticipate that cases involving the automobile exception and probable cause to search a vehicle based

of shredded ChoreBoy and blunt spray in plain view of the car's interior, the scale found in Chapman's pocket, the burnt marijuana joint found in the box of cigarettes after defendant had requested the officers retrieve a cigarette for him, and the positive dog sniff. All of those facts, in combination, easily support the trial court's finding of probable cause to enter the car interior.

Defendant's challenge to the car interior search is based on his contention that the search was not "unforeseeable and spontaneous," as is also required under the automobile exception as construed in Witt. Earlier this year in State v. Smart, 253 N.J. 156 (2023), our Supreme Court clarified this aspect of Witt.

In Smart, the police received a tip from a concerned citizen that connected a particular vehicle to drug deals. Id. at 172. Two months later, police officers surveilled the car for forty-seven minutes until they observed circumstances resembling a drug transaction that would normally justify a warrantless search. Ibid. The police then conducted a canine sniff, which confirmed their belief that the car contained drugs. They then searched the car's interior without a warrant. Id. at 162. Given that sequence of events in Smart, the Court invalidated the

solely on the smell of marijuana will likely be few and far between." Cohen, 254 N.J. at 328.

search because probable cause had not arisen from "unforeseeable and spontaneous" circumstances. Id. at 174.

Defendant likens the situation here to the facts in Smart. He contends the search of the car's interior was not unforeseeable and spontaneous because the amount of information progressively gained by the police to support probable cause could have been anticipated as they continued their investigation.

This case is plainly unlike Smart. The stop of the Toyota was not preceded by a two-month narcotics investigation but prompted by an unforeseeable citizen's report of an erratic driver. The events that rapidly unfolded at the roadside within a span of less than an hour were not foreshadowed by prior indicia of criminality.

The police would have no reason to believe that a passenger in the vehicle would have outstanding arrest warrants, or that he would possess a drug scale in his pocket when patted down. The plain view observations of ChoreBoy and blunt spray through the car window were spontaneous. The odor of marijuana was first detected at the scene. At that point, the police had a sufficient basis to call for a dog sniff. It was only when the dog alerted that the police conducted a full interior search of the car.

Defendant essentially argues that the foreseeability and spontaneity requirements of Witt and Smart should be analyzed repeatedly for each step of a car stop and search. In essence, he argues that if the information accumulated at any phase can be predicted to yield more incriminating facts, the police must halt their efforts and pursue a warrant. That argument, if carried to its logical conclusion, would virtually eliminate the automobile exception. Almost all police work that turns up information supporting facts of probable cause connected to a motor vehicle is gathered step by step. There is nothing in the Court's opinions in Witt or in Smart that supports such a strained interpretation of the law.

We therefore affirm the trial court's conclusion upholding the search of the car's interior as well substantiated by its credibility findings and its legal analysis.

Turning to the search of the trunk, we are likewise persuaded the officers did not exceed constitutional limitations. We are mindful that the permissible scope of a search is constrained to areas "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." State v. Patino, 83 N.J. 1, 11 (1980) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

The Supreme Court recently applied this scope principle in Cohen. In that pre-CREAMMA case, the police stopped the defendant's car for a motor vehicle violation. Id. at 314. As they approached the car, they detected the "general smell" of then-illegal raw marijuana, although they could not pinpoint which area(s) within the car were the source(s) of that odor. Id. at 325. The police also observed what appeared to be marijuana residue in the driver's beard. Id. at 314. They searched the car's passenger compartment for marijuana, but they found no drugs or contraband there. Id. at 315. At that point, the police searched the car's trunk and under the engine hood and discovered two guns under the hood. Ibid. The Court invalidated the search that went beyond the passenger area of the car because the general smell of marijuana was inadequate to justify a further warrantless intrusion. Id. at 327.

By contrast, in the present case, the police had ample grounds to believe that additional evidence of criminality would be found within the Toyota's trunk. The police found strong evidence of the car's use in drug trafficking within the passenger compartment before they continued their search into the trunk. The engine compartment in Cohen was "an arguably unlikely locale for storing personal items in a vehicle, including illegal narcotics[,] " whereas the trunk

searched in this case, by contrast was a logical next place to look after finding drugs and drug paraphernalia in the passenger compartment. Id. at 324.

Here, the search of the passenger compartment yielded large quantities of various drugs (seventeen bricks of heroin, a bag of marijuana, crack, and prescription pills) and materials known by officers from training and experience to package drugs. Additional drugs were found by the front passenger seat, "full wax folds of heroin that were individually separated along the floor of the vehicle" and a crack pipe. The police also found a significant amount of loose cash in defendant's pockets in denominations, suggesting to Officer Kyle that the money was used in drug transactions. Further, the police found a digital scale when they searched Chapman and another in the center console of the car. Police certainly had more probable cause here to believe defendant was using his car to engage in drug trafficking, and that it was likely the trunk also was being used to store contraband. It does not matter that the canine did not alert when passing the trunk, as there was ample evidence of probable cause to proceed to search the trunk as well.

Lastly, we note our conclusion is unaffected by the fact that the police had already arrested defendant and decided to impound his vehicle before searching his trunk without a warrant. In State v. Rodriguez, we made clear that Witt

"afford[s] 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."
459 N.J. Super. 13, 23 (App. Div. 2019).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION