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STATE OF NEW JERSEY, vs. KEVIN CONHEENEY	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION App. Docket No.: A-002518-23 Indictment No. 22-06-1110 Case No. 20002925-1 CRIMINAL ACTION Sat Below: The Honorable Lisa A. Puglisi, J.S.C.

REPLY BRIEF ON BEHALF OF

THE DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

The trial court's decision denying the motion to suppress the motor vehicle stop of the Defendant must be reversed as the stop was unsupported by a reasonable and articulable suspicion that he was involved in criminal activity, thus, all evidence obtained as a result of the illegal motor vehicle stop, specifically the Defendant's identity as well as his status as a suspended driver, must be suppressed.

The argument that the Defendant's arrest for driving while suspended was so thoroughly attenuated from the underlying drug investigation such that the exclusionary rule should not be applied should be rejected because this new legal argument was not raised below and it is not supported by the case law.

LEGAL ARGUMENT

POINT I

THE ATTENUATION ARGUMENT, NOW RAISED BY THE STATE IN POINT II OF ITS RESPONSE BRIEF FOR THE FIRST TIME, SHOULD BE REJECTED AS IT WAS NOT RAISED BELOW.

Although an appellate court may consider allegations of errors or omissions not brought to the trial judge's attention if it meets the plain error standard under R. 2:10-2, the court frequently declines to consider issues that were not raised below or not properly presented on appeal when the opportunity for presentation was

available. Generally, unless an issue goes to the jurisdiction of the trial court or concerns matters of substantial public interest, the appellate court will ordinarily not consider it. J.K. v. N.J. State Parole Bd., 247 N.J. 120 (2021); State v. Jones, 232 N.J. 308 (2018); State v. Lawless, 214 N.J. 594 (2013); State v. Robinson, 200 N.J. 1, 20-22 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2022).

The instant appeal involves the application of the typical standard of appellate review of a final decision made by a trial court, which restricts the parties to issues raised below and the record created before the trial court. R. 2:6-2. The State's attenuation argument was never raised below, either in its initial letter brief submitted to the trial court asserting grounds to legitimize the warrantless search and seizure of the Defendant, or in oral argument at the conclusion of the testimony at the suppression hearing. Thus, any alleged attenuation was not explored by either party in the record below. To allow the State to raise this argument for the first time, without affording the Appellant an opportunity to challenge its applicability through the type of rigorous cross-examination available at an adversarial hearing would be unjust.

POINT II

SHOULD THE APPELLATE COURT CONSIDER THE STATE'S ATTENUATION ARGUMENT, IT SHOULD BE REJECTED AS IT IS NOT SUPPORTED BY THE CASE LAW.

The trial court's decision denying the motion to suppress the motor vehicle stop of the Defendant must be reversed for the same reasons expressed in Appellant's initial formal brief. The State's new founded reliance on the attenuation doctrine is misplaced.

In order to conduct a motor vehicle stop, law enforcement must establish a reasonable suspicion for the seizure. State v. Pitcher, 379 N.J. Super. 308 (App. Div. 2005). Reasonable suspicion exists where there is a "reasonable and particularized suspicion" to believe that the individual has just engaged in, or was about to engage in, criminal activity. State v. Stovall, 170 N.J. 346 (2002). "A motor vehicle stop that is not based on a "reasonable and articulable suspicion is an 'unlawful seizure,' and evidence discovered during the course of an unconstitutional detention is subject to the exclusionary rule." State v. Smith, 251 N.J. 244 (2022) quoting State v. Elders, 192 N.J. 224 (2007). Thus, contrary to the argument now presented by the State, the motor vehicle stop which led to the discovery of the Defendant as a suspended driver, is indeed suppressible, and the State's attenuation argument subsumes the same. In fact, the New Jersey Supreme Court in State v. Sutherland, 231 N.J. 429 (2018),

addressed a motion to suppress a motor vehicle stop which led to the discovery of the defendant as a suspended driver and a subsequent indictment charging a violation of N.J.S.A. 2C:40-26. In reversing the Appellate Division, the New Jersey Supreme Court held that the stop was unconstitutional and remanded the matter to the Appellate Division on the issue of the community caretaking doctrine. Id. Yet, the State now argues that the exclusionary rule cannot be applied in the instant matter because law enforcement's discovery of the Defendant as a suspended driver "was so thoroughly attenuated and essentially independent from the underlying drug investigation that led to the challenged stop of his car." Sb 20. This argument should be rejected as the discovery of the Defendant as a suspended driver in this matter was entirely dependent on identifying him and conducting an MDT check during the motor vehicle stop which was solely predicated on suspicion of an alleged drug transaction.

The State's argument also must fail when evaluating the facts and circumstances of the instant case against the test for attenuation established in Brown v. Illinois, 422 U.S. 590 (1975).

First, with regard to the temporal proximity, it was immediately after the unconstitutional stop that law enforcement identified the Defendant by requesting his driver's license. Approximately seven minutes into the motor vehicle stop, law

enforcement ran the Defendant's driver's license and discovered that he was a suspended driver. T:68-1 to 68-13. Thus, this factor militates in favor of the Defendant.

Second, with regard to the presence of intervening circumstances, a determinative intervening circumstance must sufficiently break the chain of causation between the constitutional violation and the recovery of the evidence. State v. Johnson, 118 N.J. 639 (1990). Here, the unconstitutional motor vehicle stop provided law enforcement the opportunity to identify the Defendant and discover his status as a suspended driver. The acquisition of that information was a direct "fruit" of the unconstitutional motor vehicle stop. Simply stated, no intervening circumstance existed to break the chain.

Third, with regard to the purpose and flagrancy of the police conduct, in the instant matter the purpose of law enforcement was "to hit some high narcotics areas." T:18-7 to 18-12.

Analyzing the above factors, it is clear that the attenuation doctrine is inapplicable. In both time and place, the identification of the Defendant as well as the discovery of his suspended driver status sprang directly from the unconstitutional motor vehicle stop.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Order of the lower court denying Defendant's motion to suppress the motor vehicle stop, be reversed and the matter be returned to the lower court for further action.

Respectfully submitted,

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Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-2518-23T4

		CRIMINAL ACTION
STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	On Appeal from Final Judgment of Conviction in the Superior Court of New Jersey, Law Division, Ocean County
v.	:	
KEVIN M. CONHEENEY	:	Sat Below: Hon. Lisa A. Puglisi J.S.C.
Defendant-Appellant.	:	Hon. Dina M. Vicari, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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November 15, 2024

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PRELIMINARY STATEMENT

Toms River Police stopped defendant's vehicle after they had sufficiently established reasonable suspicion to believe defendant, Kevin M. Conheeney, was involved in a drug transaction. To make an investigative stop of defendant, police were only required to establish reasonable suspicion, which is a low threshold. Here, based on the training and experience of the detectives and officers, police had sufficient reasonable suspicion because they saw defendant and co-defendant engage in conduct indicative of a drug transaction in a known high-narcotics area.

This conduct included entering a shopping plaza parking lot in separate cars, co-defendant getting into defendant's car, the pair making a loop around the parking lot, defendant parking an aisle away from co-defendant's car, and then both individuals leaving in their respective cars without either having entered any stores or businesses in the plaza. The officers' suspicion was then confirmed when they pulled co-defendant over and conducted a consensual search of his car which revealed suspected drugs that field tested positive for cocaine. This information was relayed to the officers who conducted an investigative stop and search of defendant's vehicle.

Requiring more than the facts here–such as witnessing a hand-to-hand transaction–would improperly elevate the requisite suspicion standard to

something more akin to probable cause, an ask that has been repeatedly rejected by both the federal and New Jersey courts. Because the officers had reasonable suspicion to conduct and investigatory stop of defendant, the motion judge's ruling of such should be affirmed.

Regardless, defendant has failed to state a claim on appeal on which his requested relief, suppression of evidence, can be granted. The outstanding evidence sought to be suppressed after the motion to suppress was granted in part and denied in part, was a clear, empty capsule found in defendant's car often filled and used with drugs. But the drug charges against defendant were dismissed, and the only charge defendant was convicted of was driving with a suspended license. Defendant's status as an individual with a suspended license preexisted in a source independent from the search and is not suppressible. Defendant being charged with driving while suspended was so thoroughly attenuated and essentially independent from the underlying drug investigation that led to the challenged stop of his car, that the exclusionary rule would serve no purpose as his pre-existing status and unrelated fact that defendant was driving while having been suspended for drunk driving are not suppressible. He must, therefore, remain accountable for this separate and dangerous violation of the law, regardless of the legality of the initial investigative stop for drug activity.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On June 9, 2022, an Ocean County Grand Jury returned Indictment No. 22-06-1110 charging defendant with fourth-degree operating a motor vehicle during a license suspension for a second or subsequent drunk-driving violation contrary to N.J.S.A. 2C:40-26(b) (count one) and third-degree possession of a controlled dangerous substance contrary to N.J.S.A. 2C:35-10(a)(1) (count two). (Da 8 to 10).

On September 20, 2022, defendant filed a motion to suppress the evidence seized during the search of his vehicle, which the Honorable Lisa A. Puglisi, J.S.C. heard on March 8, 2023. (Pa1); (1T). On April 20, 2023, Judge Puglisi denied the motion in a written opinion. (Da11 to 22).[1]

Defendant entered a negotiated plea agreement wherein he would plead guilty to count two, driving with a suspended license, in exchange for the State recommending 180 days in jail. (Pa2 to 7). On March 8, 2024, the Honorable Dina M. Vicari, J.S.C., sentenced defendant in accordance with the negotiated plea. (Da23 to 25).

Defendant filed his Notice of Appeal on April 19, 2024. (Da27 to 30).

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[1] Co-defendant Christopher McDermott's charges were dismissed. (1T30-19 to 20).

COUNTERSTATEMENT OF FACTS

The following facts were elicited during defendant's motion-to-supress hearing.

On September 29, 2020, Detectives Duncan MacRae and Samantha Sutter[2] were working for the Toms River Police Department's Special Enforcement Team (SET). (1T8-25 to 9-3; 1T55-3 to 6). SET is a specialized unit tasked with conducting proactive investigations primarily into narcotics and other criminal offenses. (1T9-6 to 7). MacRae has been a police officer for over twenty years and a detective for ten years. (1T10-8 to 9; 1T8-18 to 24). During that time, he has participated in over 1,000 narcotics investigations including those using confidential informants and surveillance. (1T10-8 to 9; 1T8-18 to 24). Sutter has been a police officer for over ten years. She participates in up to thirty investigations a year. (1T56-11 to 21).

On this particular day, the detectives and SET were investigating narcotics and drug-related offenses in Toms River. (1T18-2 to 12). They were in unmarked cars and plain clothes to blend in with the public. (1T19-2 to 12). MacRae and another detective set up surveillance on the westbound side of Route 37 in a parking lot for a Walmart, Taco Bell, and McDonald's. (1T18-11

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[2] Detective Sutter was a patrol officer but was promoted to a detective by the time she testified at the motion-to-suppress hearing.

to 12; 1T20-18). MacRae had previously conducted over twenty-five surveillances in this parking lot because it was a high narcotics activity area due to its ease for those engaged in drug transactions to blend into the public, has immediate access to Route 37, and is approximately a mile and half from the Garden State Parkway. (1T17-10 to 18-1). Sutter and another detective were stationed in a separate parking lot on the eastbound side of Route 37. (1T28-9 to 12).

Around 4:00 in the afternoon, MacRae saw a white Toyota pick-up truck park in the lot; but the driver never got out, which aroused MacRae's suspicion. (1T20-1 to 19). The driver was later identified as Christopher McDermott. (1T27-7). When asked why this vehicle aroused his suspicion, Detective MacRae stated, "He's clearly not here to go use the store. He's not here for the McDonald's or the Taco Bell because he parked away from those as well." (1T20-4 to 19).

Detective MacRae continued to watch this vehicle and within five minutes, a white Hyundai[3] pulled up next to it. (1T21-3 to 4). The driver was later identified as defendant. (1T64-7 to 8). McDermott got out of the truck

[3] While the car was a Hyundai, at one point during his testimony MacRae mistakenly stated the car was a white Honda but then he, Sutter, and all counsel continued to correctly refer to the car as a Hyundai. (1T21-3 to 9).

and into the passenger seat of defendant's car. (1T21-7 to 9; 1T22-2 to 6). Defendant then pulled out of the parking spot, drove all the way around the parking lot, and ultimately stopped one parking aisle away from where McDermott's Toyota was parked. (1T21-7 to 9; 1T22-2 to 6). McDermott then exited and walk back to his truck. (1T21-7 to 9; 1T22-2 to 6). At this point, both vehicles then left the parking lot onto Route 37. (1T25-3 to 5; 1T61-13).

Based on his training and experience MacRae determined the interaction was highly indicative of a drug transaction. (1T23-5 to 14). He then radioed a description of these vehicles to other officers stationed in the area and requested a marked vehicle to stop both cars. (1T23-17 to 24-2). MacRae followed McDermott and Sutter began to follow defendant. (1T24-22 to 25).

McDermott drove westbound on Route 37 and stopped in a residential area at 1080 Dell Street. (1T25-6 to 7; 1T25-25 to 26-1). MacRae approached the driver and displayed his badge. He noted McDermott was very cooperative but "clearly nervous." (1T26-21 to 25; 1T27-1; 1T27-14 to 16).

McDermott consented to a search of the Toyota. (1T27-17 to 19). During the search, police found a plastic bag containing about twenty capsules filled with white powder. (1T27-21 to 22). MacRae performed a field test on the

substance in the capsules which came back positive for cocaine.[4] (1T28-1).

Meanwhile, Sutter followed defendant as he traveled eastbound on Route 37. (1T28-9 to 12). Sutter, with the assistance of a marked patrol car, stopped defendant's car. (1T61-11 to 62-15). The officers then asked defendant to get out, and he complied. (1T63-25 to 64-4). After he got out, Sutter saw on the driver's seat a clear-empty capsule matching those found in McDermott's vehicle. She noted, based on her training and experience, such capsules are usually used for CDS. (1T72-23 to 73-2).

Police also asked defendant for his license. When they ran his license, they learned it was suspended. (1T68-6 to 26). He was issued a motor vehicle summons for driving while suspended. (1T68-6 to 16).

MacRae called Sutter and informed her that the search of McDermott's vehicle revealed a substance which field tested positive for cocaine. (1T45-12 to 25). Based on this, she and MacRae determined she had probable cause to search the remainder of the vehicle. (1T70-24 to 71-14). During this search, police found a small bag filled with a white powder that field tested positive for

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[4] Later lab results determined the substance was AP-238 which was not a CDS at the time of the incident. As a result, McDermott's charges were dismissed when these lab results were completed.

cocaine[5], four capsules containing suspected cocaine, plastic bags that could be used for drug distribution, a plastic syringe, and $693. (1T73-10 to 19). Defendant was subsequently arrested. (1T71-5 to 6).

Judge Puglisi in a written opinion, found that both detectives were credible as "they both had firsthand knowledge of the incident at issue, answered questions directly and consistently on direct and cross-examination, and were candid about any gaps in their recollection. (Da12). She determined MacRae's belief that the interaction between defendant and McDermott was a CDS transaction "was not a 'hunch' but was based on his observations, training and experience in narcotics investigations." (Da18). Accordingly, she concluded that there was reasonable suspicion a CDS transaction had occurred and thus police could lawfully stop both defendant's and McDermott's cars to further investigate. (Da18, 20).

The judge then turned to analyzing the search of defendant's vehicle. She found that the capsules seen on the driver's seat–which Detective Sutter testified based on her training and experience were typically used for CDS–were in plain view and thus the detectives were justified in seizing them. (Da18 to 19).

Finally, Judge Puglisi analyzed the remainder of the search under the

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[5] Later lab testing indicated the substance contained n-ethyl pentylone, a Schedule I CDS.

automobile-exception doctrine, reviewing the record to determine if police had probable cause to believe the vehicle contained evidence of a criminal offense and whether the circumstance giving rise to probable cause were unforeseeable and spontaneous. (Da19). She determined that "[b]ased on McDermott, Detective MacRae had probable cause that both McDermott and[ ]defendant were engaged in a CDS transaction," and when this was relayed to Detective Sutter, "she had probable cause to conduct the search." (Da20). But she concluded the search was unlawful and the remainder of the evidence needed to be suppressed because the circumstances giving rise to the probable cause were not unforeseeable or spontaneous. (Da20 to 22).

This appeal followed.

LEGAL ARGUMENT

POINT I

DETECTIVE MACRAE HAD A REASONABLE AND ARTICULABLE SUSPICION TO BELIEVE DEFENDANT HAD ENGAGED IN CRIMINAL ACTIVITY.

The testimony provided at the motion to suppress hearing firmly established police articulated a reasonable suspicion to suspect defendant was engaged in drug activity. The stop of his car and the incidental discovery that defendant was driving with a suspended license were thus lawful. Accordingly, Judge Puglisi's denial of defendant's motion to suppress should be affirmed.

Appellate review of a motion judge's findings is deferential and "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999). Courts must give "great deference" to the motion judge's factual findings. State v. Barrow, 408 N.J. Super. 509, 516 (App. Div. 2009). After all, the motion judge's factual and credibility findings are "often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Locurto, 157 N.J. at 474. Thus, courts "are obliged to uphold the motion judge's factual findings" that are supported by the record and should only review the motion judge's legal conclusions de novo. State v. Gonzales, 227 N.J. 77, 101 (2016); see also State v. Hubbard, 222 N.J. 249, 263 (2015).

An appellate court also must not "engage in an independent assessment of the evidence as if it were the court of first instance." Locurto, 157 N.J. at 471. Once the reviewing court is satisfied the judge's findings were based on sufficient credible evidence in the record, "its task is complete and it should not disturb the result." Ibid. This is true even if the case is "a close one" or the appellate court may have reached a different conclusion were it independently deciding the case. Ibid. As our Supreme Court has frequently reaffirmed, "[a] trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). Only if the appellate court is "thoroughly satisfied" that the trial court erred and made a decision that was "so plainly unwarranted" may it step in and "make its own findings and conclusions." Johnson, 42 N.J. at 162.

Here, after carefully weighing the conflicting testimony before her, Judge Puglisi denied defendant's motion to suppress. She determined the detectives, MacRae and Sutter were credible, had firsthand knowledge of the incident at issue, answered questions directly and consistently on direct and cross-examination, and were candid about any gaps in their recollection. Judge Puglisi's determinations thus rested squarely on her ability to observe the testifying witnesses and judge their credibility. Her careful analysis, which was

based on sufficient credible evidence in the record, is entitled to substantial deference and should be upheld on appeal.

Judge Puglisi correctly ruled MacRae's observations of defendant in the Walmart parking lot justified Sutter's investigatory stop of defendant a short time later. Police tasked with protecting the public are authorized to approach and temporarily detain someone for questioning if they suspect the person stopped has been or is about to engage in criminal activity. State v. Davis, 104 N.J. 490, 508 (1986); Terry v. Ohio, 392 U.S. 1 (1968). "There can be no question that a police officer has the duty to investigate suspicious behavior." State v. Letts, 254 N.J. Super. 390, 396 (Law Div. 1992). "Common sense and good judgment . . . require that police officers be allowed to engage in some investigative street encounters without probable cause." Davis, 104 N.J. at 505. Officers may thus stop someone if they have a particularized and reasonable suspicion to do so. Id. at 504.

The United States Supreme Court and New Jersey courts have held this reasonable-suspicion standard means there must be "some minimal level of objective justification" for conducting the investigatory stop. United States v. Sokolow, 490 U.S. 1, 7 (1989); see also State v. Nishina, 175 N.J. 502, 511 (2003). "'Reasonable suspicion' is 'less than proof . . . by a preponderance of evidence,' and 'less demanding than that for probable cause,'" and simply

requires more than a hunch or "unparticularized suspicion." Barrow, 408 N.J. Super. at 517 (quoting Sokolow, 490 U.S. at 7). In short, officers must be able to articulate the reasons that led them to believe the defendant was engaged or about to engage in criminal conduct. State v. Thomas, 110 N.J. 673, 678 (1988).

The "components of a determination of reasonable suspicion . . . [are] the events which occurred leading up to the stop . . ., and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion." State v. Stovall, 170 N.J. 346, 357 (2002) (alterations in original) (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)). This is a "highly fact-intensive inquiry that demands evaluation of 'the totality of the circumstances surrounding the police-citizen encounter, balancing the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions.'" State v. Nyema, 249 N.J. 509, 528 (2022) (quoting State v. Privott, 203 N.J. 16, 25-26 (2010)).

Courts examining the legality of an officer's stop must look at "the whole picture." Id. at 531. The reasonable-suspicion test is incredibly fact sensitive and not "readily, or even usefully, reduced to a neat set of legal rules." Nishina, 175 N.J. at 511 (quoting Sokolow, 490 U.S. at 7); see also State v. Pineiro, 181 N.J. 13, 22 (2004); State v. Valentine, 134 N.J. 536, 546 (1994) ("No

mathematical formula exists for deciding whether the totality of the circumstances provide an officer" with reasonable suspicion). Instead, common sense should guide the court's analysis. Stovall, 170 N.J. at 370.

If the officer's observations reasonably warranted the limited intrusion on the individual's freedom based on the facts present and the rational inferences that can be drawn from the totality of the circumstances, the investigatory stop will be deemed valid. Davis, 104 N.J. at 504; State v. Rodriguez, 172 N.J. 117, 126-27 (2002). Recognition of the officer's experience and knowledge is thus a crucial component of the court's review. Pineiro, 181 N.J. at 22. "In determining whether an officer acted reasonably in the circumstances[,] due weight must be given 'to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.'" State v. Kearney, 183 N.J. Super. 13, 18 (App. Div. 1981) (quoting Terry, 392 U.S. at 27). Even though an individual's behavior may not seem suspicious to an ordinary citizen, "the officer's experience may indicate that some investigation is in order." State v. Sheffield, 62 N.J. 441, 446 (1973).

> [P]olice officers are trained in the prevention and detection of crime. Events which would go unnoticed by a layman ofttimes serve as an indication to the trained eye that something amiss might be taking place or is about to take place. The police would be derelict in their duties if they did not investigate such events.
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> [Davis, 104 N.J. at 504 (quoting State v. Gray, 59 N.J.

563, 567-68 (1971)).]

And "[t]he fact that purely innocent connotations can be ascribed to a person's actions does not mean that an officer cannot base a finding of reasonable suspicion on those actions as long as a reasonable person would find the actions are consistent with guilt." State v. Citarella, 154 N.J. 272, 279-80 (1998).

Here, Detective MacRae had a well-grounded and particularized suspicion that defendant had engaged in drug activity. In an area well known for a large volume of CDS transactions, MacRae, a specialized and experienced detective, saw McDermott drive into the parking lot, but not leave his car or enter any of the surrounding businesses. He then saw defendant drive into the parking lot and McDermott get out of his vehicle, get into defendant's vehicle, and drive around the parking lot with him before returning to a different parking spot and aisle away from McDermott's car. The pair then drove out of the lot separately without ever entering any store or business. MacRae relayed these observations to Detective Sutter and his belief a CDS-transaction had occurred.

A reasonable officer with MacRae's training and experience would view the facts and the rational inferences that can be drawn from them and objectively suspect the pair had engaged in a CDS transaction. MacRae explained the basis for his suspicion using specific facts both of the store's location and defendant's

conduct. He articulated to the motion judge that the store was located in an area of high-narcotics activity because of its proximity to major roads and based his assessment on past narcotics investigations he participated in at the same location. He also articulated for the judge why defendant's behavior raised suspicion, including that neither individual went into the store, McDermott got into defendant's car, and they drove around the parking lot with no destination before parking in a different spot an aisle away from defendant's car, and both cars then left the parking lot.

This credible articulation of specific facts and circumstances, drawn from rational inferences in light of Detective MacRae's over two decades of experience in narcotics investigations, more than meets the "minimal level of objective justification" necessary to satisfy the reasonable suspicion standard. See Sokolow, 490 U.S. at 7. Judge Puglisi thus appropriately found that police had reasonable articulable suspicion of criminal activity to stop both vehicles to further investigate. (Da18, 20).

To be sure, defendant's argument fails to recognize that the location in a high-narcotics area is simply a fact MacRae considered in forming the basis for his reasonable suspicion. Defendant also erroneously heightens the reasonable suspicion standard to require something akin to probable cause by arguing police would have needed to see something more like an exchange of money or that

their physical appearance needed to be suggestive of a crime. See (Db13). But reasonable suspicion "involves a significantly lower degree of objective justification than does the probable cause test." Davis, 104 N.J. at 501.

And given the fact-sensitive nature of the totality-of-the-circumstances test, the cases defendant relies on to argue the officers needed something more like an exchange of objects or money are wholly irrelevant to the analysis. (Db 7 to 11); see State v. Pineiro, 181 N.J. 13 (2004); State v. Arthur, 149 N.J. 1 (1997); State v. Ramos, 282 N.J. Super. 19 (App. Div. 1995); State v. Moore, 181 N.J. Super. 40 (App. Div. 2004). In other words, merely because officers viewed an exchange of product or money, or something different in those cases, does not mean such facts are required for reasonable suspicion to exist. Defendant's push for such findings to be necessary circumvents the low threshold showing needed for reasonable suspicion and fails to appropriately define any alleged error in this case. Accordingly, Judge Puglisi finding reasonable suspicion on this record is a proper exercise of discretion since her findings were instead based sufficient credible evidence in the largely undisputed record.

Moreover, that defendant and McDermott's conduct could have had an innocent explanation is irrelevant to the Court's analysis as the Court must look at the totality of the circumstances in light of MacRae's training and experience.

In United States v. Arvizu, the United States Supreme Court condemned the appellate court's notion that each observation by the officer that had an innocent explanation was entitled to no weight. 534 U.S. 266, 273-74 (2002). The Court pointed out that "the court's evaluation and rejection of the seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances.'" Id. at 274. The Supreme Court noted its precedent "precludes this sort of divide-and-conquer analysis." Ibid. The Court highlighted that in Terry, the officer observed Terry and "his companions repeatedly walk back and forth, look into a store window, and confer with one another" and although "each of the series of acts was 'perhaps innocent in itself'" the Court held that "taken together they 'warranted further investigation.'" Ibid. (quoting Terry, 392 U.S. at 22). Following that precedent, the United States Supreme Court found the officer in that case "was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants." Id. at 276.

New Jersey courts equally apply a totality-of-circumstances test focusing on the aggregate of the facts and not each individually. This Court has repeatedly held that reasonable suspicion can be established from several factors, each of which, while by themselves consistent with entirely innocent behavior, add up to reasonable suspicion taken together. See State v. Mann, 203

N.J. 328, 338-39 (2010); Stovall, 170 N.J. at 368-69; Citarella, 154 N.J. at 280-81; State v. Arthur, 149 N.J. 1, 10-12 (1997) ("It must be rare indeed that an officer observed behavior consistent only with guilt and incapable of innocent interpretation.").

Here, the totality of circumstances of defendant's conduct in a high-crime area established the low-threshold necessary for a court to determine police had reasonable suspicion to stop defendant's vehicle and ultimately discover the clear-empty capsule and defendant's status as a suspended driver. Judge Puglisi found Detective MacRae credible, thus his familiarity with narcotics investigations and this area, including the particular parking lot at issue is a necessary consideration in that totality of circumstances test. This Court should thus reject defendant's unavailing alternative explanations for his conduct.

As Judge Puglisi correctly determined, MacRae's observations, coupled with the inferences he could draw from them based on his training and experience, formed the reasonable suspicion that allowed Sutter to stop defendant after he left Walmart a short time later. These findings were well-supported, based on the undisputed record, and should be afforded proper deference on appeal. Accordingly, the evidence seized from defendant's car and all evidence learned from the stop was admissible.

POINT II

SINCE DEFENDANT ADMITTED TO DRIVING WHILE HIS LICENSE WAS SUSPENDED AND HIS DRUG POSSESSION COUNT WAS DISMISSED, HIS REQUESTED RELIEF IS NO LONGER AVAILABLE TO HIM.

Not only should defendant's conviction be affirmed because the police did indeed have a reasonable and articulable suspicion to stop his car as discussed in Point I, above, but he also fails to state a claim on appeal on which his requested relief, suppression of evidence, can be granted. The remaining drug charge after the motion to suppress was granted in part and denied in part was ultimately dismissed as part of the plea bargain that led to defendant pleading guilty only to driving while suspended. In other words, his suppression claim has become moot and his challenge to the admission of the drug evidence should be summarily dismissed. Since the test for suppression is not a "but-for" test, defendant's status as an individual with a suspended license preexisted in a source independent from the search and is not suppressible. Defendant being charged with driving while suspended was so thoroughly attenuated and essentially independent from the underlying drug investigation that led to the challenged stop of his car that the exclusionary rule would serve no purpose and thus does not apply to suppress his pre-existing status and unrelated fact that defendant was driving while having been suspended for drunk driving.

Defendant must answer for his driving while suspended, regardless of the

admissibility of the unrelated drug evidence. Perhaps had additional physical evidence been found on defendant incident to an arrest for driving while suspended, he might have a justiciable claim for suppression of the physical evidence. But since no additional evidence was seized as a result of him being charged with driving while suspended, there is nothing to suppress and his charge for driving while suspended stands irrespective of the results of the motion to suppress. Defendant being listed as a suspended driver for a prior drunk-driving offense preexisted the stop to investigate drug activity, as did the fact that police saw the car being driven by someone who was later identified as defendant who was the sole occupant of that car; and any alleged illegality in his stop for drug activity does not provide him a windfall loophole to avoid answering for the separate, unrelated, and dangerous crime of driving while suspended.

Any attempt to suggest that the evidence for his driving while suspended was the exclusive result of his challenged stop for drug activity would misstate the nature of the proofs needed to prove driving while suspended. Defendant's car was seen by police being driven prior to any police stop of his vehicle. Indeed, he was the only occupant in the vehicle that had driven in and out of the parking lot. And his presence on the driving while suspended list, which is already available to police, pre-existed the decision to stop. Therefore, both the observed driving prior to the stop and his name already being on the suspended driver list were not proofs only

learned by police as a direct result of the challenged stop. True, the decision to charge defendant with driving while suspended was set in motion by the challenged stop, it was neither the direct and exclusive result of the stop as such, and when police learned of his suspended status, he was charged for the conduct he engaged in prior to the actual stop, namely his driving while suspended. As a result, he must thus answer for his driving while suspended. In other words, that he was on the suspended list is not suppressible, nor is the fact that the car was seen being driven the car prior to the stop.

The New Jersey Supreme Court has ruled similarly where a defendant was improperly seized to check for open warrants. See State v. Shaw, 213 N.J. 398, 422 (2012). The Court clarified that although the physical evidence seized as a result of a search incident to arrest for an open parole warrant must be suppressed due to the illegal initial stop, Shaw still had to answer for the open parole warrant for which he was arrested, as well as charges arising from another open municipal warrant. Ibid. In other words, the execution of the parole warrant issued for a preexisting violation itself was not suppressed, only the drug evidence seized incident to its execution after an illegal stop. Ibid. Likewise here, regardless of the legality of the stop for suspected drug activity, defendant should still have to answer for driving despite his preexisting suspension for a prior drunk-driving offense.

It is immaterial that police would not have learned about his driving during

his license suspension had they not pulled him over. Although evidence may generally be suppressed when it can be said to be the fruits of an unconstitutional seizure, the rule is not a strict "but[-]for" test. Shaw, 213 N.J. at 413–14. In Shaw, the Court emphasized the issue is not whether "but for" the allegedly improper police conduct, the incriminating evidence would have not have been seized. Id. at 413. The Court fully recognized that had police not stopped Shaw, they would not have learned he was wanted on a parole warrant, he would not have been arrested, he would not have been searched incident to his arrest, and the drugs for which he was charged would not have been found. But such "but[-]for" reasoning did not resolve whether the evidence would be suppressed. Ibid. Rather, the Court identified the issue as whether the drugs found on Shaw was a product of the exploitation of the primary illegality—the wrongful detention—or of means sufficiently distinguishable to be purged of the primary taint—the parole warrant. Ibid.

The issue can be similarly stated here: Was the fact that police learned defendant was driving while suspended the direct product of the alleged primary illegality—the alleged wrongful car stop for suspected drug activity—or was police incidentally learning defendant was a suspended driver sufficiently distinguishable to purge or dissipate any taint from the initial car stop for drug activity? The State recognizes that, as in Shaw, the challenged stop here led to the discovery of defendant's license suspension and can fairly be said to be the "but for" cause of

police learning defendant was driving while suspended. But that is not the test. Also significant is that no additional evidence was seized from defendant as result of the license check.

The Shaw Court unanimously recognized that due to the high price exacted by suppressing evidence, a strict "but for" test was inappropriate and instead applied the test for attenuation established in Brown v. Illinois, 422 U.S. 590 (1975). Id. at 415. That test looked to three factors to determine whether the exclusionary rule should apply: (1) the temporal proximity between the challenged police conduct and the seizure of the challenged evidence; (2) the presence of intervening circumstances; and (3) particularly significant, the purpose and flagrancy of the police conduct. Brown, 422 U.S. at 602–04.

In assessing factor (1), the temporal proximity, the Shaw Court noted it was "the least determinative" of the three factors because the impact of "the passage of time . . . oftentimes is ambiguous." 213 N.J. at 416. The Court thus concluded it was at best neutral in Shaw because lengthier detentions could actually be more intrusive than a more immediate seizure. Id. at 416–17. Similarly, it is at best neutral here where although police learned of defendant being a suspended driver fairly soon after the stop, nothing in the record suggests a longer delay would have made much difference in the attenuation calculus.

Regarding factor (2), intervening circumstances, the Shaw Court highlighted

the difference between an unlawful motor vehicle or investigative stop in which incidental to the stop police learn about an outstanding warrant and where an unlawful stop is executed for the specific purpose of checking for warrants. Id. at 418. The Court noted that simply because police learn of a different warrant from which defendant was unlawfully stopped is not a true intervening circumstance given the overall objectives of the police conduct. Id. at 419–20. The Shaw Court carefully distinguished the facts before it from the many cases finding intervening circumstances when police learned of the warrant incidental to an allegedly unlawful traffic or investigative stop. See id. at 417–20 (discussing cases). The Court's distinction in Shaw squarely implicates the facts here where police learned of the driving while suspended during an incidental license check during an investigative car stop for drug activity, thus making it a true intervening circumstance.

As for the most particularly significant factor, the purpose and flagrancy of the police conduct, it weighs heavily in favor of the State here. The Special Enforcement Team that stopped defendant's car was a specialized police unit tasked with safely investigating ongoing drug-related crimes at a location known for frequent drug activity. In no way was this specialized drug-enforcement unit stopping cars with the hope of ensnaring suspended drivers on pretextual justifications. Checking stopped driver's licenses is a well-recognized routine safety measure. No evidence exists in the record, nor can it be in any way inferred, that the

police unit's real, primary, or even alternative purpose for conducting the investigative stop of defendant's car was to embark on a proverbial "fishing expedition" to enforce the driving-while-suspended statute. See id. at 418 (agreeing with case that found random stopping of cars with the hope of finding drivers with outstanding warrants was unlikely to satisfy factor (3) of Brown).

Here, the evidence shows nothing more than police enforcing the drug laws, and while in the process of trying to do so safely, also happened to learn defendant was a suspended driver and then dutifully charged him with driving while suspended, in addition to possessing the drugs found as a result of the investigation. There was thus nothing about the police conduct or motivations here suggesting any disregard for defendant's rights, let alone a flagrant disregard. This factor therefore weighs heavily in favor of attenuation and against suppression.

The police conduct here was in stark contrast to the conduct in Shaw that weighed most heavily against the State and led to suppression. See 213 N.J. at 421. The police who stopped, arrested, and searched Shaw were specifically tasked with arresting fugitives on open arrest warrants. Id. at 401. And even though the warrant for which Shaw was ultimately arrested was not the warrant for which he was first unlawfully stopped, the Court found it was not sufficiently attenuated from the illegal stop since the initial stop was an unlawful attempt to check for warrants based on the grossly inappropriate basis on which Shaw was stopped. See id. at 419–20

(finding it was hardly the chance discovery of an outstanding warrant contemplated by attenuation precedent). He was essentially stopped because he was a black man since the subject of the initial warrant was known to be a black man; but it was a different black man. Id. at 420. Not surprisingly, the Court found this was a blatantly unconstitutional basis to stop someone to check for warrants and factor (3) weighed most heavily against the State. Id. at 421. And that police learning Shaw actually had his own open parole warrant after being stopped was not sufficiently attenuated from their initial blatantly unconstitutional attempt to execute the initial warrant. Unlike here where defendant was under investigation for something completely unrelated to driving while suspended for a prior drunk driving, thus making this case directly at odds with Shaw.

This case is also distinct from State v. Badessa, where a driver was illegally stopped for allegedly avoiding a sobriety checkpoint and later charged with refusing to submit to breathalyzer based on observations made after the illegal stop. 185 N.J. 303 (2005). The challenged evidence, the police observations leading to their request to submit to the breathalyzer, in "both time and place . . . sprang directly from" the illegal stop for avowing a sobriety checkpoint. Id. at 313. The sobriety checkpoint was intended to enforce the drunk-driving laws, among which is the refusing to submit to breathalyzer charge. The Court noted a breathalyzer refusal is part of the comprehensive statutory scheme contained in N.J.S.A. 39:4-50 to -51, the

drunk-driving laws. Ibid.

In sharp contrast here, the law against driving while suspended for a prior drunk-driving offense is entirely distinct from the drug laws being enforced by the stop. Moreover, the Badessa Court found the refusal statute was not a new crime that "directly threatens public safety." Id. at 314. But, as the United States Supreme Court noted, the type of license check done here, which led to defendant being charged with driving while suspended, is intended to protect officer and traffic safety. Rodriguez, 575 U.S. 356. Indeed, it would be a direct threat to public safety to require police to allow suspended drivers to drive away. And permitting defendant to drive away from the scene would have left police derelict in their duty to protect the public. See State v. Davis, 104 N.J. 490, 504 (1986). Badessa's holding thus does not control here.

Indeed, the United States Supreme Court more recently applied the Brown three-part test in Utah v. Strieff, 579 U.S. 232 (2016), where police requested Strieff to provide identification during an investigative stop later challenged as unconstitutional. After relaying Strieff's information to a dispatcher the officer learned he had an open arrest warrant for a traffic violation. Strieff was arrested for the open warrant and drug evidence was seized during a search incident to his arrest. Id. at 235–36. In finding the discovery of the arrest warrant was a sufficient intervening event that broke the causal chain between the unlawful stop and the

seizure of drug evidence, the Court emphasized that the attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions. Id. at 238. "And the logic of [the Court's] attenuation cases is not limited to independent acts by the defendant," such as a confession or consent. Id. at 239.

In applying Brown's three-part test, the Strieff Court found that while the short time interval between the stop and search may count in favor of suppression, this was easily overcome by Utah's strong showing of the other two factors, which heavily counseled against suppression. Id. at 239–40.

Just as in Strieff, where the arrest warrant for the traffic offense predated the officer's drug investigation and was "entirely unconnected" to the stop to investigate drug activity, id. at 240, defendant's license suspension for drunk driving predated the drug investigation here and was likewise entirely unconnected with the drug investigation that led to his initial traffic stop and detention. Also, as in Strieff, once the officer learned of defendant's driving while suspended, he was obligated to arrest him for that, regardless of the validity of any arrest for drug offenses. Ibid. And what the Court said about the warrant's execution in Strieff strongly favoring the State applies with equal force to the officers charging defendant here with driving while suspended. See ibid.

Attenuation is pronounced here because the routine license check revealing

that defendant was a suspended driver was conducted during a traffic stop, where police have independent safety concerns apart from criminal investigation, thus making it a true intervening event. Charging defendant with driving while suspended was thus a ministerial act independently compelled by his pre-existing license suspension. See ibid. (noting Strieff's arrest was ministerial act independently compelled by pre-existing warrant). "Highway and officer safety are interests different in kind from the government's endeavor to detect crime in general or drug trafficking in particular." Rodriguez v. United States, 575 U.S. 348, 357 (2015). Therefore, like a warrant check, running a license check during a traffic stop is a "negligibly burdensome precaution" taken for officer and traffic safety and police learning of the license suspension essentially intervened in the investigative stop for drug activity. See Strieff, 579 U.S. at 241 (quoting Rodriguez, 575 U.S. at 356). It was thus an intervening circumstance.

The flagrancy factor also "strongly" favored the State; the officer's conduct in stopping Strieff was "at most negligent" and any error in judgment did not rise to purposeful or flagrant Fourth Amendment violation. Id. at 241. The warrant check was negligibly burdensome precaution for officer safety. Ibid. Nothing indicated the unlawful stop was more than isolated negligence and not "part of any systemic or recurrent police misconduct." Rather, it was incident to a "bona fide" drug investigation. Id. at 242. The license check here was similarly part of bona fide

drug investigation and not in any part of systemic police misconduct.

The State urges this Court to apply this well-established attenuation doctrine, which both the New Jersey and United States Supreme Courts have applied to the discovery of an arrest warrant during an investigative stop for drug activity to the discovery of a driver being on the suspended list during a traffic stop for drug activity. Certainly, a driver whose license has been suspended and subject to arrest for driving while suspended is similarly situated to a parole violator with a warrant for his arrest. In each case, police discovery of the suspect's preexisting unlawful status during an investigative stop is an intervening circumstance that should be tested under the Brown three-part test to determine whether any of the ultimate charges were too attenuated from the challenged police conduct to justify invocation of the exclusionary rule.

To be clear in concluding, the State is not suggesting the seizure of any physical evidence in this case was attenuated from the challenged stop. The State is simply urging that suppression of drug evidence found as a direct result of the investigative stop for drug activity fully vindicates the exclusionary rule. But defendant's arrest for driving while suspended is completely attenuated from the drug investigation, and thus, he must remain accountable for this separate dangerous law violation, regardless of the legality of the initial investigative stop for drug activity.

CONCLUSION

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

Respectfully submitted,

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DATED: November 15, 2024

CERTIFICATION

1. Confidential Information / Confidential Personal Identifiers (must select one). I certify that I have reviewed Rules 1:38-3, 1:38-5, and 1:38-7 and:

☒ This document or pleading does not contain any confidential information or any confidential personal identifiers, **or**

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STATE OF NEW JERSEY, vs. KEVIN CONHEENEY	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION App. Docket No.: A-002518-23 Indictment No. 22-06-1110 Case No. 20002925-1 CRIMINAL ACTION Sat Below: The Honorable Lisa A. Puglisi, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF

THE DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

The Defendant in this matter, Kevin Conheeney, appeals the trial court's decision resulting in his conviction and sentence imposed by the Honorable Dina M. Vicari, J.S.C., at the Ocean County Superior Court, Law Division. Specifically, the Defendant appeals the trial court's decision denying his motion to suppress, in part. The Defendant challenges the trial court's finding that the stop of his motor vehicle was supported by a reasonable and articulable suspicion that he was involved in criminal activity.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On September 29, 2020 at approximately 4:00 p.m., Detective Duncan Macrae and members of the Toms River Police Department Special Enforcement Team, (hereinafter "SET"), were conducting undercover surveillance in the Walmart parking lot located at 950 Route 37 West in Toms River. 1T:18-2 to 19-7.[1] Prior to September of 2020, Detective Macrae had participated in approximately twenty-five "surveillances" of the Walmart parking lot over a period of ten years. 1T:35-3 to 35-22. However, only fourteen of the approximated twenty-five "surveillances" over a ten-year period involved SET "activities," but not necessarily arrests. 1T:35-25 to 37-2. Detective Macrae concluded that the

[1] 1T refers to the transcript of motion in the Superior Court of New Jersey, Law Division, Criminal Part, Ocean County, on Docket No. 22-06-01110-I, dated March 8, 2023.

Walmart parking lot was a "known narcotics area" due to its location on Route 37 and proximity to the Parkway, despite being unable to articulate a specific number of drug-related arrests and despite not having received any complaints of drug transactions in that area. 1T:39-6 to 40-4.

On the day in question, Detective Macrae observed a Toyota pick-up truck, later identified as the Codefendant, pull into the Walmart parking lot and park on the southwest side of the lot without exiting the vehicle. 1T:19-21 to 20-1. Approximately five minutes later, Detective Macrae observed a Honda, later identified as the Defendant, pull into the lot and park next to the Codefendant. 1T:21-3 to 21-4. He then observed the Codefendant exit the vehicle and enter the passenger side of the Defendant's vehicle. 1T:21-7 to 21-9. Detective Macrae observed that both drivers were male but could not identify either driver. 1T:21-10 to 21-24. He then observed the Defendant drive around the lot, then stop one aisle away from where the Codefendant's vehicle was parked, at which point the Codefendant exited the Defendant's vehicle, entered his vehicle and exited the parking lot. 1T:22-2 to 22-22. He then observed the Defendant exit the parking lot. 1T:22-23 to 22-25. Detective Macrae did not receive any advanced information about either driver, 1T:40-9 to 40-13, did not witness a hand-to-hand exchange of objects or money between the drivers, 1T:41-15 to 41-17, did not observe either

driver attempt to conceal anything, 1T:41-18 to 41-21, and did not notice anything specifically about either driver, 1T:42-1 to 42-5. However, Detective Macrae concluded that he had just witnessed a drug transaction based on his "experience as a narcotics detective," and "that neither party used the store and the one party got into the other party's vehicle and didn't just sit there." 1T:23-5 to 23-14. Detective Macrae then radioed marked patrol cars and instructed them to stop both vehicles. Detective Macrae's observations in the Walmart parking lot were the sole basis for both motor vehicle stops. 1T:45-4 to 45-9.

Detective Macrae and Patrolman Toronto stopped the Codefendant's vehicle. 1T:26-19 to 27-1. The Codefendant appeared nervous and advised that he met with Defendant to exchange money for a football pool. 1T:24-14 to 27-19; 1T:31-19 to 31-25. The Codefendant was then asked for consent to search his person which was granted. 1T:27-14 to 27-19. Located on Codefendant's person was a plastic bag containing white powdery capsules, which field tested positive for cocaine but later tested negative for a controlled dangerous substance. 1T:27-21 to 28-1; 1T:30-15 to 30-22. Accordingly, the charges pending against the Codefendant were subsequently dismissed. 1T:30-18 to 30-19.

Simultaneously, Patrolman Sutter and Corporal Westfall, also of Toms River Police Department SET, stopped Defendant's vehicle based upon Detective

Macrae's observations in the Walmart parking lot which were communicated via police radio by Detective Macrae. 1T:60-2 to 61-19; 81-2 to 81-3; 81-25 to 82-2. The Defendant was asked to exit his vehicle, which he complied with, was informed about the nature of the motor vehicle stop and was then asked for consent to search his vehicle which was denied. 1T:63-22 to 67-8. Patrolman Sutter then requested a K-9 to conduct an exterior sniff of the vehicle. 1T:67-13. While waiting for the K-9 to arrive, Corporal Westfall ran a check of the Defendant's driver status which revealed that he was suspended for prior driving while intoxicated convictions pursuant to N.J.S.A. 2C:40-26. 1T:68-6 to 68-18. Shortly thereafter, Patrolman Sutter received a call on her cellphone from Detective Macrae advising her that he had probable cause to arrest Defendant, who was then arrested. 1T:70-24 to 70-8. A search of Defendant's vehicle was then conducted which revealed clear capsules containing white residue, a syringe and cash. 1T:71-12 to 73-19. The Defendant was subsequently charged with third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) and fourth-degree operating a motor vehicle during a period of license suspension, N.J.S.A. 2C:40-26(b). Da1-Da7.

On June 9, 2022, an Ocean County grand jury indicted the Defendant on both charges contained in the complaint. Da8-Da10. On September 22, 2022, the

Defendant filed a notice of motion to suppress. On March 8, 2022, the trial court conducted a testimonial hearing. On April 20, 2023, the trial court returned a written decision granting in part and denying in part the Defendant's motion to suppress. Da11-Da22. The Court denied the motion in part, finding that reasonable articulable suspicion existed to stop the Defendant's vehicle, and granted the motion in part, finding that the search of the vehicle was unsupported by probable cause pursuant to the automobile exception to the warrant requirement. Id.

On July 10, 2023, the Defendant entered a plea of guilty to count one of Indictment 22-06-1110 charging fourth-degree operating a motor vehicle during a period of license suspension pursuant to N.J.S.A. 2C:40-26(b). Da23-Da25. On January 8, 2024, the Defendant filed a motion for bail pending appeal, which was granted. Da26. On March 8, 2024, the Defendant was sentenced to one hundred and eighty (180) days in the Ocean County Jail as well as monetary penalties. Da23-Da25.

On or about April 19, 2024, a Notice of Appeal and Case Information Statement were filed with the Superior Court, Appellate Division. Da27-Da31; Da32-Da35.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE MOTOR VEHICLE STOP BECAUSE THE STOP WAS UNSUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE OF A REASONABLE AND ARTICULABLE SUSPICION THAT HE WAS INVOLVED IN CRIMINAL ACTIVITY. (Da17-Da18).

The Fourth Amendment to the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution prohibits unreasonable searches and seizures. U.S. Const. Amend. IV; N.J. Const. art I, ₱ 7. The stop of a motor vehicle constitutes a "seizure" within the meaning of the Fourth Amendment. Berkemer v. McCarty, 468 U.S. 420 (1984); Delaware v. Prouse, 440 U.S. 648 (1979). The State bears the burden by a preponderance of the evidence to demonstrate that a warrantless seizure is valid. State v. Judge, 275 N.J. Super. 194 (App. Div. 1994).

The validity of a motor vehicle stop depends on whether a police officer has an articulable and reasonable suspicion that the driver has committed a motor vehicle offense or was or is involved in criminal activity. State v. Locurto, 157 N.J. 463 (1999); State v. Thomas, 110 N.J. 673 (1988). The determination of whether

the police have the required articulable and reasonable suspicion to justify a motor vehicle stop depends on the totality of the circumstances. Alabama v. White, 496 U.S. 325 (1990); Florida v. J.L., 529 U.S. 266 (2000) ("The reasonableness of the official suspicion must be measured by what the officers knew before they conducted their search.) When determining if the officer's actions were reasonable, consideration must be given "to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Terry v. Ohio, 392 U.S. 1 (1968). However, "neither "inarticulate hunches" nor an arresting officer's subjective good faith can justify an infringement of a citizen's constitutionally guaranteed rights." State v. Arthur, 149 N.J. 1 (1997) *citing* Terry v. Ohio, at 21.

These principles have been applied and elaborated upon in a variety of contexts involving suspected narcotics transactions. For example, in State v. Pineiro, 181 N.J. 13 (2004), an officer was driving his patrol vehicle in a high narcotics area when he observed the defendant and codefendant standing on a corner. The officer recognized both individuals from prior police encounters and had received intelligence that the defendant was a suspected drug dealer, and that the codefendant was a drug user. The officer observed the defendant hand the codefendant a pack of cigarettes, then observed the defendant and the codefendant look at him with shock and surprise and then turned to leave the area. Based on

these observations, the officer conducted an investigatory stop of the defendant. The Supreme Court of New Jersey held that the investigatory stop was justified explaining that:

> "... both defendant and [codefendant] immediately departed the area upon seeing [the officer]. Based on [the officer's] knowledge that drugs were sometimes carried in cigarette packs, that he had not observed either man smoking, and his familiarity with both men... We are satisfied that, even though standing alone each factor may not have been sufficient, the totality of the circumstances, as viewed by a reasonable officer established a reasonable and articulable suspicion of criminal activity, justifying an investigatory stop." Pineiro, at 22.

In State v. Arthur, 149 N.J. 1 (1997), a detective was surveilling a high narcotics area when he observed the defendant park his car on the street and then saw the codefendant enter on the passenger side, remain for a short time, then exit holding a paper bag. The detective then observed the codefendant trying to conceal the bag. Based on these observations, the detective conducted a motor vehicle stop of the defendant's vehicle. The Supreme Court of New Jersey held that the investigatory stop was justified explaining that the detective's observations, in light of his experience, objectively gave rise to a reasonable and articulable suspicion that defendant was engaged in illegal narcotics activity. In so holding, the Court

relied upon the following facts: (1) the defendant parked his vehicle in a high drug area; (2) the codefendant entered defendant's vehicle, remained for a short time, then exited carrying a paper bag she had not possessed when she entered the vehicle; (3) the defendant immediately drove off after the codefendant existed the vehicle; (4) paper bags are often used to transport drugs; and (5) the codefendant tried to conceal the bag that she obtained from the defendant. See id.

In State v. Ramos, 282 N.J. Super. 19 (App. Div. 1995), an officer was patrolling a high narcotics area when he observed the defendant standing on a corner in the rain, then observed the codefendant hand currency to the defendant. The defendant then reached toward the codefendant with a closed fist. Based on these observations, the officer stopped the defendant. The Appellate Division held that the stop was justified reasoning that the officer's observations, considered in light of his training and experience, supported a reasonable suspicion that the defendant was engaging in a drug transaction. See id.

In State v. Moore, 181 N.J. Super. 40 (App. Div. 2004), a detective was surveilling a high narcotics area when he observed three men move away from a group of men standing in a vacant lot and move to the back of the lot. The detective the observed the defendant and the codefendant give money to a third

person in exchange for small unknown objects that they placed in their pockets. Based on these observations, the detective conducted a stop of the defendant. The Court held that the stop was justified, reasoning that "based on [the detective's] experience and the factors present here— a neighborhood known for heavy drug trafficking, observations of three men moving away from a group to a vacant lot, and the exchange of money for small objects— it was reasonable for [the detective] to have a well-grounded suspicion that he had witnessed a drug transaction." Id.

In State v. Madison, No. A-4086-09T2 (App. Div. April 11, 2011)[2] officers were surveilling a high narcotics area when they observed the defendant approach the codefendant. The officers recognized both the defendant and the codefendant from earlier narcotics investigations. The defendant and codefendant then entered a unit, then exited a minute later and separated. The officers began to follow the defendant's vehicle during which they observed the driver place something in his mouth. Based on these observations, a motor vehicle stop of the defendant was conducted. The Court held that the officers had reasonable suspicion to stop the defendant's vehicle based on the facts that the officers had received complaints

[2] The unpublished opinion is included in the appendix as Da37-Da43.

that the defendant had been selling drugs and that the officers had observed the defendant suspiciously interact with the codefendant. Da37-Da43.

All of the cases cited have upheld investigatory stops where a police officer observes suspicious behavior in an area known for a high level of narcotics activity, where at least one additional factor is present, to include prior police involvement with the defendant or codefendant, State v. Pineiro and State v. Madison, citizen complaints involving the defendant, State v. Madison, the exchange of money for small objects, State v. Moore and State v. Ramos, the concealing of an object, State v. Arthur, or fleeing State v. Pineiro and State v. Madison. However, with regard to presence in an area known for a high level of narcotics or other criminal activity as a factor supporting reasonable and articulable suspicion for a stop, "the State must do more than simply invoke the buzz words "high crime area" in a conclusory manner to justify investigative stops." State v. Goldsmith, 251 N.J. 384 (2022).

"A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'" State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). In the instant appeal, the trial court's finding that there existed a reasonable and

articulable suspicion to stop the Defendant was unsupported by sufficient credible evidence in the record.

First, the trial court cited the Walmart parking lot as "an area for CDS transactions" in support of the finding that the stop was supported by reasonable and articulable suspicion of criminal activity. Da17. However, Detective Macrae's testimony at the suppression hearing was insufficient to provide factual support for the trial court's conclusion that the Walmart Parking lot was a high narcotics area. Although Detective Macrae testified on direct examination that the Walmart parking lot was a "known narcotics area," on cross-examination he admitted that he could not say whether the fourteen SET "activities" over a ten-year period related to narcotics arrests, and further, he admitted that his testimony that the lot was a "known narcotics" area was simply his opinion based upon its location on Route 37 and its proximity to the Parkway. 1T:39-6 to 39-15. Such testimony did not provide sufficient credible evidence to support the trial court's finding that the Walmart parking lot was a high narcotics area. Thus, it should have been disregarded in determining whether the stop was justified.

Second, the trial court cited Detective Macrae's observations in support the decision. Specifically, the "unusual behavior and the fact that neither individual

entered the store." Da18. However, a purely innocent explanation of the alleged "unusual behavior" was stated by the Codefendant— namely, that he met the Defendant to exchange money from a football pool. 1T:31-19 to 31-25. In fact, a quantity of money was located on the Defendant. 1T:73-16 to 73-19. Even setting aside the Codefendant's innocent explanation, the "unusual behavior" observed fell short of establishing a reasonable and articulable suspicion that the Defendant was involved in criminal activity.

Unlike the facts and circumstances presented in the cases previously cited, no transaction was observed, no exchange of money, packages or objects was observed, neither the Defendant nor the Codefendant were known by Detective Macrae, there was nothing in their physical appearance suggestive of a crime, no reports of recent criminal activity had been reported, and no furtive gestures or attempts to conceal an object were observed. Nothing was known about these individuals, other than that their interaction occurred in an alleged "known narcotics area." Detective Macrae observed two people meet in a vehicle in the middle of the day in September. This observation did not rise to a reasonable and articulable suspicion of criminal activity.

The totality of the circumstances presented did not rise to the level of reasonable suspicion of criminal activity required to effectuate the stop of the Defendant's vehicle, but rather, Detective Macrae acted upon a hunch.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Order of the lower court denying Defendant's motion to suppress, be reversed and the matter be returned to the lower court for further action.

Respectfully submitted,

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