STATE OF NEW JERSEY, Plaintiff-Respondent, v. KEVIN J. CORKIN, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000409-24 On appeal from the final decision in the Superior Court of New Jersey, Criminal Part, Bergen County Sat Below: Honorable Kevin J. Purvin, J.S.C. Indictment No.: 22-04-00395-I Case No.: BER-21-001114 Date of Submission: January 2, 2025

BRIEF OF DEFENDANT-APPELLANT KEVIN J. CORKIN

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PRELIMINARY STATEMENT

This is an appeal of the denial of a motion to suppress the stop of a motor vehicle driven by defendant-appellant Kevin J. Corkin. Following the denial of the motion, Mr. Corkin entered a plea of guilty to an indictable charge of trespass, a fourth-degree offense and a DWI summons. Only the DWI conviction is challenged in this appeal. In essence, the police arrested Mr. Corkin on the trespass charge earlier in the evening when he entered a house of a third party without permission and was found asleep in a bed. Mr. Corkin was believed to have been drinking alcohol. The police took him to the police station and, after several hours, released Mr. Corkin on his own recognizance from the police station with a warning not to drive the vehicle (registered to his mother) which was parked outside the house. The arresting officer testified that Mr. Corkin was not a danger to himself or others but was still intoxicated.

After his release, the police immediately returned to the house where the car was parked to make sure Mr. Corkin did not reenter the house. When the car was driven away by an unseen driver and, even though they did not see Mr. Corkin operate the car and did not see any motor vehicle violations by the then unknown driver, the police conducted a Terry stop based on the "assumption' that he was the driver and the purported belief that he was still intoxicated. It was only when the vehicle was stopped that the police saw that Mr. Corkin was

driving the car. He was arrested for DWI and other criminal and motor vehicle charges. We maintain that the police did not have a reasonable basis to stop the vehicle since they (1) released Mr. Corkin on his own recognizance earlier in the evening based on their belief that he was not a danger to himself or others, (2) did not see him operate the car and (3) did not see any motor vehicle violations prior to pulling the car over. The Court below held that the police had a reasonable basis to stop the car based on the police observations of the condition of Mr. Corkin while being processed on the criminal trespass charge earlier in the evening and that it was a reasonable assumption that it was Mr. Corkin who was driving the car. We believe the Court got it wrong.

PROCEDURAL HISTORY

Kevin J. Corkin was arrested twice on November 21, 2021 by the Rutherford New Jersey Police Department. The first arrest was at approximately 8:17 p.m. when Mr. Corkin was charged on a criminal complaint with trespass under N.J.S.A. 2C:18-3(a) for entering the home of another person, a fourth-degree offense. He was taken to the Rutherford Police Department for processing. He was released on his own recognizance several hours later. He was arrested a second time on the same evening by the same police department at approximately 11:03 p.m. when he was charged with third degree eluding in a motor vehicle and the following motor vehicle violations:

(i) Ticket No.: 0256-E21-008127, driving while intoxicated, in violation of N.J.S.A. 39:4-50; (ii) Ticket No.: 0256-E21-008128, speeding, in violation of N.J.S.A. 39:4-98.39; (iii) Ticket No.: 0256-E21-008129, careless driving, in violation of N.J.S.A. 39:4-97; (iv) Ticket No.: 0256-E21-008130, refusal to submit to chemical test, in violation of N.J.S.A. 39:4-50.4A and (v) Ticket No.: 0256-E21-008131, consent to take sample of breath, in violation of N.J.S.A. 39:4-50.2. Da3[1].

On April 27, 2022, a Bergen County Grand Jury returned a four-count Indictment against Mr. Corkin. Da1. The Indictment charges in Count One that on or about November 21, 2021, Mr. Corkin, while in the Borough of Rutherford unlawfully entered the dwelling of a third party in violation of N.J.S.A. 2C:18-3(a). This arose out of the first arrest. Count Two charges that in or about November 21, 2021 and November 22, 2021, in the Borough of Rutherford and/or the Township of Lyndhurst, Mr. Corkin did operate a motor vehicle and attempt to elude law enforcement, in violation of N.J.S.A. 2C:29-2(b). This charge arose out of the second arrest. Count Three charges that in or about November 21, 2021 and November 22, 2021, in the Borough of Rutherford, Mr. Corkin did attempt to throw bodily fluid at Sergeant Vincent Callan of the Rutherford Police Department while in the performance of his duties while being processed after the second arrest, in violation of N.J.S.A.

[1] Da = Defendant/appellant's appendix

2C:5-1/12-13. Count Four charges that in or about November 21, 2021 and November 22, 2021, in the Borough of Rutherford, Mr. Corkin did purposely prevent or attempt to prevent Detective Sergeant Thomas Lewis from lawfully performing an official function by means of intimidation, force, violence, or physical interference or obstacle while being processed after refusing to be fingerprinted, again after the second arrest, in violation of N.J.S.A. 2C:29-1(b).

Mr. Corkin entered not guilty pleas to all these charges.

On September 15, 2022, Mr. Corkin filed a motion to suppress all charges arising out of the second arrest based on the position that it was an invalid Terry stop. An evidentiary hearing took place on October 26, 2023 before the Honorable Kevin J. Purvin, J.S.C. Bergen County Superior Court. 1T[2]. Only one witness testified for the State, the arresting Officer, Sgt. Vincent Callan of the Rutherford Police Department. Mr. Corkin offered no witnesses.

By order and written opinion dated December 7, 2023, Judge Purvin denied the motion to suppress. Da12. Mr. Corkin subsequently entered a guilty plea to count one of the indictment, the fourth-degree trespass and the dwi charge, summons No.: 0256-E21-008127. 2T.

Mr. Corkin was sentenced on September 27, 2024. On the trespass charge, he was sentenced to 2 years' probation with 6 months incarceration in

[2] 1T = Transcript of evidentiary hearing of motion to suppress on October 26, 2023. 2T = Transcript of guilty plea on March 11, 2024. 3T = Transcript of sentencing proceeding on September 27, 2024.

the Bergen County Jail as a condition of probation. The other three charges of the indictment were dismissed as part of a plea bargain.

Mr. Corkin was sentenced on the DWI charge to 6 months in the Bergen County Jail to be served concurrent to the trespass charge, 8 years loss of driver's license, 2 years interlock device, 48 hours in the Intoxicated Driver Resource Center and various monetary fines. The jail portion of the sentences were postponed on the both the trespass and the DWI charge pending this appeal. Mr. Corkin's driver license was surrendered on the date of the sentencing and remains suspended pending this appeal and any further court developments. The other motor vehicle charges were dismissed as part of the plea bargain. Da24.

An amended notice of appeal was filed on October 15, 2024. Da8.

STATEMENT OF FACTS

The evidence at the suppression hearing set forth the following facts. The Rutherford Police Department received a call from a homeowner on November 21, 2021 at 8:17 pm that an unknown person was asleep in the upstairs bedroom of their home. 1T56:15-25. The police arrived and recognized Mr. Corkin. 1T9:3-7. A car registered to his mother was parked near the house with the key fob in plain view. 1T58:11-23; 1T72:8-14. Mr. Corkin and his mother resided in North Arlington at the time of the events in the case.1T10:22-24. Mr. Corkin

was arrested for criminal trespass. There was no liquor bottles found around him or on him. 1T57:10. He was transported to the Rutherford Police Department which was three blocks away from the house for processing on the criminal trespass charge. 1T10:25 –1T11:12. According to Sgt. Callan, Mr. Corkin "appeared to be intoxicated but was not a danger to himself." 1T13:9-11. Sgt. Callan described him as "quiet but he was agitated". 1T13:18-20. Mr. Corkin denied driving that night. 1T14:13-16. However, Sgt. Callan since he knew Mr. Corkin lived in North Arlington and not Rutherford and that his car was parked near the house "knew that he must have drove there" to the house. 1T59:9-16. Sgt. Callan did not believe he could investigate Mr. Corkin for dwi since he did not see him operate the car.1T59:17-20. Sgt. Callan denied that the police could make a dwi case based on circumstantial evidence of operation.1T59:25 -1T61:4. The police did not perform any field sobriety tests or Alcotest procedures on Mr. Corkin. 1T12:24-1T13:2; 1T61:5-10. There were no medical examinations done on him by nurses or medical technicians. 1T62:11-15.

Mr. Corkin was release by the police at around 10:45 pm. 1T61:11-17. He walked out of the police station unaccompanied by anyone. 1T63:8-22. The State played as S-1 excerpts of a police body camera recording made shortly before Mr. Corkin was release from the police station. (1T contains the words

spoken on the body camera.) Mr. Corkin is told by the police that "you're obviously impaired in some manner. You can't drive your car." … I know that cars (sic) is yours in front of the house, right." 1T19:12-18. Mr. Corkin provides various responses including "I'm not driving", 1T19:15; "I'm taking an Uber" 1T19:19-20; "Whatever you want."1T20:3-4 and "I'm getting picked –I can't drive that car. I'm getting picked up…" 1T21:3-4. The police also offered to contact Mr. Corkin's brother to have him pick up the car but Mr. Corkin turned down that offer. 1T22:10-12.

Mr. Corkin was then released on his own approximately 15 minutes later even though Sgt. Callan testified that he was intoxicated. 1T26:6. The time was around 10:45 pm. 1T61:15. He had been in police custody for approximately two and one half hours. 1T61:11-20. Sgt. Callan testified that since he was not a danger to himself or others the police did not have to hold him or take him to a hospital until he sobered up or have him accompanied home by anyone. 1T26:10-16; 1T63:8-23; 1T64:7-13; 1T64:23-1T65:2. He acknowledged that Mr. Corkin had made a lot of improvement during the time in police custody "in terms of feeling better, talking better, acting better." 1T61:21-25.

The State played another portion of S-1 (the police body camera recording) made as Mr. Corkin was being released. Mr. Corkin is told again

that "you know you can't drive" and "you're not in the condition to drive." Mr. Corkin responded "I'm getting picked up." 1T28:6-13. Mr. Corkin was released and walked out of the police station on his own. 1T27:8-10.

Sgt. Callan immediately drove the three blocks to the house where Mr. Corkin had been arrested earlier for criminal trespass. He testified that he did so "to make sure [Mr. Corkin] doesn't attempt to get back in the house" as the homeowner was scared that Mr. Corkin was going to come back. 1T30:1-19. He testified that he was not concerned about Mr. Corkin driving as he had been told not to drive. 1T66:4-13. Sgt. Callan parked near the house 1T30:20-24. He saw "the brake lights of the defendant's car go on" and saw the car pull away. 1T31:7-8. He did not see the defendant get in the car and did not see Mr. Corkin driving the car. Rather, he "assumed" it was Mr. Corkin. 1T31:19-24; 1T32:23-24. Sgt Callan admitted that it was possible that someone else was driving the car since he and Mr. Corkin had discussed having Corkin's brother or a friend pick up the car. 1T70:10-16.

Sgt Callan immediately pulled out and followed the car and did not observe any motor vehicle violations over a two-block period. 1T32:6-7; 1T32:14-18. Nevertheless, he activated his lights and sirens because "[he] was impaired at the station and I assumed it was him driving the vehicle." 1T32:19-24. Sgt. Callan testified that his opinion on impairment was based on the

alcohol on Mr. Corkin's breath earlier at the police station. 1T32:25-1T33:8. Sgt Callan testified that the car did not immediately stop, briefly reached a speed of 60 miles per hour in a 25-mph residential area and was then boxed in by police cars when the car stopped at a red light. 1T33:13-15; 1T34:22-25; 1T35:7-10 and 1T36:24-1T37:2. The pursuit was about one-half mile. 1T37:3-9 and lasted about 3 minutes 1T67:1-8. The driver was Mr. Corkin. 1T37:18-19.

Sgt. Callan testified that Mr. Corkin was very agitated at the scene after his car was stopped and had alcohol on his breath. He refused to perform field tests but was placed under arrest for dwi based on the officer's position that he was still intoxicated and also for eluding and other motor vehicle charges relating to the pursuit. 1T38:1-1T39:9. The State played exhibit S-2 which is the police body camera of Sgt. Callan during the pursuit and stop. 1T39:20-23. Mr. Corkin adamantly insisted on the recording after he was stopped that he was not impaired and any impairment was four hours ago.1T42:13-14; 1T43:14-21. Sgt. Callan told the other officers on the recording that Mr. Corkin was refusing to do the field sobriety tests and that: "I mean, he's definitely – I can smell something coming off his breath that possibly could be an alcohol beverage. I mean, he's much better than when he (sic) had him before, but I think we would have to call the DRE." 1T46:1-9. Sgt Callan testified further

that it was a "maybe" as to whether Mr. Corkin was dwi and possibly it was not alcohol but drug related. 1T68:12–1T69:16.

The Honorable Kevin J. Purvin, J.S.C. denied the defendant's motion to suppress. Da12 .The Court found that Sgt. Callan's testimony was "credible and consistent" and that he had "reasonable suspicion" to stop the vehicle based on the belief that Mr. Corkin was driving while intoxicated. Da21. The Court cited as evidence that Mr. Corkin had "wander[ed] into a stranger's home and fall[en] asleep", as well as his condition at the stationhouse after his first arrest "where he was agitated and smelled of alcohol," as suggesting intoxication. Da21. The Court also cited Mr. Corkin's statement to the police that he "can't drive that car" and was "getting picked up and taken home" as "appear[ing] to intimate that he was impaired." Da21. The Court specifically noted in its ruling that it did not taken into account any alleged traffic violations that occurred after the officer had already decided to pull over Mr. Corkin. Likewise, the Court did not consider Mr. Corkin's demeanor after he was pulled over in deciding the motion. Da21.

The Court addressed and rejected several of the defendant's arguments. The Court rejected the police failure to do sobriety tests after the first arrest (which defendant argued supported an inference that Mr. Corkin was not intoxicated) on the grounds that he was being investigated for criminal trespass

and not drunk driving at that time and that there was "no clear evidence" that the defendant had recently operated a vehicle. Da21-22.

The Court also rejected the defendant's argument that since he had been at the police station for over two hours that he had sobered up. The Court found that Sgt. Callan's observation about alcohol on the defendant's breathe and his overall condition occurred approximately one hour before Mr. Corkin started driving the vehicle. Da22.

The Court also rejected the defendant's argument that the police would not have released him if they truly believed he was too intoxicated to drive and instead accepted the State's argument that the police believed Mr. Corkin when he stated that he would not drive the car. The Court accepted Sgt. Callan's testimony that a person who is too intoxicated to drive is not necessarily too intoxicated to be released from police custody. Da22.

LEGAL ARGUMENT

THERE WAS NO ARTICULABLE REASONABLE BASIS TO STOP THE VEHICLE THAT MR. CORKIN WAS DRIVING (Raised Below Da12)

We submit that the trial court erred as a matter of law in denying Mr. Corkin's motion to suppress the stop of the vehicle.

Under both New Jersey and United States law, "[i]t is well settled that the

police may arrest only if they have probable cause; may stop for brief investigatory questioning if they have an articulable, reasonable basis for suspicion; and they may make an inquiry without any grounds for suspicion." State v. Sirianni, 347 N.J. Super. 382, 387 (App. Div. 2002) (citation omitted). This case involves whether the State has proven that it had an articulable reasonable basis to stop the car, a so-called Terry stop after the United States Supreme Court landmark decision, Terry v. Ohio, 392 U.S. 1 (1968).

In State v. Alessi, 240 N.J. 501, 517 (2020), the New Jersey Supreme Court, in a case involving the stop of a motor vehicle, reaffirmed the governing principles of a Terry stop as follows:

> Both the United States and the New Jersey Constitutions protect citizens against unreasonable searches and seizures" State v. Mann, 203 N.J. 328 (2010) (quoting State v. Amelio, 197 N.J. 207, 211 (2008)…" Generally, a warrantless search or seizure is invalid absent a showing that it "falls within one of the few well-delineated exceptions to the warrant requirement" (citations omitted). These exceptions include investigatory stops, also known as Terry stops…

When the State seeks to proceed on the basis of a Terry stop, it "must now prove by a preponderance of the evidence that this presumptively invalid investigatory stop was constitutional. If the State cannot meet its burden, then

we will suppress the fruits of the stop…" Id. at 518.

The Alessi court then set forth the governing criteria in judging whether a Terry stop was legal:

> The State must show the stop was "based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity." Mann, 203 N.J. at 338, (quoting State v. Pineiro, 181 N.J. 13 ,20 (2004). Put differently, we must "assess whether 'the facts available to the officer at the moment of the seizure…warrant[ed] a [person] of reasonable caution in the belief that the action taken was appropriate." Ibid. quoting Pineiro, 181 N.J. at 21. While reasonable suspicion is a "lower standard" than probable cause, State v. Stovall, 170 N.J. 346, 356 (2002), neither "inarticulate hunches" nor an arresting officer's subjective good faith can justify infringement of a citizen's constitutionally guaranteed rights". State v. Arthur, 149 N.J. 1, 8 (1997) (quoting Terry, 392 U.S. at 21. We evaluate the totality of the circumstances to determine whether an officer had a reasonable suspicion that justified an investigatory stop. Pineiro, 181 N.J. at 22.

Alessi at 518.

The Alessi Court also confirmed the standard for review by the appellate

courts of these motions: The trial court's legal conclusions are owed no deference and are reviewed de novo. The trial court's factual findings, on the other hand, "should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction." Id. at 517. Finally, the Alessi Court stressed that these motions involved a "highly fact intensive inquiry" and that "[e]ach case exists on a spectrum of permissible and impermissible investigatory stops" and that the court "must place ourselves in the shoes of a reasonable officer and consider the knowledge available to [the officer] at the time he pulled defendant over." Id. at 521.

We submit that there was not a reasonable basis for the police to conduct a Terry stop in this case. As set forth above, Mr. Corkin was found fast asleep in a third parties' home at approximately 8:17 pm. There were no liquor bottles found around the room or on Mr. Corkin's person suggesting recent infusion of alcohol. The police did smell alcohol on his breath. Mr. Corkin was charged and processed for criminal trespass and released on his own recognizance unaccompanied by any person at around 10:45 pm. He literally walked out of the police station on his own. He had been at the police station for a period of approximately two-and one-half hours. The police released him on his own based on the police's conclusion that he was not a danger to himself or others. The police claimed to believe he was intoxicated but declined to

conduct any field sobriety or alcohol tests and thus lacked any objective proof that he was intoxicated at the time of his release.

Subsequently, Sgt. Callan saw Mr. Corkin's vehicle pulling out of the curb in front of the home where the criminal trespass had occurred and, even though he observed no independent traffic violations and did not even see who the driver was, instituted a stop of the car based on the belief that it was Mr. Corkin operating the vehicle and that he was intoxicated.

This stop should be suppressed for a number of reasons. As noted above, the police had no objective evidence that Mr. Corkin was legally intoxicated. They did not recover any liquor bottles at the house where he was arrested. They declined to do field sobriety tests or an Alcotest. He was not seen by an DRE. He was not examined by a nurse or medical technician. They released him to walk out of the station unaccompanied even though he was only three blocks from the car and the house. Thus, there was no independently reliable evidence that Mr. Corkin was intoxicated. Sgt. Callan testified that based on his observation of Mr. Corkin and the smell on his breath that Mr. Corkin was intoxicated but his decision to release him on his own with just a warning not to drive suggests otherwise.

The amount of time that Mr. Corkin was at the police station and the police willingness to let him walk out on his own undermines the State's

position that he was intoxicated. Sgt. Callan acknowledged that Mr. Corkin had made a lot of improvement during the two- and one-half hours he was at the police station "in terms of feeling better, talking better, acting better." 1T61:21-25. Sgt. Callan testified that he was not a danger to himself or others but nevertheless was too intoxicated to operate a vehicle. The State argued below that there is a legal difference between being a danger to one self or others via impairment and a supposedly lower level of intoxication that prohibits operating a vehicle. This appears to be an after the fact rationalization - the purpose of the dwi laws is to prevent a person from driving while intoxicated to avoid injury or death to oneself or others.

We believe the failure of the police to conduct field sobriety or other alcohol tests after the first arrest is also telling. Sgt. Callan testified that since the police did not see Mr. Corkin operate the car that there was no basis to even consider a dwi charge. The caselaw in New Jersey is clear that operation can be inferred and need not be seen directly by the police. Even an intent to operate a car in the future and not actual operation can result in a dwi conviction. State v. Mulcahy, 107 N.J. 467 (1987) (intoxicated defendant in car attempting to put key in ignition but stopped by police officer satisfied the operation element.) It is sufficient if there is circumstantial evidence that generates an inference that the vehicle was operated and the defendant was the operator. State v. Grant,

196 N.J. Super 470 (App. Div. 1984). (proof of intoxication, defendant asleep behind wheel of car with engine off, and its unusual place of rest on shoulder of highway taken together to show operation - the evidence raises a fair inference that defendant drove the vehicle to the location while intoxicated.) See also State v. Dickens, 130 N.J. Super 73 (App. Div. 1974) (defendant found sleeping on the highway with lights and engine on and admitted prior drinking and prior driving). A defendant's simple admission that he drove the car can also satisfy the operation requirement. Sgt. Callan admitted that he knew Mr. Corkin must have driven to the house. 1T59:9-16.

In this case, the police had evidence at 8:17 pm to do the field sobriety tests if they believed Mr. Corkin was intoxicated. They smelt alcohol on Mr. Corkin's breath. A car registered to his mother was parked directly outside the house where Mr. Corkin was found fast asleep. He was not a resident of Rutherford but resided at that time in North Arlington. The police believed that Mr. Corkin had driven the car to the house and repeatedly warned him not to return to the car and drive it when they released him. Yet, the police allowed him to walk out of the police station on his own. It is a reasonable conclusion that the police did not believe Mr. Corkin was intoxicated at the time of his release.

The police also accepted Mr. Corkin's assurances that he was not

planning to operate the car after his release and therefore no field sobriety tests were required. This too suggests that the police did not believe he was legally intoxicated – otherwise they are accepting the word of a person allegedly too intoxicated to drive that he will not drive. Under John's Law, N.J.S.A. 39:4-50.23, the police are required to impound the vehicle of a driver charged with dwi for 12 hours for the express purpose to prevent the person from operating the vehicle again while still impaired. The companion statute N.J.S.A. 39:4-50.22 allows a person charge with dwi to be released to a third party who appears at the police station, takes custody of the person and warrants under penalties of civil and criminal penalties that the person will not drive until sober. Otherwise, they must stay at the station until sober or be taken to a hospital to be held until sober. Here, the police instead allowed Mr. Corkin to walk out the door on his own.

Sgt. Callan's reason for returning to the house where the criminal trespass took place is also significant. Sgt. Callan testified that he did so "to make sure [Mr. Corkin] doesn't attempt to get back in the house" as the homeowner was scared that Mr. Corkin was going to return. 1T30:1-19. Sgt. Callan was not concerned about Mr. Corkin driving the car since he had been told not to drive. 1T66:4-17. In sum, while Sgt. Callan testified that Mr. Corkin was intoxicated, he and the other officers did not act in a manner consistent

with that purported belief.

The stop itself is deficient for additional reasons. Sgt. Callan did not even know the identity of the driver until the vehicle was stopped after a police chase. He did not see who entered the car or who was driving it prior to the stop. He "assumed" the driver was Mr. Corkin. 1T32:23-24. Sgt. Callan also was clear that he observed no independent motor vehicle violations prior to signaling for the vehicle to stop. Thus, the State's argument for a valid Terry stop rests on the actions and observations of Mr. Corkin at the police station on the first arrest earlier in the evening even though he was found not to be a danger to himself or others and was permitted to walk out of the police station alone.

Sgt. Callan himself was not sure if Mr. Corkin was under the influence of alcohol when pulled over. He told the other officers on the body camera recording that "I mean, he definitely – I can smell something coming off his breath that possibly could be an alcohol beverage (emphasis added). I mean, he's much better than when he (sic) had him before, but I think we would have to call the DRE". 1T46:1-7. He testified that "maybe" it was drugs or alcohol. 1T68:12 -1T69:16.

The New Jersey Supreme Court has long stressed that "raw, inchoate suspicion grounded in speculation cannot be the basis for the stop." State v.

Scriven, 226 N.J. 20, 34 (2016). Rather, the reasonable suspicion standard requires "some minimal level of objective justification for making the stop." State v. Nishina, 175 N.J. 502, 511 (2003), (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989); State v. Puzio, 379 N.J. Super 378, 382-384 (App. Div. 2005) (reversing the defendant's dwi conviction where police officer did not have objectively reasonable basis for believing the defendant had committed a motor vehicle offense – stop was based on an "entirely erroneous reading of the statute" and officer's good faith misinterpretation did not save the stop).

In Alessi, the New Jersey Supreme Court held:

> We reiterate that "our constitutional jurisprudence evinces a strong preference for judicially issued warrants" and an investigatory stop is an exception justified only by reasonable suspicion of involvement in a crime. Elders, 192 N.J. at 246. To validate such a stop, the State must proffer more than disconnected facts supporting varying conclusions about a defendant's conduct; rather the State should highlight specific and articulable facts which, taken together with rational inferences from those facts, demonstrate how the defendant's actions were more consistent with guilt than innocence, thereby amounting to reasonable suspicion of criminal activity.

Id. at 524.

Based on this case law and the facts of this case, we submit that there was insufficient basis for the police to stop the vehicle. The police testimony about Mr. Corkin's alleged intoxication is inconsistent with their actions as set forth above and, in our view, cannot be said to be more consistent with guilt than innocence. The stop should be suppressed, the fruits of the stop should be excluded from evidence and the dwi conviction vacated. State v. Smith, 155 N.J. 83,100 (1998). ("Evidence obtained as the fruit of an unlawful search or seizure must be suppressed.")

CONCLUSION

For the foregoing reasons, it is requested that this Court reverse the decision of the Court below, suppress the stop of the vehicle, vacate the dwi conviction and provide such other and further relief as the Court deems appropriate.

Dated: January 2, 2025

Respectfully submitted,

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APPELLATE DIVISION
DOCKET NO. A-0409-24T5

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Bergen County
v.	:	
KEVIN J. CORKIN, A/K/A KEVIN CORKIN,	:	Sat Below:
Defendant-Appellant.	:	Hon. Kevin J. Purvin, J.S.C.

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May 5, 2025

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TABLE TO APPENDIX[1]

TABLE OF AUTHORITIES

[1] Pa1 to 26 were omitted from defendant's appendix, and are essential to understanding the procedural history of this case and issues raised herein. See R. 2:6-1(a)(1)(I). Pa27 is the excerpts of the police's body-cam footage that were entered in evidence for the motion to suppress. (1T90-12 to 92-12).

STATUTES

TABLE OF CITATIONS

"Da" refers to the appendix to defendant's brief.
"Pa" refers to the appendix to the State's brief.
"Pb" refers to the State's brief.
"1T" refers to pretrial-motion proceedings on October 26, 2023.
"2T" refers to plea proceedings on March 11, 2024.
"3T" refers to sentencing proceedings on September 27, 2024.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On the night of November 21, 2021, defendant Kevin Corkin was charged in a complaint-summons, No. S-2021-0095-0256, and in a complaint-warrant, No. W-2021-0096-0256, arising from two separate arrests. (Pa1 to 17). The first arrest occurred after 8:17 p.m., when a 9-1-1 call was placed, because defendant had entered a stranger's dwelling without permission, and was found asleep in her bed. (Pa5). Defendant was thereafter charged by complaint-summons, No. S-2021-0095-0256, with fourth-degree criminal trespass. (Pa1 to 7). During processing, defendant was told by police to not operate his vehicle due to his intoxicated impairment. (Pa15; Da14 to 16). He was released from custody around 10:45 p.m., after assuring the police that he would not drive his car. (Pa15; Da14 to 16).

The second arrest occurred shortly after 11:03 p.m., when defendant returned to his car that was parked outside the victim's home, drove it away, and refused to submit to a motor-vehicle stop, instead speeding his car up to 60 miles per hour (mph) in a 25-mph zone. (Pa15; Da4; Da14 to 17). As a result of that incident, the details of which are fully developed in the State's Counterstatement of Facts, defendant was charged in a complaint-warrant, No. W-2021-0096-0256, with the following crimes: third-degree eluding, fourth-degree throwing bodily fluid at a law-enforcement officer, and fourth-degree

obstruction (for refusing to be fingerprinted and photographed at the station). (Pa8 to 17). Defendant also was issued five traffic tickets: (1) driving while intoxicated, in violation of N.J.S.A. 39:4-50; (2) speeding, in violation of N.J.S.A. 39:4-98 and -99; (3) careless driving likely to endanger a person or property, in violation of N.J.S.A. 39:4-97; (4) refusal to submit to a chemical test, in violation of N.J.S.A. 39:4-50.4a; and (5) consent to taking samples of breath, in violation of N.J.S.A. 39:4-50.2. (Da3 to 7).

On April 27, 2022, a Bergen County Grand Jury returned Indictment No. 22-04-0395-I, charging defendant with the following crimes related to both of his arrests: fourth-degree criminal trespass, in violation of N.J.S.A. 2C:18-3(a), under Count One; second-degree eluding, in violation of N.J.S.A. 2C:29-2(b), under Count Two; fourth-degree throwing bodily fluid at a law-enforcement officer, in violation of N.J.S.A. 2C:12-13, under Count Three; and fourth-degree obstruction (of an officer from lawfully performing an official function), in violation of N.J.S.A. 2C:29-1(b).[2] (Da1 to 2).

On September 15, 2022, defendant filed a motion to suppress, challenging the stop of his vehicle and the charges stemming from his second arrest. (Pa18 to 19; Da14 to 18). After an evidentiary hearing on October 26,

[2] Count One stemmed from the first arrest; Counts Two to Four stemmed from the second arrest. (Da1 to 2).

2023, (1T), and supplemental briefing by the parties, the Honorable Kevin J. Purvin, J.S.C., denied the motion, in a written order and opinion, on December 7, 2023, finding that the stop of defendant's vehicle was lawful and supported by reasonable-and-articulable suspicion. (Da12 to 23).

On March 11, 2024, defendant entered into a consolidated plea agreement for Indictment No. 22-04-0395-I and the related traffic tickets. (Pa20 to 26; 2T3-1 to 6-21). As for Indictment No. 22-04-0395-I, defendant pleaded guilty to fourth-degree criminal trespass (Count One) in exchange for the State's sentencing recommendation of two years' probation, conditioned on serving 180 days in jail.[3] (2T3-11 to 6-21; Pa23).

As for the traffic tickets, defendant pleaded guilty to driving while intoxicated (DWI) under Motor Vehicle Ticket No. E21-8127-0256, which was defendant's third DWI offense. (2T3-11 to 6-21; Pa20; 3T7-5 to 9). In exchange, the State agreed to recommend the mandatory-minimum jail sentence, fines, and penalties for a third DWI offense, and for the DWI's minimum-jail sentence of 180 days to run concurrently to the criminal trespass's 180-day-jail condition of probation. (2T3-11 to 6-21; Pa23). The State also consented to defendant's request to stay the custodial, jail portion of

[3] The recommendation that defendant's 180-day-jail sentence would be a condition of probation was absent from the plea form, but was placed on the record at the plea hearing. Compare (2T3-11 to 6-21) with (Pa23).

his aggregate sentence, pending an appeal of his motion to suppress, and agreed to dismiss defendant's remaining charges and traffic tickets. (2T3-11 to 6-21; Pa25 to 26).

On September 27, 2024, Judge Purvin sentenced defendant in accordance with the plea agreement. (3T12-20 to 17-1; Da24). For the criminal-trespass offense, the judge imposed two years' of probation conditioned on serving 180 days in jail. (3T12-20 to 13-10). And for the DWI offense, the judge imposed a concurrent jail sentence of 180 days, and the fines that were mandatory under N.J.S.A. 39:4-50(a)(3) and (i) (2021), and N.J.S.A. 39:4-50.8. (3T12-20 to 13-20; Da24). The judge also imposed the minimum, two-year requirement for an ignition-interlock device, 48 hours at an Intoxicated Driver Resource Center, and a mandatory, eight-year loss of defendant's driving privileges, in accordance with N.J.S.A. 39:4-50.17(b) (2021), and N.J.S.A. 39:4-50(a) and (b) (2021). (3T13-11 to 16-15; Da24). The judge then dismissed the remaining charges under the indictment, and the other traffic tickets. (3T10-4 to 14; 3T16-16 to 21; Da24).

Additionally, the judge granted defendant's request to stay only the custodial, jail portion of his sentence, pending an appeal of his motion to suppress, giving him twenty days to file a notice of appeal. (3T12-22 to 14-12; Da24). If defendant did not file an appeal within that time, the judge

directed him to report to Bergen County jail on October 18, 2024, to serve his 180-day sentence. (3T13-2 to 14-12; Da24). Defendant surrendered his driver's license to the court at sentencing, in compliance with N.J.S.A. 39:4-50(c). (3T7-5 to 25; 3T16-13 to 15).

On October 15, 2024, defendant filed an Amended Notice of Appeal with this Court, solely challenging the denial of his motion to suppress and his DWI conviction. (Da8).

COUNTERSTATEMENT OF FACTS

This case stems from defendant's choice to operate a vehicle while intoxicated, following his release from a police station for an arrest for criminal trespass, after representing to police that he would not drive his car. In reaction to the motor-vehicle stop that ensued, defendant then disregarded an officer's signal to stop and eluded police, traveling at one point 60 mph in a 25-mph, residential zone to do so. The details of defendant's two separate arrests follow.

A. The motion-to-suppress hearing.

The following facts are derived from Sergeant Vincent Callan's motion testimony, the excerpted body-worn-camera footage that was entered in evidence, and the judge's fact-findings. On November 21, 2021, Sergeant Callan, Officer Travis Ritter, and Officer Katherine Calienni of the Rutherford Police Department (RPD) responded to a dispatch about an intruder in a home on Woodward Avenue in Rutherford. (1T7-13 to 8-22; Da14). A 9-1-1 call had been placed around 8:17 p.m., upon the female homeowner finding defendant—who she did not know, and who had went into her house without permission—asleep in her bed. (1T29-4 to 23; 1T56-15 to 20; Pa27 at 0:06:19 to 0:07:20; Da14 to 15). Ritter and Calienni arrived first on scene, two minutes before Callan's arrival, and found defendant sleeping in the

homeowner's bed with the homeowner's coat on. (1T7-13 to 8-22; 1T56-15 to 58-10; Da15).

Sergeant Callan had twenty years of law-enforcement experience, and had been trained in how to detect impaired drivers, including what signs to look for and how to administer field-sobriety tests. (1T4-21 to 7-21). Over his career, he had conducted hundreds of motor-vehicle stops, and had been personally involved in about twenty DWI arrests. (1T5-18 to 6-25).

Upon arrival, Sergeant Callan entered the Woodward Avenue home and went upstairs, where Officers Ritter and Calienni were speaking with defendant. (1T9-1 to 14). Callan recognized defendant because he had a past case with him, and was able to identify defendant's name after conferring with the desk sergeant jarred Callan's memory. (1T9-1 to 10-20; Da15). Callan was aware defendant lived in North Arlington, and not Rutherford where he was found in someone else's home. (1T7-13 to 10-24; 1T59-6 to 10).

After defendant was arrested for criminal trespass, the officers brought him to RPD headquarters and placed him in the station's arrest room. (1T11-5 to 12-17; 1T56-15 to 58-10). There, after being read his rights, defendant was processed for the criminal-trespass arrest, which included the police fingerprinting defendant, photographing him, and issuing him a complaint-summons. (1T11-5 to 12-17; 1T74-16 to 25; Da15 to 16). The judge found

that defendant was at the station for about two hours.[4] (Da15).

While defendant was at the RPD, Sergeant Callan spoke with him and observed defendant's demeanor. (1T11-25 to 14-23; Pa27). Defendant appeared intoxicated to Callan, based on Callan's training and experience, and the odor of alcohol on defendant's breath. (1T11-25 to 14-23; 1T24-5 to 25; Da15). But because the police did not have proof that defendant in fact operated a vehicle while intoxicated, they did not administer field-sobriety tests while processing defendant for the criminal-trespass arrest. (1T12-24 to 14-23; 1T61-5 to 10; 1T71-25 to 73-6; Da15). Nor did the police charge him with driving while intoxicated (DWI). (1T59-11 to 20). Defendant's vehicle was parked on the street in front of the Woodward home.[5] (1T62-23 to 63-4; 1T72-8 to 17; Pa27 at 0:00:15 to 0:01:26; Da15). Defendant, however, denied that he had been driving. (1T12-24 to 14-16).

A body-cam excerpt of defendant's conversation with Sergeant Callan,

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[4] Sergeant Callan testified, after reviewing his investigation report to refresh his recollection, that defendant was at the station for about an hour-and-thirty minutes while being processed for the criminal-trespass arrest. (1T15-3 to 16-21). On cross-examination, Callan said "okay" to defense counsel's estimation that defendant was at the station for two-hours-and-fifteen minutes. (1T61-12 to 20).

[5] The vehicle was registered to defendant's mother, and Sergeant Callan recognized the car as defendant's from his prior engagement with defendant. (1T72-8 to 17).

from about 10:07 p.m. to 10:12 p.m., was entered in evidence and played at the motion hearing.[6] (1T16-22 to 24-3; 1T90-12 to 92-12; Pa27). Around this time, Callan told defendant, "[y]ou're obviously impaired in some manner. You can't drive your car," and thereafter encouraged defendant to call someone else to pick his car up. (1T19-12 to 22-12; Pa27 at 0:00:14 to 0:04:06; Da15).

Defendant told police, "I'm not driving, I'm walking."[7] (Pa27 at 0:00:14 to 0:00:26; Da15). He also represented to police that he was "taking an Uber." (Pa27 at 0:00:14 to 0:00:33; Da15).

The body-cam footage shows that defendant then shook his head, "no," in response to Sergeant Callan asking if he wanted to call someone to get his car. (Pa27 at 0:00:14 to 0:00:57). But when Callan continued to ask if he wanted to call someone to get his car and to "call a friend," defendant accepted his cellphone, represented he was going to get picked up, and eventually

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[6] Four excerpts of the police's body-cam footage were entered in evidence, spliced together after the motion hearing, and provided to the judge and defense counsel before the written opinion. (1T90-12 to 92-12; Pa27). Some of the spliced footage cuts off before the clip played at the hearing ended. See, e.g., (1T23-7 to 23; Pa27 at 0:04:34 to 0:04:36); (1T53-13 to 54-23; Pa27 at 0:20:13).

[7] The transcript contains an error that defendant responded, "I'm not driving, Mark is." (1T19-12 to 15). The judge made a fact-finding that defendant told police that he was walking. (Da15).

manipulated his phone as if he was going through it. (Pa27 at 0:00:57 to 0:02:19). When Callan asked if defendant was "able to get him" and if they were "going to come get the car," defendant said, "Yeah." (Pa27 at 0:02:18 to 0:02:27). When Callan asked if that person was going to come get the car, "come here," and pick defendant up, defendant said, "No." (Pa27 at 0:02:27 to 0:02:30). Defendant then admitted to police, "I'm getting picked . . . I know . . . I can't drive that car. I'm getting picked up and taken home too."[8] (1T20-24 to 21-5; Pa27 at 0:02:30 to 0:02:38; Da15; Da21).

During their conversation, Sergeant Callan also warned defendant that he could see, through the window, that the key fob for his car was inside "in the center of the coffee cup" with "money all over it," and that someone could rob or steal the car if they pulled the handle. (1T21-6 to 13; Pa27 at 0:02:38 to 0:03:15). Callan also offered to call defendant's brother to pick up the car; but defendant declined and asked if he could just be let go. (Pa27 at 0:03:15 to 0:04:06; Da15 to 16). Callan also told defendant, "I can smell alcohol on you," to which defendant said, "I'm fine." (1T23-8; Da16).

A body-cam excerpt of defendant's conversation with Officer Ritter in

[8] The transcript contains an "indiscernible," that sounds like defendant was getting "taken home too." Compare (1T20-24 to 21-5) with (Pa27 at 0:02:30 to 0:02:38). The judge made a fact-finding that defendant stated, "I can't drive that car. I'm getting picked up and taken home." (Da21).

the arrest room, for which Sergeant Callan was present, was also entered in evidence and played at the motion hearing. (1T16-22 to 19-7; 1T27-12 to 29-24; 1T90-12 to 92-12). The footage was from around 10:33 p.m. to 10:36 p.m., (1T28-2 to 4; Pa27 at 0:08:37), shortly before defendant left the station around 10:45 p.m. (1T27-8 to 18; 1T61-15 to 17). This body-cam excerpt shows that, shortly before defendant was released, he was again told by police, specifically by Officer Ritter, that he was "not in the condition to drive." (1T27-12 to 28-18; Pa27 at 0:05:12 to 0:05:21). Ritter also noted, "I don't want you to get hurt or hurt somebody else." (1T27-12 to 28-18; Pa27 at 0:05:12 to 0:05:38). In response, defendant assured the police that he was "getting picked up" and was not going to drive. (1T27-12 to 28-18; Pa27 at 0:05:12 to 0:05:38).

In going over the complaint-summons, Officer Ritter again told defendant that he could not drive, stating, "[y]ou're not incapacitated right now, so like, you know, you're not – you have your aware with all [sic], you just – you're just not under the condition to drive. There is nothing wrong with being drunk, you just can't drive." (1T27-12 to 28-25; Pa27 at 0:05:38 to 0:05:58) (emphasis added). At the very beginning of the excerpt, Ritter also asked defendant if he was "sure [he did] not need a lift or anything," but defendant declined. (Pa27 at 0:04:47 to 0:04:55; 1T14-2 to 3).

Defendant was released after assuring the police he would not drive, around 10:45 p.m., "walk[ing] out" the front door of the station. (1T26-6 to 27-16; 1T61-15 to 17). Though defendant was intoxicated and too impaired to drive, Sergeant Callan explained that defendant was not a danger to himself (i.e., incapacitated, where he was unable to care for himself), so police did not make him get someone to pick him up.[9] (1T26-10 to 16; 1T65-18 to 66-1; 1T73-7 to 20; Da16). Callan explained that under the Alcohol Rehabilitation Treatment Act (ATRA), officers bring civilians to a hospital if they believe the civilian is a danger to themselves, until the civilian sobers up, but he did not believe that applied in this case. (1T26-10 to 27-7). Callan further explained that in order to allow an intoxicated person to leave on their own under ATRA, they must be able to walk without falling down and be able to care for themselves, and conducting field-sobriety tests is not required. (1T73-7 to 75-2). Callan was not concerned about defendant driving because "[defendant] was told not to drive," (1T65-14 to 66-13), multiple times. (1T73-7 to 75-2).

After defendant's release, Sergeant Callan went back to the Woodward residence where defendant had criminally trespassed, which was about three

[9] Sergeant Callan acknowledged on cross-examination that defendant had made a lot of improvement, from when he was first encountered, in terms of feeling better, talking better, and acting better, to the extent that he was not a danger to himself and could walk out the door by himself. (1T61-21 to 62-10).

blocks from the RPD.[10] (1T10-25 to 11-4; 1T30-1 to 19; 1T75-8 to 13). Callan explained that the homeowner "was scared that [defendant] was going to come back"; so Callan went to the residence to make sure defendant did not attempt to get back in the house.[11] (1T30-1 to 19; 1T66-2 to 17; Da16). The residence was on the corner of an intersection; and Callan parked about 10 feet therefrom, arriving shortly after defendant was released. (1T30-20 to 31-3).

While Sergeant Callan was sitting there, he saw the brake lights of defendant's Buick go on, and the car pull away, heading eastbound on Woodward Avenue. (1T31-4 to 32-3; Da16). Callan did not see who got in the car, including the driver, or observe anyone else in the car besides the driver, and began following the vehicle. (1T31-4 to 32-7; 1T69-17 to 23; 1T75-14 to 17; Da16). Based on the body-cam excerpt that was entered in evidence of the pursuit, and the judge's fact-findings, Callan began following the vehicle around 11:03 p.m.[12] (1T39-20 to 47-16; 1T90-12 to 92-12; Pa27 at

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[10] Sergeant Callan estimated that it took about two minutes to drive from the RPD to Woodward Avenue. (1T75-3 to 13).

[11] Defense counsel acknowledged at the suppression hearing that the police primarily went back to the victim's home to make sure defendant did not go back in the house, and that "[t]heir concern wasn't the driving," acknowledging that the police had told defendant not to drive. (1T78-1 to 22).

[12] Sergeant Callan testified that he believed he activated his body camera when he began following the vehicle, but that the body cameras have a thirty-second delay. (1T39-10 to 41-3). The excerpt shows the car's dashboard

0:08:40; Da16).

After Sergeant Callan closed the distance between him and the vehicle, and was about two blocks from it, he activated his car's lights and siren to initiate a motor-vehicle stop, because defendant had been impaired at the station and he assumed defendant could have been driving the vehicle.[13] (1T32-8 to 24; Da16). Before Callan activated his lights and siren, he did not observe any other motor-vehicle violations. (1T32-8 to 24).

Even though Sergeant Callan activated his lights and siren to pull over the vehicle, the car did not do so. (1T33-13 to 36-1). Instead, the car would pretend like it was going to stop, and then continue. (Pa27 at 0:08:40 to 0:11:18; 1T41-12 to 13; Da16). At one point, Callan paced the vehicle going 60 mph, in a 25-mph zone, in a residential neighborhood; and observed the car "t[ake] off" when it "got to the light above Route 3," which appeared to Callan like the car was eluding him. (1T33-13 to 36-1; Da16).

Sergeant Callan testified that the pursuit lasted about four to five minutes, and acknowledged on cross-examination that the body-cam footage recorded about three minutes of the chase. (1T36-22 to 23; 1T66-18 to 67-5).

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during the pursuit because it was not possible to train the body-cam on the road while Callan was driving. (1T39-10 to 18).

[13] Sergeant Callan acknowledged that it was possible another person, like defendant's friend or brother, was driving the car away. (1T70-1 to 16).

The pursuit only ended because Callan pulled up behind the Buick when it stopped at a red light, while a patrol car from the Lyndhurst Police Department (PD) boxed it in near the vehicle's front.[14] (1T36-14 to 37-2). Callan gave an uncertain estimate that the Buick had travelled about a half-mile, from Woodward Avenue to where it ultimately stopped in Lyndhurst, at Park and Riverside Avenues.[15] (1T37-3 to 9; 1T41-21 to 24; Da17).

Once the Buick stopped, around 11:07 p.m., Sergeant Callan approached the driver's side of the vehicle, and told defendant, who was the driver, to "shut the car off." (1T37-10 to 22; Pa27 at 0:11:07 to 0:11:38; Da17). Defendant was speaking to his mother, on his cellphone, that he was holding in his hand. (1T37-10 to 22; Pa27 at 0:11:24 to 12:15). When defendant popped the door to have it ajar, Callan fully opened the driver's door, and again told defendant to "shut off" the car. (Pa27 at 0:11:24 to 0:11:31). He also directed defendant to give him the keys to the car, and to exit the vehicle. (Pa27 at 0:11:31 to 0:11:48; 1T37-16 to 19). Defendant did not promptly heed the police's command to exit his vehicle, and told the officer he "literally just

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[14] During the pursuit, Sergeant Callan notified Lyndhurst PD that he was in pursuit of the Buick headed into its town, (1T36-14 to 21), and gave updates over the radio of the vehicle's description and where he saw it heading. (Pa27 at 0:08:40 to 0:11:18).

[15] Google Maps estimates the distance between the victim's house, and Park and Riverside Avenues, is 2.2 miles. (Pa5) (noting victim's address).

left." (Pa27 at 0:11:31 to 0:12:17; Pa27 at 0:13:00 to 0:13:14).

Defendant appeared "very agitated" to Sergeant Callan during the stop, and claimed he did not know why he was being pulled over. (1T37-23 to 38-2). Callan was standing about a foot away from defendant while he was speaking with him, and could still detect the odor of alcohol on defendant's breath. (1T38-3 to 9). Eventually, defendant exited the vehicle, to a safe area on a sidewalk, where Officer Ritter and Callan tried to have defendant perform field-sobriety tests that defendant refused to do. (1T38-3 to 22; Pa27 at 0:13:00 to 0:15:25).

During the stop, Sergeant Callan reminded defendant that he was told not to drive the vehicle, that he gave defendant an opportunity to call someone to get his vehicle, and that defendant said he was not going to drive and was getting an Uber. (Pa27 at 0:13:33 to 0:15:15). During the stop, defendant asked how he was not fine to drive, alleged he was fine, and fine to drive, and claimed that the police were "harassing" him. (Pa27 at 0:11:07 to 0:17:25; 1T54-1 to 20; 1T67-9 to 14; Da17). When Callan noted defendant was under the influence before, defendant said, "Yeah, four hours ago," acknowledging that he had been under the influence. (Pa27 at 0:13:24 to 0:13:47).

Based on Sergeant Callan's observations of defendant, in light of his training and experience, he believed defendant was still intoxicated to the

point where he could not operate a vehicle. (1T38-23 to 39-2). After defendant refused field-sobriety tests though, Callan sought another officer's direction about the refusal. (Pa27 at 0:15:25 to 0:16:32).

During the phone discussion, for which only Sergeant Callan's answers can be heard, Callan said that he still could smell something coming off defendant's breath "that possibly could be an alcoholic beverage," noting that defendant was "much better than before, but I think we would have to call the DRE," given defendant was refusing field-sobriety tests and asking to be brought in, and asked the other officer what should be done.[16] (Pa27 at 0:15:25 to 0:16:32; 1T68-12 to 69-16). While Callan was on the phone, defendant can be heard admitting to other officers that, "Yeah, I had something to drink, you can smell alcohol on me," though claiming he was fine and not under the influence. (Pa27 at 0:16:12 to 0:16:23). Defendant was thereafter arrested for eluding, as well as driving while intoxicated. (1T38-23 to 39-9).

After defendant was arrested, he was taken back to the RPD and placed in the arrest room again where he was earlier. (1T48-16 to 18). Upon his arrival back to the RPD, defendant appeared "very agitated" to Sergeant Callan. (1T48-19 to 21; 1T70-21 to 71-1). And based on defendant's "irate"

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[16] Sergeant Callan testified that he was not certain that defendant's intoxication was due to alcohol and that maybe it was a drug issue. (1T68-12 to 69-16).

behavior when they returned to headquarters, the smell of alcohol emitting from his breath, in light of Callan's training and experience, Callan believed that, though defendant's impairment had improved from earlier, defendant was still under the influence to the degree where it was still not safe for him to operate a vehicle. (1T48-19 to 49-7; 1T54-25 to 55-6).

Like the field-sobriety tests, defendant also refused to do an Alcotest, and was read the statutorily required refusal warnings. (1T49-15 to 24). He was issued motor-vehicle summonses, including driving while intoxicated, careless driving, speeding, and refusal to submit to breath testing. (1T48-9 to 15; 1T55-11 to 14). And he was charged with third-degree eluding in a complaint-warrant. (1T55-11 to 24; Pa8). Defendant also was charged with fourth-degree throwing bodily fluid at a law-enforcement officer (for spitting at Sergeant Callan during the second arrest's processing, which bodily fluid hit the arrest room's desk), and fourth-degree obstruction (for refusing to be fingerprinted and photographed at the station). (Pa8 to 17; 1T70-21 to 24).

A body-cam excerpt of the processing of this second arrest was entered in evidence and played at the motion hearing. (1T50-6 to 54-23; 1T90-12 to 92-12). During the second arrest's processing, defendant admitted to speeding up when he noticed Sergeant Callan following him, stating, "I was driving fine, yet you want to speed up behind me? Yeah, I'm going to . . . speed up."

(1T53-9 to 12; Pa27 at 0:20:00 to 0:20:13). Defendant also said that he would have pulled over and fought the officers, alleging they "would have literally" had to shoot him to stop him. (1T52-13 to 53-12; Pa27 at 0:19:15 to 0:19:25).

1. Motion Judge's Ruling.

After reviewing the parties' submissions and crediting Sergeant Callan's testimony, the judge denied the motion to suppress in its entirety, ruling the stop was lawful and justified by reasonable-and-articulable suspicion. (Da12 to 23). The judge found that Callan had reasonable suspicion that defendant was driving while intoxicated based on the police's observations of his intoxicated state at the station. (Da21 to 23). The judge found "[d]efendant's condition at the stationhouse, where he was agitated and smelled of alcohol, suggested intoxication." (Da21). And the judge noted that the case's genesis—where defendant had wandered into a stranger's home and fallen asleep—raised initial alarms for the officers and informed their suspicion that defendant was driving under the influence. (Da21). The judge also found that defendant "appeared to intimate [himself] that he was impaired," stating "I can't drive that car. I'm getting picked up and taken home." (Da21).

The judge further found that, "[b]ased on the [police's] conversation [with defendant] at the stationhouse, it was apparent that no one was going to pick up [d]efendant's car from . . . where it was parked. Thus, Sergeant Callan

had reason to believe that [d]efendant was driving the car." (Da22).

The judge disagreed with defendant's argument that enough time had elapsed between his first arrest and the stop to allow him to sober up. (Da22). The judge found that Sergeant Callan's observations of defendant's intoxicated condition at police headquarters—and when he told defendant that he smelled like alcohol—occurred between 10:07 p.m. and 10:12 p.m., that defendant was eventually released after 10:42 p.m., and that he began to drive his car around 11:03 p.m. The judge also rejected defendant's argument that the officers presumably would not have released defendant if he was "still too intoxicated to drive"—finding, "as S[ergeant] Callan asserted, [that] a person who is too intoxicated to drive is not necessarily too intoxicated to be released from police custody." (Da22). The judge further found that "[d]efendant's repeated assurances that he would not drive gave the officers reason to believe that he would not, in fact, do so." (Da22).

The judge also rejected defendant's argument that the officers' non-administration of sobriety tests, following his first arrest for criminal trespass, discredited their observations of defendant's intoxication. (Da21 to 22). The judge credited that the officers were investigating criminal trespass at that time, and did not have clear evidence that defendant had operated his vehicle while intoxicated. (Da21 to 22). The judge ruled that later, however, Sergeant

Callan had reasonable suspicion, under the totality of circumstances, that defendant was driving under the influence when he saw defendant's vehicle being driven away, and lawfully conducted the motor-vehicle stop.

B. Defendant's guilty plea.

On March 11, 2024, defendant entered into a plea agreement for Indictment No. 22-04-0395-I and his traffic tickets. (2T3-1 to 6-21; Pa20 to 26). As to Indictment No. 22-04-0395-I, defendant pleaded guilty to fourth-degree criminal trespass and admitted the following facts under oath: that on November 21, 2021, defendant entered the dwelling on Woodward Avenue in Rutherford. (2T3-1 to 6-21; 2T11-22 to 12-12). Defendant admitted that he knew what he was doing was wrong, and that he knew he was not licensed or permitted to enter the dwelling. (2T12-1 to 12). This criminal-trespass charge did not stem from defendant's motor-vehicle stop, and is thus unrelated to the denial of the suppression motion that he is challenging on appeal.

As to defendant's traffic tickets, defendant pleaded guilty to a third DWI offense. (2T3-1 to 6-21). Defendant acknowledged that, later on the same day as his criminal-trespass offense, he operated a motor vehicle, while impaired by alcohol.[17] (2T12-1 to 13-9). This appeal follows.

[17] The plea transcript has a scrivener's error as to the DWI's specific date. See (2T12-1 to 16).

LEGAL ARGUMENT

POINT I

THE JUDGE PROPERLY RULED THAT THE STOP OF DEFENDANT'S VEHICLE WAS SUPPORTED BY REASONABLE-AND-ARTICULABLE SUSPICION.

The judge properly denied defendant's motion to suppress. Under the totality of this case's circumstances, Sergeant Callan objectively had reasonable suspicion to stop defendant's vehicle on two bases: (1) that defendant was driving the car while intoxicated, or (2) that someone else was stealing the vehicle, which had the key fob visible inside with "money all over it." Defendant's failure to adhere to the stop, and unsafe elusion of police, also was an intervening act that constituted a break in the chain from the originally initiated stop, thus rendering any evidence incident to defendant's eluding arrest admissible under the attenuation doctrine. For these reasons, this Court should affirm.

A. The judge's findings of fact, based on his review of the body-cam footage and the sergeant's credited testimony, are entitled to deference.

An appellate court's scope of review of the trial court's factual findings and credibility determinations is limited; they must be upheld so long as they are "supported by sufficient credible evidence in the record." State v. Handy, 206 N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). This is so whether they were "substantially influenced by [the trial court's]

opportunity to hear and see the witnesses and to have the 'feel' of the case," Elders, 192 N.J. at 244, or were based on its review of a video recording. State v. S.S., 229 N.J. 360, 379-81 (2017).

This same rule applies even if an appellate court "might have reached a different conclusion were it the trial tribunal." State v. Robinson, 200 N.J. 1, 15 (2009); see also S.S., 229 N.J. at 374, 380-81. A "trial court's findings should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction." Robinson, 200 N.J. at 15; accord Ornelas v. United States, 517 U.S. 690, 699 (1996) (cautioning that reviewing courts "should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"). Only legal conclusions are not afforded such deference. State v. Alessi, 240 N.J. 501, 517 (2020).

Here, Judge Purvin based his fact-findings on his review of the body-cam footage that was entered in evidence, and Sergeant Callan's testimony. (Da14 to 17; 1T90-12 to 92-12). Callan's credibility was tested on cross-examination; and the judge was in the unique position to observe his demeanor, posture, tone, and responsiveness. In the end, Judge Purvin found Callan's testimony was "credible and consistent." (Da21). And given his credibility determinations and review of the body-cam footage, the judge made

deferential fact-findings that (1) defendant had not sobered up when he was released from the station for his first arrest; that (2) defendant intimated he was impaired when he told officers, "I can't drive that car . . . I'm getting picked up and taken home"; and that (3) defendant represented to the officers, before his release, that he was walking, not driving, and taking an Uber. (Da15 to 16; Da21 to 22).

The judge's findings of fact, based on Sergeant Callan's credited testimony and review of the body-cam footage, are entitled to deference and should not be disturbed. See S.S., 229 N.J. at 379-81 (holding that even if "more than one reasonable inference can be drawn from the review of a video recording, . . . the one accepted by a trial court cannot be . . . clearly mistaken"); State v. Walker, 213 N.J. 281, 290 (2013) (noting testimony of witness—whose credibility had been tested on cross-examination, was largely uncontested, and found credible by judge—was entitled to deference).

B. The sergeant had reasonable-and-articulable suspicion to believe that defendant was driving his vehicle under the influence, or that the vehicle was being stolen.

The judge properly ruled that Sergeant Callan had reasonable suspicion that defendant was driving his car while intoxicated, and therefore lawfully initiated a stop of the vehicle. (Da21 to 23). In addition, Callan objectively had reasonable suspicion that the vehicle was being stolen, given that he had

previously seen the car's key fob inside it, with "money all over it," and could not see who was in the car.

It is well settled that the police may lawfully detain a motorist on less than probable cause in order to investigate suspicious conduct. Adams v. Williams, 407 U.S. 143, 145-46 (1972); Terry v. Ohio, 392 U.S. 1, 22 (1968); State v. Stovall, 170 N.J. 346, 356 (2002). A brief detention is reasonable if the officer can articulate "some minimal level of objective justification" to ensure that the detention was based on "something more" than an officer's "inchoate and unparticularized" hunch. United States v. Sokolow, 490 U.S. 1, 7 (1989); State v. Golotta, 178 N.J. 205, 213 (2003).

This minimal standard, known as "reasonable and articulable suspicion," is met in the context of a motor-vehicle stop when the officer articulates specific facts and circumstances, along with the rational inferences drawn in light of his experience, that, when viewed as a whole, provide a reasonable officer with a particularized and objective basis to suspect that the driver has committed a motor-vehicle offense "or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law . . . ." Terry, 392 U.S. at 21-22; United States v. Cortez, 449 U.S. 411, 417-18 (1981); Alessi, 240 N.J. at 508, 518-21; State v. Zapata, 297 N.J. Super. 160, 171 (App. Div. 1997) (quoting Delaware v. Prouse, 440 U.S. 648, 663 (1979)). Simply put,

"[r]easonable suspicion is not a high threshold." United States v. Lawes, 292 F.3d 123, 127 (2d Cir. 2002).

This level of suspicion requires a showing "considerably" less than a preponderance of the evidence. Kansas v. Glover, 589 U.S. 376, 380 (2020); United States v. Arvizu, 534 U.S. 266, 274 (2002); Stovall, 170 N.J. at 370. Indeed, reasonable suspicion is a "rather lenient test," United States v. Santana, 485 F.2d 365, 368 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974), which "involves a significantly lower degree of objective evidentiary justification than does the probable cause test." State v. Davis, 104 N.J. 490, 501 (1986); see also Golotta, 178 N.J. at 213. For example,

> [r]easonable suspicion . . . can be established with information that is different in quantity of content than that required to establish probable cause, but also . . . can arise from information that is less reliable than that required to show probable cause.
>
> [Alabama v. White, 496 U.S. 325, 330 (1990).]

It also depends on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Navarette v. California, 572 U.S. 393, 402 (2014) (quoting Ornelas, 517 U.S. at 695).

The "essence" of the reasonable-and-articulable-suspicion standard "is that the totality of the circumstances—the whole picture—must be taken into account." Cortez, 449 U.S. at 417; State v. Gamble, 218 N.J. 412, 431 (2014);

Stovall, 170 N.J. at 361. Due weight must be given to the factual inferences drawn by resident judges and local police officers. Arvizu, 534 U.S. at 273-74; State v. Johnson, 171 N.J. 192, 219 (2002). And police training and experience must not be given more than "mere grudging recognition" when assessing the need for police action. Davis, 104 N.J. at 503.

To meet the low standard of reasonable suspicion, the totality of circumstances may include a defendant's behavior viewed through the lens of the officer's training and experience. See Terry, 392 U.S. at 22 (finding reasonable suspicion of criminal activity can be based on individual's behavior); State v. Arthur, 149 N.J. 1, 10-11 (1997); see also State v. Slinger, 281 N.J. Super. 538, 543 (App. Div. 1995) (recognizing proof of intoxication can be based on police officer's observations alone). For example, proof of intoxication for a DWI offense may be based on a police officer's observations of a defendant's demeanor, physical appearance, slurred speech, inability to follow commands, or odor of alcohol, a lay opinion of alcohol intoxication, or a defendant's admission of consumption. See State v. Bealor, 187 N.J. 574, 588-89 (2006). It also may be based on an offender's "loud and abrasive" behavior. State v. Zingis, 471 N.J. Super. 590, 602 (App. Div. 2022) (citing State v. Cryan, 363 N.J. Super. 442, 455-56 (App. Div. 2003)).

Here, Sergeant Callan lawfully stopped defendant's vehicle based on his

reasonable-and-articulable suspicion that defendant was driving the vehicle while intoxicated (DWI). Under N.J.S.A. 39:4-50, a person is guilty of DWI if he "operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic, or habit-producing drug[.]" "Under the influence" of alcohol means a driver's "physical coordination or mental faculties are deleteriously affected," State v. Nunnally, 420 N.J. Super. 58, 67 (App. Div. 2011), and has been defined as "a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway."[18] Cryan, 363 N.J. Super. at 455.

Before defendant's release from his first arrest for criminal trespass, Sergeant Callan told defendant that he was "obviously impaired in some manner," and that he could not drive his car. Callan had been observing defendant's demeanor while he was being processed. Callan had been trained in how to detect impaired drivers, including what signs to look for, and had been personally involved in about twenty DWI arrests. And based on Callan's twenty years of training and experience, defendant's behavior, and the odor of alcohol on defendant's breath, defendant appeared intoxicated to him.

[18] The term also has been generally described as "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit producing drugs," and includes the definition quoted above. See State v. Olenowski, 255 N.J. 529, 548-49 (2023); Bealor, 187 N.J. at 589-90.

The judge credited Sergeant Callan's observations of defendant's intoxicated state. As the judge pointed out, defendant had wandered into a stranger's home and fallen asleep in her bed, which "raised initial alarms for the officers." (Da21). Additionally, the judge found that "[d]efendant's condition at the stationhouse, where he was agitated and smelled of alcohol, suggested intoxication." (Da21). Plus, as the judge found, defendant intimated he was impaired before his release, acknowledging that he "can't drive that car. I'm getting picked up and taken home." (Da21). All told, the judge properly ruled that "the information available to S[ergeant] Callan, whose testimony was credible and consistent, gave rise to a reasonable suspicion of intoxication," (Da21), at the very least.

As the judge further found based on his review of the body-cam footage, not enough time had elapsed for defendant to sober up by his release for the first arrest. (Da22). The judge highlighted that Sergeant Callan's observations of defendant's intoxicated condition, and statement that defendant smelled like alcohol, happened between 10:07 p.m. and 10:12 p.m. (Da22). Defendant was then issued a summons at 10:42 p.m., (Da22), before his release around 10:45 p.m. (Pb11 to 12). Defendant then began driving his vehicle around 11:03 p.m. (Da22).

Indeed, right before defendant's release, between 10:33 p.m. and 10:36

p.m., which was about thirty minutes before defendant drove, Officer Ritter reminded defendant that he was "not in the condition to drive," noting "I don't want you to get hurt or hurt somebody else." (Pb10 to 11). While Ritter acknowledged that defendant was not incapacitated, he still referred to defendant as "being drunk," "not under the condition to drive," and told him that he could not drive. (Pb10 to 11). Thus—given Sergeant Callan's and Ritter's observations of defendant before his release that he was impaired to the degree where it would be improper to drive—when Callan saw defendant's vehicle pulling away shortly thereafter, Callan amply had reasonable suspicion to believe that it was defendant driving the car, while intoxicated. Callan therefore properly initiated a motor-vehicle stop.

This is so even though Sergeant Callan could not see who was driving. Under the totality of circumstances, where defendant's vehicle was about three blocks from the station, and defendant had been reluctant to arrange someone else to pick up his car, Callan had reasonable suspicion that defendant was driving, when he could not see who was in the car. On this point, State v. Williams, 254 N.J. 8 (2023), and Kansas v. Glover, 589 U.S. 376 (2020), are apposite.

In Williams, the Supreme Court held, applying the rationale of Glover, that a data inquiry of a vehicle's license plate, revealing that the owner had a

suspended license, provided reasonable suspicion to stop the vehicle, and infer that the owner was driving, "unless the officer . . . has a sufficient objective basis to believe that the driver did not resemble the owner." 254 N.J. at 15-16, 40-42. If, upon or before stopping the vehicle, it became reasonably apparent to the officer that the driver did not look like the owner whose license was suspended, the officer simply has to cease the stop and allow the motorist to drive away. Ibid. The officer though is not expected to engage in a hazardous chase to determine who the driver is before stopping the vehicle. See id. at 42-43 (rejecting rule requiring visual confirmation of driver). Similarly in Glover, the United States Supreme Court reasoned that a data inquiry of a vehicle's license plate, revealing the car's owner has a revoked driver's license, provides reasonable suspicion for a stop so long as the officer lacked information negating an inference that the owner is the driver. 589 U.S. at 378, 381-83, 385-86 (finding officer drew "entirely reasonable" and "common sense" inference that vehicle's owner was driving).

The same reasoning applies here. Sergeant Callan knew that defendant's vehicle, while registered to his mother, was parked outside the criminal-trespass victim's home, about three blocks from the station. And Callan was aware of defendant's reluctance to arrange for someone to pick up his car. So when Callan saw defendant's vehicle pulling away upon his arrival, and could

not see who was driving or anyone else in the car, it was entirely reasonable for him to suspect that defendant was driving, while intoxicated.[19]

Alternatively, under the totality of circumstances, Sergeant Callan would have objectively had reasonable suspicion that the vehicle was being stolen. Before defendant's release, Callan warned defendant that he could see, through his vehicle's window, that the car's key fob was inside it, with "money all over it," and that someone could rob or steal the car if they pulled the handle. (Pb10). Given that Callan could not see who was in the car when it pulled away, and knowing that the car's key fob was inside with money all over it, it would have been objectively reasonable for Callan to suspect that the car was being stolen, and initiate a stop on that basis alone. See N.J.S.A. 2C:20-10.1 (making theft of motor vehicle crime of third-degree or higher). This reasonable suspicion also would have been heightened when the driver eluded police after the stop's initiation, and "took off" at a "light above Route 3," or travelled 60 mph in a 25-mph zone, to evade the police.

While the vehicle being stolen was not Sergeant Callan's articulated basis for the stop at the suppression hearing, that is of no consequence to the stop's objective legal justification. "'[T]he fact that the officer does not have

[19] The judge also made a fact-finding that, based on the conversation between the police and defendant at the station, "it was apparent that no one was going to pick up [d]efendant's car from the area where it was parked." (Da22).

the state of mind [that] is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" State v. Gonzales, 227 N.J. 77, 98 (2016) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)). The motor-vehicle stop here thus has two objective justifications under the circumstances: reasonable suspicion that either defendant was driving while intoxicated, or that the vehicle was being stolen.

Finally, it is of no moment that defendant was not arrested initially for DWI, or administered field-sobriety tests, while he was being arrested for criminal trespass. This does not affect the reasonableness of the officers' suspicion, in light of their training and experience, defendant's behavior and his smell of alcohol, that defendant was intoxicated. As the judge found, "the police were investigating criminal trespass, not drunk driving, at that time." (Da22). And as Sergeant Callan explained, and the judge credited, there was not clear or sufficient evidence that defendant had in fact operated his vehicle while intoxicated. (Da22; Pb8).

Although "operation" for DWI has been interpreted broadly, and encompasses more than witnessing an offender driving a vehicle, the arrest must be based on the facts known to the officers at the time of the arrest. See State v. Mulcahy, 107 N.J. 467, 476-81 (1987). In Mulcahy, though the Court

found probable to arrest the defendant for DWI based on the officer's observations of the "inebriated" defendant staggering out of a tavern, getting in his car that was illegally parked, and starting to put his keys in the ignition, the Court made a distinction. 107 N.J. at 470-71, 479-80. Relevant here, the Court pointed out that the mere fact Mulcahy's car was on the sidewalk, and he was observed to be drunk at a later time, without more, did not provide probable cause to arrest for DWI. Ibid. The Court reasoned that, under those circumstances, "the officers had no evidence at the time of the arrest as to when the car got there, and there was thus no reasonable basis for the conclusion that the defendant drove the car onto the sidewalk while intoxicated." Id. at 479-80.

Similarly here, Sergeant Callan did not arrest defendant for DWI when he was being arrested for criminal trespass, because Callan believed the police did not have proof that defendant in fact operated his vehicle based on what was known at the time of that arrest. Defendant's car was parked on the street in front of the victim's home, but defendant denied that he had been driving. And like Mulcahy reasoned, and the judge credited, Callan did not have sufficient evidence as to when the car got there, or that defendant had driven the car there while intoxicated. This though did not alter the reasonableness of Callan's observations that defendant was too impaired to drive.

Due to Callan's belief that he lacked proof of operation, however, defendant was not arrested for DWI when he was being arrested for criminal trespass, or directed to perform field-sobriety tests—which require reasonable suspicion of a DWI to perform, when a defendant is being subject to an investigatory detention. See State v. Bernokeits, 423 N.J. Super. 365, 373-76 (App. Div. 2011). And because defendant was not arrested for DWI at that time, the impoundment requirements and third-party-liability provisions under John's Law, N.J.S.A. 39:4-50.22 and 39:4-50.23, did not apply.[20]

Defendant was later released from the station because he assured police that he would not drive, not because the police thought he was not too impaired to drive. He represented to the police that he was "not driving, I'm

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[20] N.J.S.A. 39:4-50.22, under John's Law, directs that law enforcement must provide a third party, accompanying or transporting a DWI arrestee from a law-enforcement agency, with a written statement advising that party of his potential criminal and civil liability "for permitting or facilitating the arrestee's operation of a motor vehicle while the arrestee remains intoxicated."

Under the Alcohol Treatment and Rehabilitation Act (ATRA), N.J.S.A. 26:2B-16, the police have a responsibility to assist an intoxicated person, who is incapacitated, to an intoxication treatment facility. If the intoxicated person is not incapacitated, the police have discretion to assist the person to "his residence or to an intoxication treatment center or other facility." N.J.S.A. 26:2B-16. If the officer is acting solely pursuant to ATRA, and not subjecting the person to an investigative detention, he or she may ask the person to submit to a "reasonable test" to determine if the person is intoxicated, but does not have to do so. Ibid. A person's intoxication can be made on the basis of the officer's observations alone.

walking," that he was "taking an Uber," and that he could not "drive that car. I'm getting picked up and taken home." (Pb9 to 10). And minutes before his release, defendant again assured police that he was "getting picked up" and was not going to drive. (Pb11 to 12). As the judge found, these "repeated assurances that [defendant] would not drive gave the officers reason to believe that he would not, in fact, do so." (Da22). The judge also recognized, "a person who is too intoxicated to drive is not necessarily too intoxicated to be released from police custody." (Da22); accord Olenowski, 255 N.J. at 547 (recognizing that even smallest amount of alcohol can affect individual, and being "absolutely drunk" is not a statutory requirement for DWI).

Sergeant Callan explained that in order to allow an intoxicated person to leave on his own under ATRA, he must be able to walk without falling down and be able to care for himself, and that conducting field-sobriety tests is not required. (Pb12). Thus, because defendant, though intoxicated, was not incapacitated and could care for himself—and was asking to be let go—the police permitted him to leave the station. Shortly before his release, the police had asked defendant if he was "sure [he did] not need a lift or anything"; but defendant declined the offer and represented he was "getting picked up." (Pb11). Callan was not concerned about defendant driving because he was told not to drive, multiples times; and due to defendant's repeated assurances

to police that he would not do so, Callan's belief was reasonable. Callan's belief, however, changed when Callan returned to check the victim's home, shortly after defendant's release, and saw defendant's car being driven away.

That Sergeant Callan prudently sought another officer's advice about defendant's refusal of field-sobriety tests—and during that call noted that he could still smell something coming off defendant's breath "that possibly could be an alcoholic beverage," mentioned that defendant was "much better than before, but I think we would have to call the DRE," and asked the other officer what should be done—does not change the reasonable suspicion that objectively existed, at the time Callan initiated the stop, that defendant was driving while intoxicated. See, e.g., State v. Sutherland, 231 N.J. 429, 439 (2018) (holding State is not required to prove motor-vehicle violation occurred in order to meet reasonable-suspicion standard); State v. Williamson, 138 N.J. 302, 304 (1994). Additionally, while Callan was on the phone, defendant admitted to other officers that, "Yeah, I had something to drink, you can smell alcohol on me," though claiming he was fine and not under the influence.[21]

[21] Defendant's claim that he was fine and not under the influence is immaterial. "[O]nce drivers become intoxicated and operate a motor vehicle, it does not matter . . . whether they realized they were intoxicated or believed they could overcome the effects of intoxication." State v. Hammond, 118 N.J. 306, 315-16 (1990). "[I]ntoxicated drivers pose a significant risk to themselves and to the public. . . . That reality imposes a duty on law enforcement officers to take appropriate steps within constitutional and

(Pa27 at 0:16:12 to 0:16:23; Pb17). And, as the judge found, defendant intimated that he was impaired before he was released, acknowledging, "I can't drive that car. I'm getting picked up and taken home." (Da21).

Under the totality of circumstances, Sergeant Callan objectively had reasonable suspicion to stop defendant's car on two bases: that defendant was driving the car while intoxicated, or that someone else was stealing the car that had the key fob visible inside with "money all over it." Because the motor-vehicle stop was properly based on reasonable suspicion, this Court should affirm the denial of the suppression motion.

C. Defendant's failure to adhere to the stop, and unsafe elusion of the police, also was an intervening act that constituted a break in the chain from the originally initiated stop under the attenuation doctrine.

In addition, defendant dangerously eluded police when Sergeant Callan initiated the motor-vehicle stop, thereby committing an eluding crime. This is significant because, under the attenuation doctrine, defendant's eluding crime is an intervening circumstance that constituted a break in the chain from the originally initiated stop, where any evidence that would be incident to the eluding arrest—such as observations of defendant's intoxication incident to that arrest and during processing for that arrest—would not be subject to

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statutory boundaries to maintain the safety of New Jersey's roads." Golotta, 178 N.J. at 221.

exclusion.

A suspect is "obliged to submit to [an] investigatory stop, regardless of its constitutionality." State v. Williams, 192 N.J. 1, 10-11 (2007) (Williams I); see also State v. Reece, 222 N.J. 154, 172 (2015) ("A suspect is required to cooperate with the investigating officer even when the legal underpinning of the police-citizen encounter is questionable."). When a suspect purposely fails to submit to an investigative stop, especially in a way that endangers the police, himself, or the public, this Court "need not decide whether the officer acted without reasonable suspicion" because such "would not suppress the later discovery of [evidence incident thereto] even if the investigatory stop did not meet acceptable constitutional standards." Williams I, 192 N.J. at 10.

This is because "[a] person has no constitutional right to use an improper stop as justification to commit the new and distinct offense of resisting arrest, eluding, escape, or obstruction, thus precipitating a dangerous chase that could have deadly consequences." State v. Crawley, 187 N.J. 440, 459 (2006) (emphasis added); see also Williams I, 192 N.J. at 17. Indeed, "police officers attempting in good faith, . . . to perform their duties in effecting [a motor-vehicle stop] should be relieved of the threat of physical harm that can result from a high speed motor vehicle chase." State v. Seymour, 289 N.J. Super. 80, 87 (App. Div. 1996).

Under the attenuation doctrine, in evaluating whether evidence is sufficiently attenuated from the taint of an alleged constitutional violation, the Court must examine three factors: "(1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct." Williams I, 192 N.J. at 15 (quoting State v. Johnson, 118 N.J. 639, 653 (1990)). Here, because defendant's eluding crime "broke the link in the chain" from the originally initiated stop, the suppression of evidence incident to that arrest is unwarranted. See Williams I, 192 N.J. 4, 10-11; Seymour, 289 N.J. Super. at 82-88.

Although under the first factor, the time was close between the initiated stop and evidence challenged, that factor is "the least determinative" and is not dispositive here. Williams I, 192 N.J. at 16 (quoting State v. Worlock, 117 N.J. 596, 622-23 (1990)). Critically, factors two and three substantially outweigh factor one in favor of applying the attenuation doctrine.

As to factor three, Sergeant Callan was acting in good faith, on his reasonable belief that defendant was driving his car while intoxicated. Such conduct cannot credibly be described as flagrant misconduct.

As for factor two, the presence of intervening circumstances, such can be the most important in determining whether evidence is tainted. Williams I,

192 N.J. at 16. When analyzing this factor, the most compelling consideration is whether the intervening circumstances are dangerous and require an immediate police response to preserve police or public safety. See State v. Badessa, 185 N.J. 303, 314–15 (2005). And here, "[c]ourts of this State have held that eluding the police and resisting arrest in response to an unconstitutional stop . . . constitute intervening acts[,] and that evidence seized incident to those intervening criminal acts will not be subject to suppression." Williams I, 192 N.J. at 16-17 (citing Seymour, 289 N.J. Super. at 86-87).

The plain language of the eluding statute, N.J.S.A. 2C:29-2(b), requires a motorist to immediately stop his vehicle when signaled by an officer to do so. Seymour, 289 N.J. Super. at 86-87. Instead, defendant here ignored Sergeant Callan's activation of his lights and siren to pull over; and, during the pursuit, he pretended like he was going to stop, but then continued. At one point, defendant sped 60 mph, in a 25-mph zone, in a residential neighborhood. And Callan saw the car "t[ake] off" when it got to a light above Route 3.[22] Indeed, during processing for the second arrest, defendant admitted to speeding up when he noticed Callan following him. (Pb19). Defendant also

[22] Sergeant Callan gave an uncertain estimate that defendant travelled about a half-mile, from the victim's home on Woodward Avenue, to where it ultimately stopped in Lyndhurst, at Park and Riverside Avenues. (Pb15). Google Maps estimates this distance as 2.2 miles.

commented that he would have pulled over and fought the officers, noting they "would have literally" had to shoot him to stop him. (Pb19).

Defendant's flight from police thereby put the public and police at risk, endangering their safety. See Seymour, 289 N.J. Super. at 87. Defendant's response to knowing that he was getting pulled over was to increase his speed to 60 mph, in a 25-mph zone, in a residential area. During the pursuit, a terrible accident could have ensued, involving defendant himself, Sergeant Callan and other officers, or a pedestrian nearby in defendant's path. Defendant's eluding posed a substantial risk of injury to the public, police, and defendant alike. For these reasons, the second attenuation factor weighs heavily in favor of applying the attenuation doctrine here.

While a panel in State v. Williams, 410 N.J. Super. 549, 560-61 (App. Div. 2009) (Williams II), held that obstruction does not "automatically" purge the taint of an unconstitutional stop, that panel merely affirmed the holding in Williams I that such attenuation cases must be reviewed on a case-by-case basis, applying the three-factor attenuation test enumerated in State v. Johnson, 118 N.J. 639 (1990). The panel found the attenuation doctrine inapplicable where a male riding a bicycle around a housing complex peddled away at the sight of the police, was then ordered to stop because he fled, and was grabbed 4-to-5 seconds later, when he threw a box of cocaine to the ground from his

pocket. See Williams II, 410 N.J. Super. at 552-53. But here, defendant dangerously eluded police when Sergeant Callan initiated the stop, speeding 60 mph at one point, in a 25-mph zone, in a residential area. And even in Williams II, the panel distinguished Williams II's facts from the sufficient intervening circumstances in Seymour—where a defendant had similarly fled, like here, in his car to elude a police signal to stop, resulting in a mile-and-a-quarter pursuit that put the police and public's safety at risk. See Williams II, 410 N.J. Super. at 561-63; Seymour, 289 N.J. Super. at 82-88.

Accordingly, the application of the exclusionary rule is unwarranted in this case. The point of these line of cases, like Williams I and Seymour, is that "the law should deter and give no incentive to suspects who would endanger the police and themselves by not submitting to official authority." Williams I, 192 N.J. at 17. It is "farfetched to believe that police officers will attempt suspicionless investigatory stops or pat downs . . . in the hope that a suspect will commit an independent crime that will be the basis for a lawful search." Ibid. And if officers do act in bad faith, which was not the case here, their flagrant misconduct will not satisfy the test under the attenuation doctrine.

A greater need exists to deter suspects from disobeying an officer's command to stop and then fleeing, which is "fraught with the potential for violence because flight will incite a pursuit, which in turn will endanger the

suspect, the police, and innocent bystanders." Williams I, 192 N.J. at 12-13, 17 (quoting Crawley, 187 N.J. at 460 n.7). Indeed, "flight 'from the police in a motor vehicle with the police in vehicular pursuit could endanger [not only] defendant, [but also] the officer, other motorist[s], or pedestrians,'" as evidenced by this case. See Crawley, 187 N.J. at 455 (quoting Seymour, 289 N.J. Super. at 87). For compelling practical and safety reasons, "constitutional decision-making cannot be left to a suspect on the street"; his appropriate recourse is to challenge the stop or search in court. Williams I, 192 N.J. at 13 (quoting Crawley, 187 N.J. at 455, 459). And where suspects do safely submit to a stop, and later resort to the court for recourse, the attenuation doctrine will not apply.

Defendant made a different choice here. Irrespective of whether the officers had reasonable-and-articulable suspicion for the stop, defendant changed the legal landscape by taking the law into his own hands, disobeying Sergeant Callan's command to stop, and dangerously eluding police in his vehicle, putting the public and police at risk. See State v. Herrerra, 211 N.J. 308, 337 (2012). Consequently, defendant's eluding crime is an intervening act that constituted a break in the chain from the originally initiated stop, where any evidence that would be incident to the eluding arrest—such as observations of defendant's intoxication incident to that arrest, and during

processing for that arrest—would be admissible under the attenuation doctrine. See Williams I, 192 N.J. at 4, 10-11; Seymour, 289 N.J. Super. at 82-88. For this additional reason, the denial of defendant's motion should be affirmed.

CONCLUSION

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

Respectfully submitted,

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Dated: May 5, 2025

STATE OF NEW JERSEY, Plaintiff-Respondent, v. KEVIN J. CORKIN, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000409-24 On appeal from the final decision in the Superior Court of New Jersey, Criminal Part, Bergen County Sat Below: Honorable Kevin J. Purvin, J.S.C. Indictment No.: 22-04-00395-I Case No.: BER-21-001114 Date of Submission: May 19, 2025

REPLY BRIEF OF DEFENDANT-APPELLANT KEVIN J. CORKIN

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Appellant, Kevin Corkin, submits this reply brief in further support of his appeal.

LEGAL ARGUMENTS

POINT ONE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS BASED ON THE UNLAWFUL INITIAL STOP

Appellant maintains that the initial stop of the motor vehicle he was driving was unlawful because Sergeant Vincent Callan lacked the requisite reasonable, articulable suspicion to conduct a valid Terry stop.

The State, in its brief on appeal, in our view, picks and chooses among the facts to try to persuade this Court to uphold the decision of Judge Purvin. The difficulty for the State is that it cannot have it both ways. As noted in our initial brief, if the State believed that Mr. Corkin was impaired at the time of the first arrest, it could have made the dwi arrest. The car was found in front of the house where Mr. Corkin was arrested inside sleeping, the car belonged to his mother and neither Mr. Corkin nor his mother resided in Rutherford. Many a defendant has been arrested on a dwi charge on less proofs. Under the State's characterization of the standard of reasonable suspicion as "minimal", (State brief at page 25), the police could have alleged operation of the motor vehicle at the time of the first

arrest if they actually believed he was unfit to drive. It is clear that driving of the vehicle was on the police's mind as they discussed it with Mr. Corkin repeatedly and told him not to drive before he was released after the first arrest. Yet the police choose not to conduct field tests or an Alcotest during the over two hours Mr. Corkin was at the police station presumably because they did not believe he was sufficiently impaired to merit a dwi charge. Significantly, at the end of the first arrest, the police were satisfied to let Mr. Corkin walk out of the police station alone.

The State's argument (as well one part of Judge Purvin's finding) that the focus of the police investigation was on a criminal trespass charge as opposed to a dwi charge and therefore the police did not focus on that charge in the first arrest is likewise questionable. Many police investigations start in one area and quickly expand to other areas. Common examples are motor vehicle stops for motor vehicle violations that quickly expand to drugs and weapons offenses. There is no rule of law enforcement that limits the scope of an investigation to the original focus especially when other motor vehicle and criminal offenses present themselves. It is the hallmark of a good police officer to make broad inquiries.

The irony of the situation is that approximately two- and one-half hours later the police acknowledge that Mr. Corkin is much better in terms of impairment to the point that Sergeant Callan is not sure after the stop of the motor whether Mr.

Corkin is under the influence of alcohol or drugs, and actually suggests calling a DRE expert. Sergeant Callan testified that he went down to the house after Mr. Corkin was released on the first charge not because of concern about Mr. Corkin driving but because the owner of the house was concerned that Mr. Corkin would reenter the house. Sergeant Callan does not see the person who enters the car and does not see any motor vehicle violations by the driver. Instead, he assumes that it is Mr. Corkn and immediately signals the car to pull over.

It is well settled that a Terry stop, defined as a brief seizure by a police officer, is only lawful if based on reasonable suspicion. Terry v. Ohio, 392 U.S. 1, 21 (1968). It is also well settled that mere inarticulable hunches or generalized suspicions are insufficient. See Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979). The New Jersey Supreme Court summarized the scope of the constitutionality of a Terry stop under New Jersey law as follows:

> An investigatory stop is valid only if the officer has a "particularized suspicion" based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing. The "articulable reasons" or "particularized suspicion" of criminal activity must be based upon the law enforcement officer's assessment of the totality of circumstances with which he is faced. Such observations are those that, in view of officer's experience and knowledge, taken together with rational inferences drawn from those facts, reasonable warrant the limited intrusion upon the individual's freedom.

State v. Davis, 104 N.J. 490, 504 (1986). In addition, the New Jersey Supreme Court has stated:

> Neither 'inarticulate hunches' nor an arresting officer's subjective good faith can justify an infringement of a citizen's constitutionally guaranteed rights. Rather, the officer 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.'

State v. Arthur, 149 N.J. 1, 7-8 (1997).

As outlined above, it is well settled that mere inarticulable hunches or generalized suspicions are insufficient. See Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979). It is respectfully submitted that this is exactly what occurred in this case. Sergeant Callan did not see Mr. Corkin either walk towards the car or get in the car or operate the car or even commit a motor vehicle violation. It is clear from these facts alone that the Judge erred in finding that Sergeant Callan had reasonable, articulable suspicion to pull over the vehicle without more. In our view, the police officer was angry because he assumed it was Mr. Corkin who entered the car despite being told not to. However, such anger, and the totality of the circumstances here, does not constitute the reasonable articulable suspicion necessary to conduct the motor vehicle stop in this case.

The State also argues that the police had a reasonable articulable belief that the car was being stolen when observed by the police since the key fob and money were present in view in the car. This theory was only raised in a post hearing brief

submitted by the Prosecutor's Office to the trial court and was not suggested at all by Sergeant Callan throughout his entire hearing testimony or in any police reports. In addition, while Judge Purvin mention the Prosecutor's position in footnote 6 of his written opinion (Da19), he did not refer to it at all in his reasoning for his opinion and did not rely on that theory in any aspect of his actual decision. It is clear that the police action that evening was not based at all on a theory that the car was being stolen. In our view, not only is this not supported at all in any part by the evidence at the hearing, the stolen car argument is even a greater "inarticulate hunch" even if that had even occurred to the police and would not justify the stop of the vehicle.

POINT TWO

THE STATE WAIVED THE ARGUMENT THAT THE ATTENUATION DOCTRINE APPLIES BY FAILING TO RAISE IT BEFORE THE TRIAL COURT BELOW AND CANNOT NOW ARGUE IT NOW FOR THE FIRST TIME ON APPEAL. ALTERNATIVELY, MR. CORKIN'S ACTIONS DID NOT DISSIPATE THE TAINT OF THE UNLAWFUL STOP.

The State argues, for the first time on appeal, that under the Attenuation Doctrine, the act of Mr. Corkin eluding the police acted as an intervening circumstance which constituted a break in the chain from the originally tainted stop. The State argues that the evidence related to the tainted stop would

therefore not be subject to the exclusionary rule. The State's argument fails for two reasons. First, the State cannot, on appeal, raise this argument for the first time. Additionally, even if this Court were to rule that the State is permitted to raise this argument for the first time on appeal, the Court should still find that the attenuation doctrine should not apply under the facts in this case.

It is well settled that certain arguments cannot be raised for the first time on appeal. In State v. Robinson, 200 N.J. 1, 20 (2009), the New Jersey Supreme Court held: "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go the jurisdiction of the trial court or concerns matters of great public interest." (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)); see also State v. Galicia, 210 N.J. 364, 383 (2012) (explaining a reviewing court will generally not consider an issue, including a constitutional issue, that is not raised before the trial court (citing Deerfield Ests., Inc. v. Twp. of E. Brunswick, 60 N.J. 115, 120 (1972))).

Here the State is attempting to raise an alternative argument for the first time on appeal. This argument was not presented to the trial court. It is not related to a jurisdictional issue and it does not concern matters of great public importance.

Therefore, this argument should fail because by not raising it before the trial court, the State has waived this argument.

This argument should also fail because, even if this argument is permitted to be brought for the first time on appeal, the attenuation doctrine should not apply under the facts of this case.

In State v. Williams, this Court considered whether flight from an unconstitutional investigatory stop automatically justified the admission of evidence obtained during the course of the flight. State v. Williams, 410 N.J. Super. 549, 552 (App. Div. 2009). The Court held that the "evidence is admissible only if there is a significant attenuation between the unconstitutional stop and the seizure of evidence and that commission of the offense of obstruction is insufficient by itself to establish significant attenuation." Id. In that case, officers from the Elizabeth Police Department were patrolling in a housing complex courtyard with the purpose to prevent a suspected retaliatory shooting when they observed a male riding a bike. Id. at 553. When the man recognized them as officers, he quickly started pedaling away. The officers ordered him to stop, but he kept peddling away as the officers ran after him. He then slowed down when he saw other officers coming towards him from the front. As the officers grabbed him, he threw a box containing cocaine on the ground. He was arrested and

charged with various drug charges. He moved to suppress the evidence based on the unlawful stop. Id.

The trial court denied defendant's motion to suppress on the ground that defendant's failure to immediately stop his bike established probable cause to arrest him for obstruction even though the stop was unconstitutional. Id. at 554. On appeal, the Court agreed that the officers did not have reasonable suspicion that the defendant was engaged or about to engage in criminal activity. Id. at 555. In analyzing whether the evidence would still be admissible because the defendant had fled from the officers, this Court recognized that the New Jersey Supreme Court held that "evidence the police obtained in apprehending a person who has obstructed an unconstitutional investigatory stop may be admissible if the evidence is 'sufficiently attenuated from the taint' of the unconstitutional stop." Id. at 558-59. (quoting State v. Williams, 192 N.J. 1, 15 (2007)).

The New Jersey Supreme Court in Williams held that the determination of whether the police "have obtained the evidence by means that are sufficiently independent to dissipate the taint of their illegal conduct" requires consideration of three factors: "(1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct." Id. at 559. (Williams, 192 N.J. at 15 (quoting State v. Johnson, 118 N.J. 639, 653 (1990)). The Appellate Division

recognized that the determination "whether evidence is sufficiently attenuated from the taint of a constitutional violation" must be made on a case-by-case basis in light of this three-factor test. Id. at 560. The Court held that the officers in that case did not seize the cocaine "by means that [were] sufficiently independent to dissipate the taint of their [prior] illegal conduct." Id. at 563. (Williams, 192 N.J. at 15 (quoting Johnson, 118 N.J. at 653)).

In this case, the State argues that the Appellant's eluding the police broke the chain from the original stop and therefore the evidence should be admissible. It is respectfully submitted that under the three-factor test, the evidence should not be admissible. As to the first factor, as the State concedes, the time was close between the stop and the evidence being obtained. It was the same pursuit. As to factor two, although Mr. Corkin did not immediately stop, he did not lead the officer on a prolonged chase. The entire pursuit lasted only about half-a-mile and only several minutes and he only briefly reached a speed of 60 miles per hour. There were no accident or injuries. This very brief pursuit should not be considered sufficient to dissipate the taint of the unlawful stop.

As to the last factor, it is submitted that Sergeant Callan acted with flagrant disregard for Mr. Corkin's constitutional rights in initiating the stop without observing any criminal activity or motor vehicle offense. He did not even know for certain who was driving the vehicle and did not observe any motor vehicle

moving violations when he initiated the unlawful stop. The caselaw in New Jersey and the federal courts under Terry is long standing and well established and firm that the police cannot stop a person without meeting the constitutional requirements. This is not a new or novel principle. As a result, under this test, it is urged that this Court find that Mr. Corkin's actions did not dissipate the taint of the unlawful stop and therefore the evidence should be suppressed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the denial of the motion to suppress be reversed and the DWI conviction vacated and dismissed.

Respectfully submitted,

/s/ Paul B. Brickfield

Paul B. Brickfield