SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2668-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Essex County.
v.	:	
FARIYD A. GEORGE A/K/A FARIYD GEORGE,	:	Indictment Nos. 22-06-01428-I; 23-09-01764-I; 23-09-01765-I.
Defendant-Appellant.	:	Sat Below:
	:	Hons. John Zunic, J.S.C., and John I. Gizzo, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: October 2, 2024

DEFENDANT IS CONFINED

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[1] Pursuant to Rule 2:6-1(a)(1)(I), defendant has appended three police reports, which were submitted as State's exhibits on the suppression motion, and which were considered by the motion court in its written decision. (Da 26, 30, 33)

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PROCEDURAL HISTORY

On June 14, 2022, defendant Fariyd A. George was charged in Essex County Indictment 22-06-01428-I with second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count one). (Da 1-2)[2] On September 7, 2023, two other indictments were returned. Indictment 23-09-01764-I charged second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count one); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count two); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count three); third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (count four); third-degree possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a)(1), (b)(3) (count five); second-degree possession with intent to distribute CDS within 500 feet of a public facility, N.J.S.A. 2C:35-7.1(a) (count six); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count seven). (Da 3-10) Indictment 23-09-01765-I charged second-degree certain persons not to possess a weapon, N.J.S.A. 2C:39-7(b)(1)

[2] "Da" refers to defendant's appendix. "Dca" refers to defendant's confidential appendix. "PSR" refers to the presentence report. "BWC" 1, 2, 3, 4-A, and 4-B refer to the five video clips from Officer Yasillis Ortiz's body-worn camera, which are appended at Dca 1. The transcripts are abbreviated as follows:
1T -- May 2, 2023 (suppression motion)
2T -- March 1, 2024 (plea)
3T -- April 19, 2024 (sentencing)

(count one).[3] (Da 11-12)

On March 6, 2023, George moved to suppress the handgun underlying Indictments 22-06-01428-I and 23-09-01765-I. On May 2, 2023, Judge John Zunic, J.S.C., held an evidentiary hearing. (1T) On August 15, 2023, Judge Zunic issued a written order and opinion denying the motion. (Da 25-33)

On March 1, 2024, pursuant to a global plea deal, George pleaded guilty before Judge John I. Gizzo, J.S.C., to count one of Indictment 23-09-01764-I (second-degree aggravated assault) and count one of Indictment 23-09-01765-I (second-degree certain persons). (2T 5-13 to 18-4; Da 34-41) In exchange, the State agreed to recommend concurrent five-year sentences with a five-year parole bar on the certain-persons count and an 85% parole bar on the aggravated-assault count pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. (2T 5-13 to 25; Da 37)

On April 19, 2024, Judge Gizzo sentenced George in accordance with the plea and dismissed the remaining counts. (3T 8-12 to 13-4; Da 42-48)

On May 7, 2024, George filed a notice of appeal. (Da 52-55)

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[3] Indictments 22-06-01428-I and 23-09-01765-I both alleged gun possession on July 5, 2020. (Da 2) The latter indictment was amended on the record to correct the date and weapon. (2T 3-24 to 5-10) Indictment 23-09-01764-I alleged various offenses on June 28, 2023. (Da 3-10)

STATEMENT OF FACTS

The suppression motion concerned a handgun that the State alleged George possessed, which the police seized in a third party's home pursuant to a warrantless consent search. Neither the third party, nor her daughter testified. Although multiple officers were on the scene, only one testified, and video footage from only one officer's body-worn camera (BWC) was admitted into evidence. No testimony was presented as to what occurred during the critical moments immediately preceding the third party's consent.

A. Suppression Hearing[4]

On July 5, 2020, Newark police responded to an apartment complex on Oxford Street following a report of gunshots. (1T 5-13 to 7-2) The police found George alone in the courtyard with an injured foot, which he said had been caused by fireworks. (1T 7-3 to 13) Emergency services transported him to the hospital and later concluded that he had been shot in the foot. (1T 7-14 to 22)

The police obtained surveillance video from the apartment complex, which, according to police summaries, showed the following: George was

[4] The facts are drawn from Officer Yasillis Ortiz's testimony and BWC footage admitted at the suppression hearing, as well as three police reports submitted as State's exhibits and considered by the court below. (Da 26, 30, 33 (motion court opinion relying on "the investigative reports")) The motion court's opinion refers to Officer Ortiz using "he/him" pronouns, but the prosecutor at the hearing addressed Ortiz as "ma'am." (1T 5-1 to 7)

walking in the courtyard, shook his leg, fell onto the grass, and began to limp; a woman later identified as Amaryllis Gross spoke with George and then went into the apartment complex and knocked on a door; when no one answered, Gross placed on the windowsill an object that Officer Ortiz claimed at the suppression hearing was a weapon; Gross left but then returned, retrieved the alleged weapon, and entered her own apartment. (1T 8-3 to 9-23; Da 27) Ortiz claimed that the police could "see" the weapon on the surveillance video, but the State did not present the video. (1T 9-7 to 9, 17-24 to 2)

According to Ortiz, the police came upon Gross, who was the 911 caller, in the courtyard after seeing her on the video. (1T 9-24 to 8; Da 16) Other officers read Gross her Miranda rights. (1T 10-9 to 11, 20-17 to 23) Ortiz said that Gross admitted that George gave her a bag containing a gun and that she was hiding it in her apartment. (1T 10-2 to 11-5; Da 27) Ortiz testified that the police "ha[d] occasion . . . to go back" to Gross's apartment, not explaining who initiated the entry, and, once inside, Gross signed a consent-to-search form.[5] (1T 11-6 to 12-18) Gross's daughter, who leased the apartment, also signed the form.

[5] The State admitted the consent-to-search form as S-3 at the suppression hearing. (1T 11-14 to 14-18) The defense is not in possession of that exhibit, but the State has agreed to include it in its appendix pursuant to Rule 2:6-3 if and when the State recovers the exhibit from storage. In any event, the consent form is not critical to this appeal, as the BWC shows Officer Ortiz reading the advisories aloud.

(1T 11-9 to 18, 16-23 to 24)

At the suppression hearing, the State played a brief portion of Ortiz's BWC, which showed Ortiz reading aloud a consent waiver that advised Gross and her daughter about their right to refuse consent and recited language that no promises induced their consent; the BWC also showed Gross's daughter say that her highest level of education was two years of college. (1T 13-13 to 16-15; BWC4-A at 48:20 to 50:37) While Ortiz read the waiver, Gross at one point walked away from Ortiz and bent over, not looking at the consent form or Ortiz. (1T 21-23 to 22-14) According to Ortiz, Gross then said that the handgun was on a nightstand, and the police seized it. (1T 13-6 to 12)

At several points, Ortiz's testimony conflicted with or omitted significant details revealed by the rest of Ortiz's BWC footage and the police reports. For example, the BWC and police reports show that the police encountered Gross more than once, and Gross at first declined to tell them what happened. (Da 16, 20, 23; BWC1 at 8:55 to 9:30) The BWC also reveals that Gross initially refused to open the door to her apartment when the police first asked. (BWC4-A at 27:00 to 27:14) And the BWC shows that Gross ultimately consented only after being detained, handcuffed, placed in the back of a police car, surrounded by multiple officers, and threatened with "trouble" if she did not tell them the truth. (Da 20, 23-24; BWC4-A at 22:00 to 34:44)

Specifically, according to Ortiz's BWC and all three police reports, the police initially encountered Gross before seeing her on the surveillance video, and she first said that "she did not know what happened and she just called for police." (Da 16, 20, 23; BWC1 at 8:55 to 9:30) After watching the surveillance video, the police sought out Gross a second time, "detained" her, and began to question her. (Da 20, 23-24; BWC4-A at 22:00 to 34:44) Ortiz was not present for the entire detention, so Ortiz's BWC does not show everything that occurred. But the BWC shows that during the interrogation, Gross was handcuffed in the back of a police car with its door open while surrounded by multiple officers; Gross repeatedly denied knowing why the police were detaining her; and one officer shouted at Gross, "You know for what." (BWC4-A at 22:00 to 34:44) Ortiz estimated that between five and ten officers were on the scene; eleven officers are listed in the police reports; and many can be seen in the BWC footage. (1T 19-8 to 17; Da 15; BWC4-A at 22:00 to 34:44)

According to Sergeant Ricardo Velez's report, the police confronted Gross about the video showing her "grab[bing] a bag"; they promised that she was "not in trouble"; and they said they "needed to know what happen[ed]." (Da 20) The BWC shows that they also threatened, "Any lies you tell me, you're gonna be in trouble." (BWC4-A at 28:12 to 28:16) The BWC also shows unidentified officers who, when asked where they found Gross the second time,

said, "The daughter went and got her because ya'll had knocked on the door, and . . . she said she didn't have to open the door blah blah blah." (BWC4-A at 27:00 to 27:14 (emphasis added))

In addition, according to Ortiz's BWC and Sergeant Velez's report, the police initially obtained Gross's verbal consent while she was detained and handcuffed in the police car, before later entering her apartment and having her sign the formal consent form. (Da 20; BWC4-A at 30:09 to 33:52) At the suppression hearing, the State did not present any testimony regarding the circumstances of how they obtained Gross's verbal consent. The 911 call occurred at 1:31 a.m., but Gross and her daughter did not sign the consent form until 4:56 a.m. (Da 23-24) Ortiz admitted that other officers interacted with Gross when Ortiz was not present, so Ortiz could not say what transpired, but none of those officers testified, nor were any BWCs from them admitted. (1T 19-18 to 20-16) Neither Gross nor her daughter testified, even though Ortiz's BWC shows that about 30 minutes after signing the consent form, one of them can be heard asking if she signed it, to which Ortiz responded that she already did. (BWC4-A at 48:20 to 50:37; BWC4-B at 1:15 to 1:24) The BWC also shows that Gross said she had been drinking beer that night. (BWC3 at 27:00 to 27:10)

B. Motion Court's Decision

The motion court found Ortiz credible and concluded that Gross and her

daughter voluntarily consented to the warrantless search of their apartment. (Da 29-30, 32-33) The court primarily relied on the signed consent form and waiver advisory about their right to refuse consent. (Da 32) The court rejected the defense's argument that the State failed to carry its burden by not calling Gross or her daughter. (Da 32) The court also rejected the defense's argument that Gross's visibly inattentive behavior during the waiver advisory undermined her understanding, instead reasoning that she was "in close proximity" and was able to hear it; her daughter had some higher education; and Gross told the police that the gun was on the nightstand. (Da 32-33)

The court believed that there was no "sign of [Gross's] unwillingness to cooperate with law enforcement" and specifically that "[u]pon initial contact in the courtyard, Ms. Gross readily disclosed that the gun was in her apartment near the television." (Da 33) Although the court considered Ortiz's BWC and the police reports, it did not address several critical facts revealed by them, including that the police initially encountered Gross prior to seeing her on the surveillance video; Gross initially claimed that she did not know anything; Gross previously refused to open the door for police; Gross agreed to cooperate only after being detained, handcuffed, and confronted during an undescribed interrogation; and Gross had been drinking, and either her or her daughter forgot they signed the consent form. (Da 16, 20, 23) Finally, the court did not

specifically cite or analyze the mandatory voluntariness factors, instead writing only, "None of the factors that would potentially indicate coerced consent are present in this matter. See State v. Hagans, 233 N.J. 30 (2018)." (Da 33)

LEGAL ARGUMENT

POINT I

SUPPRESSION IS REQUIRED BECAUSE THE STATE FAILED TO PROVE THAT THE THIRD PARTY VOLUNTARILY CONSENTED DURING A SECRET CUSTODIAL INTERROGATION THAT THE MOTION COURT ENTIRELY IGNORED. (Da 25-33)

The State presented, and the motion court accepted, a false picture of how Gross's and her daughter's consent was obtained. On their telling, Gross spontaneously offered to help the police upon first sighting and never once resisted. But the BWC and police reports, which were considered but not properly analyzed below, revealed an entirely different story: Gross initially refused to cooperate or consent and only relented after being detained, handcuffed, questioned, and threatened by multiple police officers during an undescribed interrogation. Not only did the court get the facts wrong, but it also failed to analyze the legally required consent factors, which, when properly considered, overwhelmingly favored suppression. Because the State failed to prove that Gross's consent was voluntary, suppression was required. As a result,

George must be afforded the opportunity to withdraw from his plea deal. See U.S. Const. amends. IV, XIV; N.J. Const. art. I, ¶ 7.

Both the State and Federal Constitutions protect individuals against unreasonable searches and seizures. U.S. Const. amends. IV, XIV; N.J. Const. art. I, ¶ 7. A warrantless search or seizure is presumptively unreasonable unless the State proves by a preponderance of the evidence that it "falls within one of the few well-delineated exceptions to the warrant requirement." State v. Elders, 192 N.J. 224, 246 (2007). Because the burden lies with the State when the police do not obtain a warrant, "the State must provide evidence" at a suppression hearing to legally justify the warrantless conduct. State v. Atwood, 232 N.J. 433, 446-48 (2018). If the State fails to present sufficient evidence, courts must conclude that "the State did not carry its burden." Id. at 448; accord, e.g., State v. Shaw, 237 N.J. 588, 617-18 (2019) (rejecting the State's argument contesting standing where "the State failed to produce any evidence to support that point"); State v. Gibson, 218 N.J. 277, 296-99 (2014) (no probable cause for warrantless arrest where "[t]he State presented no evidence regarding" critical factual issues); State v. Williams, 84 N.J. 217, 227 (1980) (consent involuntary where the State failed to present "proof of facts surrounding the consent"); State v. Boone, 479 N.J. Super. 193, 210-11 (App. Div. 2024) (no reasonable suspicion for investigative stop where the State failed to "put forth facts at the suppression

hearing to establish" such suspicion).

Consent is the only exception claimed here. State v. King, 44 N.J. 346, 352 (1965). "[C]onsent searches under the New Jersey Constitution are afforded a higher level of scrutiny" than under federal law. State v. Carty, 170 N.J. 632, 639, modified, 174 N.J. 351 (2002). In New Jersey, the State bears the burden of proving by "clear and positive testimony" that an individual's consent was voluntary, meaning that it was "unequivocal and specific and freely and intelligently given." Shaw, 237 N.J. at 618-19 (citation omitted). The State carries a particularly "heavy burden" in consent cases because evidence has shown that people have "an almost reflexive impulse to obey an authority figure," and "[m]any persons, perhaps most, would view the request of a police officer to make a search as having the force of law." Carty, 170 N.J. at 644, 647 (citations omitted); accord State v. Sugar, 100 N.J. 214, 234 (1985) (the standard for a warrantless consent search is "exacting"); State v. Witt, 223 N.J. 409, 415, 442-43 (2015) (explaining New Jersey's history of "widespread abuse of consent searches" and recognizing "the potential for future abuses"). Close scrutiny is especially warranted here because the warrantless search breached the sanctity of the home. See State v. Vargas, 213 N.J. 301, 313 (2013) ("The privacy interests of the home are entitled to the highest degree of respect and protection in the framework of our constitutional system.").

In State v. King, our Supreme Court identified several factors that courts must consider in assessing whether consent was voluntary. 44 N.J. at 352-53; State v. Hagans, 233 N.J. 30, 39-40 (2018). Factors tending to show that consent was coerced include: (1) The consenting person was already arrested; (2) the consenting person denied guilt; (3) the consenting person refused initial requests for consent; (4) the consenting person must have known that the search would discover contraband; and (5) the consenting person was handcuffed. King, 44 N.J. at 352-53. Factors tending to show voluntary consent include: (1) The consenting person had reason to believe that the police would find no contraband; (2) the consenting person admitted guilt before consenting; and (3) the consenting person affirmatively assisted the police. Id. at 353. In addition to the King factors, "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973).

Although a lower court's factual findings ordinarily receive deference, State v. S.S., 229 N.J. 360, 379-81 (2017), "if the trial court does not make any factual finding on a given topic, no deference is due the conclusions it reaches on that subject," State v. Ahmad, 246 N.J. 592, 609 (2021); e.g., State in Int. of M.P., 476 N.J. Super. 242, 300-01 (App. Div. 2023) (considering facts apparent from video of statement not addressed below). Even where the trial court makes

the necessary factual findings, appellate courts "cannot defer to factual findings that are not supported by sufficient credible evidence in the record and therefore are clearly mistaken." State v. Wint, 236 N.J. 174, 201 (2018). In particular, appellate courts must not give "blind deference" to a finding that is not "supported by the fair inferences that can be drawn from the record." Gibson, 218 N.J. at 294-96. In addition, a trial court finding "is not entitled to any special deference where it rests upon a determination as to worth, plausibility, consistency, or other tangible considerations apparent from the face of the record with respect to which [s]he is no more peculiarly situated to decide than the appellate court." State v. Brown, 118 N.J. 595, 604 (1990) (citation omitted); accord, e.g., State ex rel. J.M., 339 N.J. Super. 244, 248-49 (App. Div. 2001) (reversing probable cause finding because police officer's version of events "belie[d] common sense"); State v. Taylor, 38 N.J. Super. 6, 23-24 (App. Div. 1955) (rejecting credibility findings where officers' testimony contained "incredible and improbable elements" "beyond the probabilities of common experience"). In contrast, no deference is owed to a trial court's legal conclusions, which are reviewed de novo. Hagans, 233 N.J. at 38, 40-43; State v. Lamb, 218 N.J. 300, 313 (2014).

In assessing the voluntariness of a person's consent, video footage of the police encounter is an "important tool" that can "aid in the search for the truth"

because it "permit[s] visual and audial evaluation of the police and [suspect's] interaction on the issue of consent." Hagans, 233 N.J. at 40-41. When such videos are "made while an event unfolds," they "protect the public and police alike in that the videos can expose misconduct and debunk false accusations." Id. at 41 (citation omitted). Conversely, the State's failure to present such dispositive evidence is highly relevant under the totality of circumstances. See Gibson, 218 N.J. at 296, 299 (ordering suppression where "[t]he State presented no evidence" about critical issues in dispute); accord State v. Bacome, 440 N.J. Super. 228, 240 (App. Div. 2015) (at a suppression hearing, "the prosecution run[s] the risk that the factfinder may draw an inference adverse to the prosecution's interests when a key fact is supported only by hearsay"), rev'd on other grounds, 228 N.J. 94 (2017). The State's failure to present BWCs documenting the entire detention and questioning of Gross is particularly glaring given the large number of officers on the scene and that at the time BWCs were already mandated by Newark Police Department (NPD) policy, the U.S. Department of Justice's Consent Decree with the NPD, and the New Jersey Attorney General's BWC policy.[6]

[6] See Newark Police Div., Body-Worn Cameras (Gen. Order No. 18-05) (Apr. 13, 2018), https: // www. npdconsentdecree.org/_files/ugd/582c35_4b56fb75a39742e5ad542481460e5878.pdf; Consent Decree at 38-39, United States v. City of Newark, No. 2:16-cv-01731-MCA-MAH (D.N.J. May, 5, 2016), https: // www. npdconsentdecree.org/_files/ugd/582c35_8f30b967fdfd4e1cb75ed859

Here, the State sought to justify its warrantless search under the consent exception, for which it carried the heavy burden of presenting "clear and positive" proof of voluntariness. But it failed to present any testimony about the critical moments leading up to Gross's eventual signing of the consent form. See Williams, 84 N.J. at 227 (holding "the State has not met the burden of showing that the [third party] knowingly consented to the search" where it presented "no proof of facts surrounding the consent"). It was not enough for the State to rely on only the final consent form and a short video clip of the formal waiver advisory, which came at the very end of an hours-long ordeal that involved multiple officers, initial refusals to cooperate or consent, the seizure of Gross's person, a coercive interrogation, and a sudden and unexplained change of heart.

Although a consent-to-search form may be one factor, it is not dispositive. Shaw, 237 N.J. at 619-20. The totality of events leading up to the signing of a consent form are critical and can undermine the voluntariness of a person's eventual consent. See, e.g., State v. Jefferson, 413 N.J. Super. 344, 351-52, 361-

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122070ef.pdf; N.J. Att'y Gen., Law Enforcement Directive Regarding Police Body Worn Cameras (BWCs) and Stored BWC Recordings 9, 11 (Directive No. 2015-1) (July 28, 2015), https: // nj.gov/oag/newsreleases15/AG-Directive_ Body-Cams.pdf (as applied to police departments that opt to deploy BWCs, generally requiring that BWCs be actively recording during searches, investigative detentions and arrests, and interviews of witnesses or suspects; and generally requiring that BWCs "remain activated throughout the entire encounter"). The search in this case occurred prior to the enactment of the BWC statutes, N.J.S.A. 40A:14-118.3 to -118.5, which mandate similar BWC policies.

62 (App. Div. 2010) (invalidating third party's consent despite them signing a consent form and being advised about the right to refuse consent because the trial court "did not adequately weigh the coercive effect of the lengthy police intrusion into and seizure of the home"); State v. Dolly, 255 N.J. Super. 278, 281-81, 284-86 (App. Div. 1991) (same where other evidence of involuntariness included the presence of ten police officers with guns drawn); State v. Speid, 255 N.J. Super. 398, 401-02 (Law Div. 1992) (same where police detained defendant and her family, "exhorted" her to sign the consent form using expletives, and made other "uncouth" remarks, in part because "the language and deportment of the police . . . . had the propensity to create an inherently coercive atmosphere"); State v. Hladun, 234 N.J. Super. 518, 522-24 (Law Div. 1989) (same where defendant previously refused consent and police threatened to get a warrant); State v. Alexander, 170 N.J. Super. 298, 306-07 (Law Div. 1979) (same where other evidence of involuntariness included the seizure of defendant's person).

As those cases demonstrate, our courts have repeatedly made clear that what happens before the ultimate signing of a consent form matters. But here, the State's only witness glossed over those critical details -- in a bare-bones hearing that produced only twenty-three transcript pages -- and at times testified to a version of events directly contradicted by the police reports and objective

BWC. (1T) Based on the State's distorted version of events, the motion court made the critical erroneous findings that "[u]pon initial contact in the courtyard, Ms. Gross readily disclosed that the gun was in her apartment near the television" and that there was not "any sign of her unwillingness to cooperate with law enforcement." (Da 33) But as the BWC and police reports reveal, neither of those findings were accurate. In fact, Gross did not readily disclose anything upon initial contact; she denied knowing anything until the police detained her and put her in handcuffs. And as also shown by the BWC, Gross initially refused to consent to an apparent attempted police entry -- in one officer's own words, "she said she didn't have to open the door" -- which that officer belittled by stating, "blah blah blah." (BWC4-A at 27:00 to 27:14)

Not only did Gross at first refuse to cooperate or consent, but she only relented after being detained, handcuffed, surrounded by police, interrogated, threatened, and promised leniency. Although Ortiz claimed at the suppression hearing that the police made no threats or promises to obtain Gross's consent, (1T 12-22 to 13-2), the BWC and police reports again show that was not accurate. Instead, while Gross was detained, the police shouted at her at least once, demanded that they "needed to know what happen[ed]," threatened that she was "gonna be in trouble" unless she told them the truth, and repeatedly promised that she would not be "in trouble" if she complied. (BWC4-A at 22:12

to 22:22, 27:45 to 34:44; Da 20) Those demands and promises were plainly coercive because the police secured Gross's cooperation only by exploiting her own criminal liability, which at that point could have involved multiple felony offenses, including unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); hindering a prosecution, N.J.S.A. 2C:29-3(a)(3); aiding a convicted felon in illegally possessing a weapon, N.J.S.A. 2C:2-6(c)(1)(b), 2C:39-7(b)(1); and obstruction of justice, N.J.S.A. 2C:29-1. See Schneckloth, 412 U.S. at 229 ("subtly coercive police questions" tend to indicate involuntary consent).

In addition, the police threat about "trouble" had the clear capacity to overbear Gross's will because before it was made she had steadfastly refused to cooperate, and she complied only after the police threatened her. See Carty, 170 N.J. at 645 ("'Consent' that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse." (citation omitted)); State v. Miller, 342 N.J. Super. 474, 480-83 (App. Div. 2001) (affirming on other grounds but accepting trial court's finding that consent was involuntary where the police threatened the consenting party with arrest).

The motion court also improperly dismissed the defense's argument that Gross's visible inattentiveness during the waiver advisory undermined the voluntariness of her consent. Cf. State v. Chapman, 332 N.J. Super. 452, 467

(App. Div. 2000) (consent voluntary where video showed that during the waiver advisory defendant was "looking at the consent to search document while it was being read by [the officer], and that, at one time, he even corrected the officer regarding the year of the vehicle"). Much of the court's reasoning on that point -- including that Gross's daughter had some college education and that Gross told the police where the gun was located -- had nothing to do with whether Gross was paying attention and sufficiently understood her legal right to refuse consent. See Hagans, 233 N.J. at 39 (the State must prove that the consenting person knew they had the right to refuse). And the court entirely ignored the larger implication that Gross may have been intoxicated when she consented, which was further indicated by the BWC showing that Gross admitted that she drank beer that night and that either Gross or her daughter quickly forgot that they signed the consent form. (BWC3 at 27:00 to 27:10; BWC4-B at 1:15 to 1:24) The State's failure to call Gross, the central witness to whether or not her own consent was voluntary, further deprived the court of crucial facts regarding her mental state. Cf. Schneckloth, 412 U.S. at 286 (Marshall, J., dissenting) ("Where, as in this case, the person giving consent is someone other than the defendant, the prosecution may require him to testify under oath."), cited with approval in State v. Johnson, 68 N.J. 349, 354 n.3 (1975) (citing "ways by which the State could satisfy [its] burden" of proving voluntary consent).

Not only did the court get those critical facts wrong, but it also failed to properly apply the law by not analyzing the mandatory King factors, which overwhelmingly indicated that Gross's consent was involuntary. See 44 N.J. at 352-53. Every King factor indicating coercion is present here. First, Gross was arrested at the time she gave verbal consent. Second, she previously denied guilt, first telling police that she did not know what happened and then repeatedly saying she did not know why she was being detained. Third, she previously refused to consent to an entry at least once -- a critical fact not disclosed by the State or addressed by the motion court. Fourth, she knew that the search would uncover the handgun, implicating her in multiple felonies. (For the same reason, the opposite King factor favoring voluntary consent was not present). And fifth, she was handcuffed at the time the police requested verbal consent.

Only one of the King factors tending to indicate voluntariness was present, as Gross apparently admitted hiding the handgun prior to consenting. However, the circumstances in which the police obtained that admission were highly coercive, as they included an intimidating custodial detention, the presence of multiple officers, demands for information, promises of leniency, and a threat of "trouble" made to a suspect facing criminal liability who may have also been intoxicated. See State v. Bindhammer, 44 N.J. 372, 380 (1965) ("the State has a heavier burden of establishing that such consent was given freely" if "given

while in custody"); Schneckloth, 412 U.S. at 229 (courts must consider "the possibly vulnerable subjective state of the person who consents").

Finally, the last King factor favoring voluntary consent, whether the person "affirmatively assisted" the police, was also not present, notwithstanding the fact that Gross ultimately told the police where the gun was located. (Da 33) 44 N.J. at 353. As shown by the BWC footage and police reports, far from actively assisting the police, Gross resisted them throughout most of the encounter by declining to provide information and at first refusing to consent, and she only relented after the coercive interrogation and detention. That Gross eventually disclosed where the gun was after giving in to the police demands did not offset the coercive atmosphere leading up to her consent, nor was it the type of active involvement that would suggest a true willingness to aid the police in their pursuit of crime. Cf. King, 44 N.J. at 355 (finding the assistance factor where the defendant helped the police enter his apartment "without protest").

In sum, nearly all of the King factors indicated that Gross's consent was not voluntary, and the only one that suggested voluntariness was far outweighed by the rest. In particular, Gross's prior refusal to cooperate or consent, and the police's coercive promises and threat while she was handcuffed and facing legal jeopardy, heavily undermined the voluntariness of her eventual consent. The totality of circumstances plainly indicated that Gross "would [have] prefer[ed]

to refuse." Carty, 170 N.J. at 645. The motion court failed to consider those critical facts and thus wrongly denied George's motion to suppress. Ultimately, "[i]t was the State's obligation to put forth facts at the suppression hearing to establish" that the warrantless search of Gross's home was based on voluntary consent, "which it patently failed to do." Boone, 479 N.J. Super. at 210. As a result, this Court should "reverse the order denying defendant's suppression motion and remand for suppression of the evidence." Ibid.

CONCLUSION

For the reasons stated above, this Court should reverse the denial of George's motion to suppress and remand to give him the opportunity to withdraw from his plea agreement.

Respectfully submitted,

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Dated: October 2, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-2668-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division,
v.	:	Essex County.
FARIYD A. GEORGE, a/k/a FARIYD GEORGE,	:	Sat Below: Hon. John Zunic, J.S.C., Hon. John I. Gizzo, J.S.C.
Defendant-Appellant.	:	

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December 12, 2024

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PRELIMINARY STATEMENT

Two Newark Police Officers responded to a dispatch call of a possible shooting at an apartment complex. While they quickly found defendant in a central courtyard, he claimed not to know how he came to be injured. A woman told police she had called 911 for defendant. It took police more than two hours, including review of much surveillance video, to determine that the woman had accepted a gun from defendant before police arrived, and ultimately placed it inside an apartment.

They found her, handcuffed her, gave her warnings against self-incrimination, and then calmly explained they only wanted to get the gun in order to charge defendant. She immediately agreed to cooperate and was released from the handcuffs within about twelve minutes. She and police calmly walked to her daughter's apartment. Police learned that the woman was only visiting her daughter. In light of that information, once inside the apartment, police read the printed Consent to Search form to both women, including its statement that they could refuse to grant consent, after which each woman freely signed the form. In short order, police recovered a gun from inside a bedroom in the apartment, evidence used to charge defendant.

The trial judge conducted a suppression hearing that explored the relevant

facts. The judge correctly concluded, based on the totality of the circumstances, that the women had not been coerced, and so had given their consent voluntarily. The judge thus denied defendant's motion to suppress the gun. Moreover, defendant lost any reasonable expectation of privacy by giving a gun to a complete stranger, thus no search to which defendant could object had taken place. The denial of defendant's motion to suppress should be sustained.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

An Essex County Grand Jury issued indictment 22-06-1428 on June 14, 2022. (Da1-2) ("indictment 1428"). It charged defendant with one count of second-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(b). A different Essex County Grand Jury issued indictment 23-09-1764 on September 7, 2023. Therein, defendant was charged in seven counts. (Da3-10) ("indictment 1764"). Count one charged second-degree aggravated assault, in violation of N.J.S.A. 2C:12-1(b)(1); count two charged fourth-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5(d); count three charged third-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4(d); count four charged third-degree possession of controlled dangerous substance (CDS), in violation of N.J.S.A. 2C:35-10(a); count five charged third-degree possession of CDS with intent to distribute, in violation of N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3); count six charged second-

degree possession of CDS with intent to distribute within five hundred feet of a public housing complex, in violation of N.J.S.A. 2C:35-7.1(a); and count seven charged fourth-degree resisting arrest, in violation of N.J.S.A. 2C:29-2(a)(2). The same Essex County Grand Jury that returned indictment 1764 also returned indictment 23-09-1765, the same day. (Da11-12) ("indictment 1765"). It charged defendant with second-degree being a certain person not to possess a weapon, in violation of N.J.S.A. 2C:39-7(b)(1).

On March 6, 2023, defendant filed a motion to suppress the evidence in indictment 1428. (Da26). The trial court conducted a suppression hearing, with defendant present, on May 2, 2023. (1T; see 1T3-1 to 9). The court denied the motion by order dated August 15, 2023. (Da25). The same day, the court issued an accompanying written decision, containing its reasoning in support of its order. (Da26-33).

On March 1, 2024, defendant pleaded guilty to count one of indictment 1764, which charged him with second-degree aggravated assault, and also to indictment 1765, which charged him with second-degree felon in possession of a weapon. (2T; see 2T13-10 to 16-23).[1] The plea form, which the court reviewed with defendant on the record, (2T8-21 to 13-12), stated defendant's

[1] The date of the crime in indictment 1765 was amended to July 5, 2020, and the weapon involved was amended to a handgun. (2T3-18 to 5-10).

understanding that he was subject to a mandatory period of parole ineligibility of five years, and that the State would recommend a sentence of five years, with eighty-five percent of that time subject to parole ineligibility, to run concurrently with a sentence of five years, with five years of parole ineligibility. (Da36-37). It further stated that the State would move to dismiss all other counts of indictment 1764, and would move to dismiss indictment 1428. (Da37). Defendant also executed the supplemental plea form for cases subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and the supplemental plea form for offenses subject to the Graves Act, N.J.S.A. 2C:43-6c. (Da40-41).

On April 19, 2024, the trial court sentenced defendant to five years in prison, with eighty-five percent of that time subject to parole ineligibility, on his conviction for second-degree aggravated assault, and five years in prison, with five years of parole ineligibility, on his conviction for second-degree being a certain person not to possess a weapon, with the sentences to run concurrently. (3T10-14 to 11-15). Mandatory fines were also imposed. (3T10-22 to 23; 3T11-14 to 15). Counts two through seven of indictment 1764, and indictment 1428, were dismissed. (3T11-23 to 12-14; Da42-45; Da46-48; Da49-51).

Defendant filed his notice of appeal on May 7, 2024. (Da52-55).

COUNTERSTATEMENT OF FACTS

A. The Suppression Hearing

The trial court received testimony from one witness, Newark Police Officer Yasilis Ortiz, but also relied on three police reports, the signed Consent to Search form, and the video from Officer Ortiz's body-worn camera. (1T; Sa1; Da13-24; Dca 1[2]). On July 5, 2020, at 1:31 a.m., Newark Police received a call that a possible shooting had taken place at 17 Oxford Street, a public housing complex. (Da23[3]; 1T6-12 to 7-2). Officers Ortiz and Ramon Cruz, in uniform and in a marked police car, responded, arriving at the scene at 1:39:10 a.m. (1T5-13 to 7-2; Da23; Dca 1, clip one, 1:39:10 a.m.). On arrival, they entered the central courtyard, where they encountered defendant seated on a retaining

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[2] Officer Ortiz's video is in five separate clips, contained in four folders. (The fourth and fifth clips are both in the fourth folder.) The first clip begins at about 1:36:20 a.m., and ends at about 2:01:23 a.m. The second clip begins at about 2:19:48 a.m., and ends at about 2:25:15 a.m. The third clip starts at about 2:39:08 a.m., and ends at about 3:34:57 a.m. The fourth clip does not indicate time of day, but lasts about 1 hour, twenty minutes. The fifth clip, which also does not indicate time of day, lasts about forty-two minutes, thirty-four seconds. Less than five minutes into the fifth clip, daylight can be seen through a hallway window. Herein, reference is made where appropriate to either actual time of day or running time, as the case may be. Contrary to defendant's implication, while the hours of video were not all viewed during the suppression hearing, the entire video was entered into evidence. (1T18-6 to 11).

[3] Officer Ortiz's report indicates June 5, which was incorrect. (Da23).

wall; he reported an injury to his left foot. (1T7-3 to 9; 1T10-13 to 25; Dca 1, clip one, 1:40:15 a.m. to 1:43 a.m.).

Defendant denied having been shot; he said that he fell. (Dca 1, clip one, 1:42 to 1:43:35). Defendant admitted that a "lady" had called 911 on his behalf. (Dca 1, clip one, 1:43:45 a.m.). A woman unseen at that time on the video, and later identified as Amaryllis Gross, was heard voluntarily telling police she had called in the incident, at defendant's request; they did not approach her. (Da16; Da20; Da23; Dca 1, clip one, 1:45:15 a.m. to 1:45:50 a.m.). As police then had no facts to suspect Gross's personal involvement in the matter, she was not questioned in depth, or in an accusatory fashion, contrary to defendant's suggestion she was then "encountered" and interrogated. (Db5-6). Rather, she simply failed to volunteer information. Nor was she given her Miranda[4] warnings at that time. (Db4). Defendant said nothing to the police about her.

Ortiz summoned an ambulance for defendant; an Emergency Medical Technician (EMT) approached defendant at about 1:57:18 a.m. (1T7-15; Dca 1, clip one). About one minute later, Amaryllis Gross and another woman, who had earlier spoken privately with defendant, were briefly observed sitting on a retaining wall on the opposite side of the courtyard from defendant; they were

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

not being questioned. (Dca 1, clip one, 1:58:27 a.m. to 1:58:31 a.m.).

About twenty minutes after the initial call, Sergeant Ricardo Velez was dispatched to the scene. (Da20). Defendant told Velez he did not know how he had been injured, but Velez learned the EMTs administering to defendant opined that he had a gunshot wound. (Da20). Velez directed two officers to escort defendant to the hospital. (Da20). The police remaining on scene later learned that a bullet was lodged in defendant's foot. (1T7-21 to 22).

Velez directed Ortiz and Cruz to speak with a security officer for the housing complex, to determine whether video had recorded the incident, which they did. (1T8-5 to 8; Da20; Da23). That process involved review of many videos from different angles; between about 2:43 a.m. and 3:00:15 a.m., Ortiz and private security failed to locate defendant on video. (Dca 1, clip three.) Ortiz went out to the street, reported to Sergeant Velez, and returned to the courtyard of the housing complex at about 3:04:25 a.m. (Dca 1, clip three). She then encountered Amaryllis Gross at about 3:04:55 a.m., and asked Gross for her identifying information. (Dca 1, clip three). Gross told Ortiz that Gross's daughter lived in Apartment 2A, but that she was from Wilmington, North Carolina. (Dca 1, clip three, 3:05:48 a.m. to 3:05:55 a.m.). Gross, then still <u>not</u> detained, began to explain what had happened. (Dca 1, clip three, 3:06:15 a.m.).

Gross said defendant asked her to call 911 because he got shot in the foot,

but she mentioned nothing about taking anything from defendant, never mind a gun. (Dca 1, clip three, 3:06:10 a.m. to 3:07:25 a.m.). When Officer Ortiz asked for Gross's telephone number (she had a cell phone in her hand), Gross provided a number in area code 336, not the 973 area code common to Newark. (Dca clip three, 3:07:25 a.m. to 3:08:06 a.m.). After that, Ortiz thanked Gross, and allowed her to depart. (Dca clip three, 3:08:15 a.m.).

Ortiz headed directly into the security office, telling two private security employees that police needed to learn where defendant had been before he was injured. (Dca 1, clip three, 3:08:16 a.m. to 3:08:35 a.m.). Relevant surveillance video was thereafter located, and it revealed that defendant had walked normally out of 17 Oxford Street, with what appeared to be drinks in each hand. (Da20; Dca 1, clip three, 3:18:17 a.m. to 3:20:15 a.m.). Officer Ortiz told the security personnel that police were still awaiting confirmation that defendant had suffered a gunshot wound. (Dca 1, clip three, 3:18:17 a.m. to 3:20:15 a.m.). In the courtyard, defendant stumbled and fell; when he arose, he began limping. (Da16; Da20; Dca 1, clip three, 3:19:05 a.m. to 3:20:15 a.m.).

With that new information, Officer Ortiz and private security went outside, to look for the gun near where defendant fell. (Dca 1, clip three, 3:20:53 a.m. to 3:24:15 a.m.). At that point, Officer Ortiz speculated for the first time that defendant may have given the gun to Amaryllis Gross. (Dca 1, clip three,

3:24:15 a.m. to 3:24:18 a.m.).

After reporting to Sergeant Velez by phone and in person, and searching the courtyard with Velez and other police for the gun unsuccessfully, Ortiz asked the security personnel to review more video, to determine where Amaryllis Gross went during the relevant time. (Dca 1, clip three, 3:24:20 a.m. to 3:34:57 a.m.). Thus, more than two hours after the 911 call was received, police still had no evidence that Amaryllis Gross had possessed defendant's gun.

The fourth video clip, lacking actual time of day, began with Officer Ortiz inside the security office, reviewing more video with the two security personnel, plus another police officer. (Dca 1, clip four, 0:01[5]). Within about one minute, one of the security employees pointed to a video showing a person inside one of the buildings. The two police officers and two security personnel hastily departed the security office, and ran across the courtyard into one of the complex's buildings. (Dca 1, clip four, 1:00 to 2:00). In a hallway, Officer Ortiz remarked that she had seen on the video that Amaryllis Gross took the gun with her. (Dca 1, clip four, 2:18). A fellow officer radioed that everyone should look for Amaryllis Gross. (Dca 1, clip four, 2:25 to 2:45).

[5] For clips four and five, times indicated refer to the length of time within the clip, not actual time of day.

Ortiz went back into the courtyard, telling her colleagues, including Sergeant Velez, that Amaryllis Gross had possessed the gun, which Ortiz saw on the video. (Da20; Dca 1, clip four, 3:00 to 4:10). They entered a second building, where the group proceeded to the apartment occupied by the daughter of Amaryllis Gross, Rasheedah. (Dca 1, clip four, 4:10 to 5:25). While still on the elevator headed to the apartment, Ortiz told Velez that the video showed Amaryllis place the gun inside one building, then remove it and take it with her, which information caused Sergeant Velez to decide to detain her for tampering with evidence when they found her. (Dca 1, clip four, 4:10 to 5:00).

Rasheedah Gross answered her apartment door, and told police Amaryllis was not inside. (Dca 1, clip four, 5:40 to 5:55). After confirming that fact, the police went to a different building, in which the woman who had been sitting on the retaining wall with Amaryllis lived. (Dca 1, clip four, 5:55 to 8:40). On the way, Sergeant Velez directed that Amaryllis be read her rights, which Ortiz confirmed with Velez while on an elevator up to the second woman's apartment. (Dca 1, clip four, 8:53 to 9:10).

While on the elevator, Officer Ortiz advised Sergeant Velez that surveillance video disclosed that Amaryllis had been near defendant, walked into a building, unsuccessfully tried to gain entry to a unit, and placed a "metallic, shiny object," which appeared to Ortiz to be a gun, on a windowsill.

(1T8-9 to 9-9; Da16; Da20; Da23; Dca 1, clip four, 9:10 to 9:38). Some time later, according to the video Officer Ortiz had seen, Amaryllis removed the object from the windowsill, and then walked into a different unit, which police learned was the apartment in which she was staying. (1T9-12 to 23; Da23; Dca 1, clip four, 9:10 to 9:38).

But when the second woman opened her apartment door, she told police Amaryllis was not inside. While in the elevator leaving the building, Sergeant Velez reported on his phone that the injury to defendant had still not been confirmed to be a bullet wound. (Dca 1, clip four, 16:20).

Ortiz and Velez returned to the security office, where Ortiz recorded the security recording showing Amaryllis and the second woman get off an elevator and walk to a yellow bag on a window sill, where Amaryllis removed a small object, which she then placed inside a greenish bag she had, before the two women returned to the elevator and left that floor. (Dca 1, clip four, 21:10 to 21:55). Beckoned by another police officer, Ortiz and Velez moved back to the courtyard immediately outside the security office, where they encountered Amaryllis. (1T10-2 to 5; Dca 1, clip four, 21:55 to 22:07).[6] Ortiz handcuffed

[6] A clock seen on the wall of the second woman's apartment at the 14:09 mark of the video appeared to show the time to be between 4:20 a.m. and 4:25 a.m. (Dca 1, clip four). If that clock was accurate, this encounter happened at about 4:28-4:33 a.m., three hours after the initial dispatch call.

her, and she was escorted by Sergeant Velez out to the street, where he warned her of her rights against self-incrimination. (1T10-2 to 11; Da20; Dca clip four, 22:15 to 27:40). Before joining them, Officer Ortiz briefly went into the courtyard to explain to Amaryllis's daughter, Rasheedah, and a male companion that Amaryllis was being detained. (Dca 1, clip four, 23:50 to 24:10). As Ortiz joined Velez and Amaryllis on the street, Velez told Amaryllis that she was not yet being questioned, but that everything appeared on surveillance video. (Dca 1, clip four, 24:15 to 24:40).

At the police car, after calmly and patiently reading Amaryllis the complete Miranda warnings, while a few other officers stood a fair distance away, and not "surround[ing]" Amaryllis, as defendant claims (Db6), Sergeant Velez twice told Amaryllis in a calm voice that she was not in trouble, unless she lied to him, and then explained what the surveillance video showed. (Dca 1, clip four, 27:20 to 28:20). Velez then said that all police needed was the gun, so that defendant could be charged. (Dca 1, clip four, 28:20 to 28:25).

After confirming with Velez that she was not in trouble, Amaryllis told police how defendant directed her to hide the gun in an apartment, but that, as nobody answered that door, she first left the gun in a bag outside the apartment but later returned, took it, and placed it in her bedroom. (Dca 1, clip four, 28:25 to 30:15). Officer Ortiz quickly mentioned that a Consent to Search form should

be obtained, and another officer took a form from a folder. (Dca 1, clip four, 31:15 to 32:05). Meanwhile, Sergeant Velez stepped aside to discuss on the phone with an unknown person the subject of searching her room, and whether Amaryllis could be released without charges. Returning, Velez then explained to her, twice, that she was not in trouble, but would have to travel to a police station to provide a statement. (Dca 1, clip four, 30:25 to 33:00). Shortly afterwards, Officer Ortiz removed Amaryllis's handcuffs, which she had been wearing for about twelve minutes. (Dca 1, clip four, 33:53 to 34:08).

Now unshackled, Amaryllis walked at an unhurried pace from the street into the courtyard with Sergeant Velez and other officers, where the group met Rasheedah. (Dca 1, clip four, 33:53 to 37:15). On the way to Rasheedah's apartment, Rasheedah told Officer Ortiz that her mother was originally from New Jersey, but now lived in Wilmington. (Dca 1, clip four, 36:35 to 36:48). Amaryllis then told police, in Rasheedah's presence, that she once had New Jersey identification, but had moved to Wilmington. (Dca 1, clip four, 36:48 to 37:15). On the elevator to Rasheedah's apartment, the women told police Amaryllis had a bedroom in Rasheedah's apartment. (Dca 1, clip four, 37:15 to 37:48). As they got off the elevator, Amaryllis again said, within earshot of Rasheedah, that she lived in Wilmington, intended to return there, and was only staying with her daughter until her daughter's birthday. (Dca 1, clip four, 37:48

to 38:03).

Before entering Rasheedah's apartment, Officer Ortiz reminded Sergeant Velez they should get the Consent to Search form signed "first." (Dca 1, clip four, 38:20 to 38:25). As Amaryllis and Rasheedah entered Rasheedah's apartment, Ortiz asked which Building they were in. (Dca 1, clip four, 38:30 to 38:35). Once inside the apartment, Sergeant Velez immediately cautioned Amaryllis that she should not touch anything. (Dca 1, clip four, 38:45 to 38:50).

Having learned Rasheedah was the named tenant on the apartment lease, Sergeant Velez directed the officer filling out the Consent to Search form that both Rasheedah and Amaryllis should sign the form. (1T11-6 to 12-21; 1T13-16 to 16-15; Dca 1, clip four, 38:50 to 38:58; Dca 1, clip four, 40:25 to 40:40). While Ortiz and another officer got information from Amaryllis, just off-camera, Sergeant Velez explained to Rasheedah why police wanted her to sign the Consent form too. (Dca 1, clip four, 39:00 to 41:05). Responding to her exasperated daughter's question, Amaryllis admitted that she possessed a gun, which she said defendant had given her to place inside the first apartment. (1T10-12 to 16; Da20; Dca 1, clip four, 43:18 to 44:50). But as she was unable to gain access to that apartment, and was uncomfortable leaving the gun in a public area, she had removed it, and taken it inside Rasheedah's unit. (1T11-2 to 4; Da20; Dca 1, clip four, 43:18 to 44:50).

The video revealed that three previously unidentified males were inside Rasheedah's apartment during the entire time. (1T21-16 to 18). At risk to their own safety, the police allowed one of the men to go unescorted into a room where the man closed the door. (Dca 1, clip four, 39:20 to 39:38). Later, a different male emerged from the bedroom in which the gun lay openly displayed; he commented on its location. (Dca 1, clip four, 45:45 to 46:02). At no time did any police draw their own weapon. That is, the atmosphere inside the apartment probably was more relaxed than was warranted, despite the presence of a number of police.

Officer Ortiz again asked Amaryllis whether she had any identification, such as a Passport, and Amaryllis again said she had none. (Dca 1, clip four, 45:35 to 45:40). After the relevant information had been inserted onto the form, Officer Ortiz read the Consent to Search form to the two women, including the information that (1) they had the right not to have a search made without police getting a search warrant, and that (2) they had the right to refuse to give consent to search. (1T14-19 to 15-21; Dca 1, clip four, 48:20 to 48:45; Sa1). While Amaryllis – a few feet from Officer Ortiz – at one point turned her back to Officer Ortiz and bent over, nothing suggests she did not hear everything the officer read. After Ortiz finished reading the form, Sergeant Velez confirmed with the women that they were not being pressured, and that their consent was

voluntary. (Dca 1, clip four, 48:45 to 49:30).

Before offering the form to Rasheedah for her signature, Officer Ortiz learned from Rasheedah that she was a high school graduate with two years at Essex County College. (1T15-25 to 16-6; Dca 1, clip four, 49:20 to 49:53; Da24). At that time, first Rasheedah, and then Amaryllis, signed the form. (1T11-20 to 13-5; 1T16-7 to 10; Da20; Da24; Sa1; Dca 1, clip four, 49:53 to 50:37; Sa1). That is, before she signed the Consent to Search form, Amaryllis walked around the apartment freely for about as long as she had been handcuffed.[7]

Sergeant Velez, Officer Ortiz and another officer went into Amaryllis's bedroom, saw the gun lying openly in front of a large-screen television, and left it there for the Crime Scene Unit (CSU). (Da24; Dca 1, clip four, 50:38 to 51:00). After arriving, a CSU officer checked the gun, photographed the Consent to Search form, photographed the gun, and finished his business inside Rasheedah's apartment. (Da24; Dca 1, clip four, 1:19:03 to 1:20:00; Dca 1, clip five, 00:01 to 6:10). By then, it was daylight. (Dca 1, clip five, 5:00 to 6:10).

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[7] If Amaryllis was handcuffed at 4:28 a.m., see note 6, above, then she signed the consent at 4:56 a.m., which was about twenty-eight minutes after she was handcuffed, and about sixteen minutes after she was released from the handcuffs.

B. The Decision of the Trial Court

The trial court held that Officer Ortiz was a credible witness, as the investigative reports, body-worn video, Consent to Search form, and handgun in evidence corroborated the officer's testimony. (Da29-30).[8] The court, relying principally on the video evidence, further held that both Amaryllis and her daughter were informed by police they could refuse consent to search the apartment, and there was no evidence either misunderstood their right. (Da32). Further, the court accepted as valid the signed Consent to Search Form. (Da32). Rasheedah was the "proprietor" of the apartment, meaning the lessee, not Amaryllis. (Da24; Da27-28). Nor did any evidence support a claim that their consent was coerced, as not one of various factors normally considered to "potentially indicate" coercion was present. (Da32). Defendant's claim that the two women were inattentive as Officer Ortiz read the form was explicitly rejected by the trial judge. (Da32-33; see 1T14-19 to 16-22; 1T21-23 to 22-14). The judge also noted that the women understood that the police had a single stated objective, to secure the handgun defendant had given to Amaryllis, which representation the police honored. (Da33). For these reasons, the trial judge found the consent to search given by the women was lawful. (Da25-33).

[8] The trial judge transposed the exhibit numbers of the Consent to Search form and the video. (Compare 1T11-14 to 12-2 and 1T13-21 to 14-4 with Da32).

C. Defendant's Guilty Pleas

One day short of ten months after the trial judge denied defendant's suppression motion, he entered his two guilty pleas. (2T). In relevant part, defendant admitted that on July 5, 2020, he had possessed a handgun, having already been convicted of a felony, specifically unlawful possession of a weapon, and he admitted that the handgun he possessed on July 5, and which had wounded him, was operable. (2T14-19 to 15-20).

LEGAL ARGUMENT

POINT I

THE JUDGE CORRECTLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE GUN.

Defendant lacked an objectively reasonable expectation of privacy by delivering the gun to a complete stranger, Amaryllis Gross. Further, police obtained lawful consent to search the apartment of Rasheedah Gross for the gun, from both Rasheedah and Amaryllis Gross. On either rationale, the judge properly denied defendant's motion to suppress.

A. As Defendant Lacked a Reasonable Expectation of Privacy Once He Delivered the Gun to a Stranger, No Search Implicating Defendant Occurred.

While the trial judge did not address the preliminary question whether a search implicating defendant occurred in these circumstances, this Court may,

as "appeals are taken from orders and judgments and not from opinions . . . or reasons given for the ultimate conclusion." State v. Scott, 229 N.J. 469, 479 (2017) (internal quotation omitted); see State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (noting appellate court may affirm decision "on grounds different from those relied upon by the trial court").

Although defendant had automatic standing to challenge the gun's seizure by virtue of being charged with a possessory offense, State v. Randolph, 228 N.J. 566, 581-82 (2017), whether he possessed a reasonable expectation of privacy in Rasheedah's apartment is a separate issue, which is defendant's burden to establish. State v. Hinton, 216 N.J. 211, 230, 235 (2013). Because the merits of the suppression motion "rest on whether defendant possesses a reasonable expectation of privacy, the court must address that issue as part of the substantive constitutional analysis." Id. at 234. Absent a finding defendant met his burden to show society is willing to recognize his subjective expectation as objectively reasonable, he "cannot challenge" the admissibility of the gun into evidence on Fourth Amendment grounds, or equivalent rights under Article I, Paragraph 7 of the New Jersey Constitution, for the police action was not a "search" under either the federal or State Constitution. Hinton, 216 N.J. at 230, 239-40.

Defendant gave the gun to a complete stranger, Amaryllis. While

defendant asked her to place the gun inside an apartment he believed would protect it from discovery by police, defendant assumed the risk his objective could not be achieved. His "precipitous bailment" of the gun to a stranger did not create any reasonable expectation of privacy in Rasheedah's apartment, where the gun ended up. See Rawlings v. Kentucky, 448 U.S. 98, 100-01, 104-06 (1980) (holding defendant lacked reasonable expectation of privacy in purse of person who he'd known "for only a few days," in light of the "precipitous nature of the transaction" in which he placed contraband in her purse); United States v. Austin, 66 F.3d 1115, 1116, 1118-19 (10th Cir. 1995) (ruling defendant lacked reasonable expectation of privacy in bag when he asked stranger in airport to watch it; "defendant assumed the risk" stranger "would allow the authorities access to the bag"), cert. denied, 516 U.S. 1084 (1996); United States v. Miller, 636 F.2d 850, 851-54 (1st Cir. 1980) (holding defendant lacked reasonable expectation of privacy in smuggled fish being transferred by four persons from a trailer to trucks, as no evidence showed four persons had a "special relationship of confidence" with defendant, or worked "under some limited grant of his permission"); People v. Barronette, 507 N.Y.S.2d 73, 75-76 (N.Y. App. Div. 1986) (holding bailor who made "precipitous bailment" by giving "unlocked luggage" to "a total stranger" to transport out of airport terminal lacked reasonable expectation of privacy in contents of luggage).

Therefore, defendant failed to meet his burden to show that he had any objectively reasonable expectation of privacy when he delivered the gun to Amaryllis. Hence, no "search" took place to which defendant could object.

State v. Evers, 175 N.J. 355 (2003), stands for the identical proposition, applied to the Internet. Evers claimed to possess "a reasonable expectation of privacy with respect to the pornographic material he unloosed into the electronic stream of commerce when he emailed two photographs of an under-aged nude girl in an exposed position to fifty-one chat room subscribers." Id. at 368. The Supreme Court rejected Evers's argument, noting the well-established proposition that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." Id. at 369 (brackets and ellipsis in original) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)). When information is revealed to a third party, then "[i]f that third-party discloses the information to the government, the individual, who falsely believed his confidence would be maintained, will generally have no Fourth Amendment claim." Ibid.

When defendant gave Amaryllis Gross his gun, he acted "at peril" that she "would disclose his wrongdoing. There is no constitutional protection for misplaced confidence or bad judgment when committing a crime." Id. at 370. For this reason, the judge correctly denied defendant's motion to suppress.

B. The Consent of a Third Party Was Obtained Lawfully, So the Gun Was Seized Lawfully.

Voluntary consent is a valid basis to sustain a warrantless search against a motion to suppress. United States v. Matlock, 415 U.S. 164, 169-71 (1974); State v. Miranda, 253 N.J. 461, 475-76 (2023). A person other than defendant may consent to the search under appropriate circumstances. Matlock, 415 U.S. at 169-71 (noting that in such circumstances defendant "assume[s] the risk" the third party will permit the search); Miranda, 253 N.J. at 476; State v. Crumb, 307 N.J. Super. 204, 242 (App. Div. 1997) ("Consent may be obtained from a third party so long as the consenting party has the authority to bind the other party."), certif. denied, 153 N.J. 215 (1998). Like any exception to the warrant requirement, the State need prove consent only by a preponderance of the evidence. State v. Elders, 192 N.J. 224, 246 (2007).

In its review of the denial of defendant's suppression motion, this Court should accord great deference to the motion judge's factual findings. State v. Gonzales, 227 N.J. 77, 101 (2016). They should be upheld "so long as those findings are supported by sufficient credible evidence in the record." Ibid.; State v. Gamble, 218 N.J. 412, 424 (2014). Deference is due even where, as here, videotape of the incident is part of the evidentiary hearing. State v. S.S., 229 N.J. 360, 379-81 (2017); Elders, 192 N.J. at 244-45. Deference should particularly be given to the judge's finding that Officer Ortiz was a credible

witness. State v. Locurto, 157 N.J. 463, 474 (1999). This deference is further due the ultimate decision of the trial judge that consent was given voluntarily, a factual issue that this Court should not reverse unless it concludes the determination to be "clearly erroneous." State v. King, 44 N.J. 346, 354 (1965). In other words, the trial court's factual findings, including its ultimate factual holding that voluntary consent was lawfully given, "should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). Defendant cannot make such a showing here, as the credible evidence before the judge was more than sufficient to support his findings.

1. Valid Consent Was Given by the Daughter, Rasheedah Gross

Consent to search in this case was provided by not one, but two, third-parties – Amaryllis Gross, and her daughter, Rasheedah, who defendant ignores entirely. For good reason, because Rasheedah's consent was valid and conclusive by itself, and that consent is unassailable. This Court is empowered to affirm the decision of the trial judge based solely on Rasheedah's consent, on the authority discussed in Point I(A).

It is not disputed that Rasheedah was the tenant with control over the apartment searched. It is indisputable that Amaryllis told police she lived in another state at least three times, told them she planned to return to that state,

and did not produce any identification to call her assertions into question. Her daughter confirmed that Amaryllis was only visiting from Wilmington. Therefore, Amaryllis should be treated as no more than an overnight guest in her daughter's apartment.

While an overnight guest may have a reasonable expectation of privacy in her host's home, the host maintains the authority to license others, including law enforcement, into the home, as well. Minnesota v. Olson, 495 U.S. 91, 99 (1990). "[A] homeowner does not relinquish control over the premises to a third party simply because the third party occasionally resides in the home." State v. Flowers, 598 S.E.2d 725, 728 (S.C. Ct. App. 2004); see State v. Fountain, 534 N.W.2d 859, 863-64 (S.D. 1995) (holding that overnight guest sharing use and access of premises is subject to host's consent to search guest's effects); State v. Vaster, 601 P.2d 1292, 1293-95 (Wash. Ct. App. 1979) (holding that since no evidence was presented adult son "exercised exclusive control over any portion of" his mother's residence, her consent allowed police to arrest defendant in "his" bedroom).

At a minimum, the facts showed Rasheedah and Amaryllis each had control over the bedroom in which the gun was found. "New Jersey recognizes . . . that there may be dual control over a particular location. In such a case either party has the authority to grant the right to search at that location." State

v. Santana, 215 N.J. Super. 63, 69 (App. Div. 1987) (citing cases).

Rasheedah was never under suspicion, and was never detained. She was an adult who had two years of college. Rasheedah's consent would be valid even if Amaryllis was under arrest when Amaryllis gave her consent – a point the State does not concede. The arrest of another in the presence of the consenting party does not automatically equal coercion of the consenting party. United States v. Drayton, 536 U.S. 194, 205-08 (2002) (rejecting argument individual could not validly consent after traveling companion arrested). No facts even suggest Rasheedah was subjected to any pressure by police. Just the opposite. Police asked more than once whether she understood her right to deny them consent to search.

In addition to Rasheedah's actual authority to give consent to search the bedroom where the gun had been placed, her "apparent authority" also justified the police in acting. Police "may, depending on the circumstances, rely on the apparent authority of a person consenting to a search." Miranda, 253 N.J. at 476 (internal quotation omitted). Amaryllis said nothing to indicate she was exerting the right to exclude police from the bedroom. Just the opposite; Amaryllis was assisting the police, as Rasheedah saw. Amaryllis never told Rasheedah to deny police access to "her" bedroom. Because Rasheedah was the "proprietor" of the apartment, which Amaryllis was visiting from another state, the police were

justified in relying on Rasheedah's consent, regardless of whether Amaryllis's consent was voluntary. Sufficient credible evidence supports the trial judge's finding that the consent given by Rasheedah was voluntary, and thus valid.

2. Amaryllis Gross Also Gave Valid Consent to Search

When Amaryllis signed the consent form, she had already been released from a brief detention, of about twelve minutes. Any possible coercion arising from her short arrest period had dissipated by the time – about a quarter of an hour later – that the Consent to Search form was read to her, in a familiar place, among persons known to her. Any remaining pressure was further diminished by the words appearing on the form and read to Amaryllis, especially the form's reminder that she had the right to refuse consent. But she gave no indication of reversing her earlier decision to cooperate with police.

Whether consent has been validly made is assessed by the totality of the circumstances. State v. Hagans, 233 N.J. 30, 40 (2018) (citing King, 44 N.J. at 353). A handcuffed person may still provide valid consent, depending on the other attendant circumstances. Hagans, 233 N.J. at 34-35, 40-43 (finding sufficient credible evidence to affirm ruling of trial court that handcuffed individual, who initially refused to consent, validly changed mind and provided valid consent, under totality of circumstances); see King, 44 N.J. at 353 (noting that "many decisions have sustained a finding that consent was voluntarily given

even though the consent was obtained under the authority of the badge or after the accused had been arrested"). The facts that Amaryllis was told she had the right to refuse to consent, and that she had been given Miranda warnings, weigh in favor of finding her consent to have been given voluntarily. State v. Hladun, 234 N.J. Super. 518, 523 (Law Div. 1989).

Hagans disposes of defendant's argument that Amaryllis's consent was coerced. In that case, a driver was arrested after her passenger had been arrested. 233 N.J. at 34. The police officer read the consent form to her, and the driver refused to permit a search. Id. at 35. Within a few minutes, she reversed herself, and consented. Ibid. The trial judge acknowledged and evaluated the factors first set out in King, but found the driver "consented to the search voluntarily even though a majority of" the King factors "cut against a finding of voluntariness." Id. at 39-40. The trial judge noted the video evidence provided "was more compelling than the results suggested by a mechanical application of the King factors to the facts of the case." Id. at 40. The trial judge "stressed the officer's lack of insistence, the short period between the initial refusal and the consent, the officer's non-aggressive request for clarification, and" the driver's "repeated affirmations that she did, in fact, give her consent to search." Ibid. Significant to the trial judge was the fact that the officer did not "badger[]" the driver in an effort to procure consent. Id. at 41. The video showed that he asked

the driver "several different questions to ensure she understood and consented." Ibid. The Supreme Court noted that the Appellate Division "observed" that the driver "appeared at ease throughout the entire interaction and listened to and calmly considered her options." Ibid. The Supreme Court held that "sufficient credible evidence support[ed] the trial court's determination that [the driver]'s consent was voluntary under the totality of the circumstances, despite the presence of several of the potentially coercive King factors." Id. at 42-43. The Court specifically rejected Hagans's argument that the King "guideposts" were "dispositive" in finding the driver to have been coerced. Id. at 42.

This case is even stronger than Hagans. Amaryllis never refused to cooperate with police, or to give her consent. She had been released from handcuffs and knew she was no longer under arrest about a quarter of an hour before she was presented with the consent form, dissipating any effect of the arrest. In contrast to the driver in Hagans, who was arrested on the side of the road, and worried for her six-year-old daughter seated in her car, 233 N.J. at 34, Amaryllis was in the familiar environment of the apartment in which she was then staying, with four people apparently known to her, including her adult daughter. Defendant's contentions Amaryllis was subjected to an "hours-long ordeal," at first "refus[ed] to cooperate or consent" (Db15), and "resisted them throughout most of the encounter" (Db21), do not withstand the slightest

scrutiny of the record, since they mischaracterize the parties' interactions for the three hours before police confronted her with knowledge of the true facts of her role. Also, defendant's claim Amaryllis "initially refused to consent to an apparent police entry" (Db17) is a misinterpretation of the video; in response to an officer's question, "Where'd you find her?", another officer said Amaryllis was walking, and then said she, the officer, thought "the daughter went and got her because y'all had knocked on the door, she said." (Dca 1, clip four, 27:00 to 27:12). The officer was speaking of Rasheedah, not Amaryllis, at the apartment.

Nor does defendant's assertion that Amaryllis's decision to consent was "unexplained" (Db15) withstand scrutiny. The police explained to her what the complex's surveillance videos clearly showed, which she knew to be true. She knew that they knew the truth, and she was warned that the only way she would get into trouble was to lie to them. Defendant's accusations that police "shouted at her at least once," "threatened" her, and made "demands and promises," (Db16-17), are shown by the video to be grossly overstated.

Amaryllis's consent was voluntary. She willingly gave it to exculpate herself, a motivation that numerous courts have recognized and endorsed in upholding third-party consents. "[T]he right of the custodian of the defendant's property who has been unwittingly involved by the defendant in his crime to

exculpate himself promptly and voluntarily by disclosing the property and explaining his connection with it to government agents, must prevail over any claim of the defendant to have the privacy of his property maintained against a warrantless search by such agents." United States v. Diggs, 544 F.2d 116, 120-21 (3d Cir. 1976) (en banc); see United States v. Botsch, 364 F.2d 542, 547-48 (2d Cir. 1966) ("It would be a harsh doctrine, indeed, that would prevent an innocent pawn from removing the taint of suspicion which had been cast upon him by a defendant's cunning scheme."), cert. denied, 386 U.S. 937 (1967); United States v. Mazzella, 295 F. Supp. 1033, 1035-36 (S.D.N.Y. 1969); Gieffels v. State, 590 P.2d 55, 60-62 (Alaska 1979); see also State v. Brockman, 494 S.E.2d 440, 444 (S.C. Ct. App. 1997) (dictum), rev'd, 528 S.E.2d 661 (S.C.), cert. denied, 530 U.S. 1281 (2000).

Defendant's comparison of Amaryllis's situation with that presented in State v. Carty, 170 N.J. 632 (2002), should be swiftly rejected. Carty concerned a specific problem that repeatedly affected a large segment of the population, detained motorists asked to consent, because eighty percent of those persons who gave consent were "not charged with any violation" of law. Id. at 645. Amaryllis was not subjected to "official intimidation or harassment" as those motorists were, ibid., because the police had video proof of her possession of defendant's gun when they sought her consent.

Defendant's reliance on State v. Miller, 342 N.J. Super. 474 (App. Div. 2001), is similarly misplaced. In Miller, the third-party consent was found to be involuntary because the officers communicated through their words and actions that "it didn't matter what" the third party said, the officers were committed to entering her home, which position one of the officers expressly conceded in answering a question from the trial judge during the suppression hearing. Id. at 483. Here, the officers' words and actions consistently conveyed that they would respect the decision made by the Gross women.

Finally, defendant's contention the trial judge erred "by not analyzing the mandatory King factors" (Db19) tries to create an obligation rejected by King, which rejection was reinforced by Hagans. See King, 44 N.J. at 353 ("Since the factors mentioned above are only guideposts to aid a trial judge in arriving at his conclusion, they cannot purport to lay down rules of law which preclude him from determining the issue of voluntariness of consent by his consideration of the totality of the particular circumstances of the case before him."); Hagans, 233 N.J. at 42-43 (noting that "technological advancements" enhancing the ability of the trial judge to "better evaluate the manner in which" police obtain consent "are precisely why the King Court factors are guideposts rather than rigid absolute authority"); see also State v. Williams, 461 N.J. Super. 80, 104 (App. Div. 2019) (noting, but not criticizing, fact that trial judge did not

"expressly articulate[]" an analysis of King factors), certif. denied, 241 N.J. 92 (2020).

In sum, under the totality of circumstances, Amaryllis Gross gave voluntary consent to the police to search the bedroom in which defendant's gun was found. Sufficient credible evidence supports the trial judge's decision that she did.

CONCLUSION

The decision of the trial court to deny defendant's motion to suppress should be affirmed.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

December 12, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2668-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Respondent,		On Appeal from a Judgment of
	:	Conviction of the Superior Court
v.		of New Jersey, Law Division,
	:	Essex County.
FARIYD A. GEORGE A/K/A FARIYD GEORGE,	:	Indictment Nos. 22-06-1428-I; 23-09-1764-I; 23-09-1765-I.
Defendant-Appellant.	:	
		Sat Below:
	:	Hon. John Zunic, J.S.C., and John I. Gizzo, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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DEFENDANT IS CONFINED

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Fariyd George relies on the procedural history and statement of facts from his initial brief. (Db 1-7)[1]

LEGAL ARGUMENT

George relies on the legal arguments from his initial brief and adds the following:

POINT I

SUPPRESSION IS REQUIRED BECAUSE DEFENDANT HAS STANDING TO CHALLENGE THE SEARCH AND THE STATE FAILED TO PROVE THIRD-PARTY CONSENT.

In his initial brief, George argued that suppression is required because the State failed to prove that Amaryllis Gross voluntarily consented to a search of her bedroom. (Db 9-22) As laid out more thoroughly in that brief, the body-worn camera footage (BWC) and police reports revealed that Gross initially refused to cooperate with police and consented to a search of her room only after being handcuffed, placed in the back of a police car, questioned, surrounded by multiple officers, and threatened with "trouble" if she did not tell them the truth. (Db 5-7) The motion

[1] This brief uses the same abbreviations as George's initial brief. In addition, Db refers to George's initial brief, Sb refers to the State's brief, and Dsa refers to George's supplemental appendix.

court's decision ignores these facts, which bear significantly on the voluntariness of Gross's consent. (Da 25-33)

In its response brief, the State argues for the very first time on appeal that George lacks standing to challenge the search of Gross's bedroom. (Sb 18-21) In addition, the State argues that even if Gross's consent was involuntary, her daughter Rasheedah provided valid consent for the search independent of her mother. (Sb 23-26) These arguments must be squarely rejected.[2]

A. The State's Argument That George Does Not Have Standing Is Both Waived For Purposes Of Appeal And Lacks Merit Because George Has Automatic Standing Given His Possessory Interest In The Gun And The State's Failure To Prove Abandonment.

As an initial matter, the State's belatedly raised claim that George lacks standing to challenge the search of Gross's bedroom is waived because the State made no such argument to the motion court. It is well-established that "the points of divergence developed in proceedings before a trial court define the metes and bounds of appellate review." State v. Witt, 223 N.J. 409, 419 (2015) (citing State v. Robinson, 200 N.J. 1, 19 (2009)). "The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves." Robinson, 200 N.J. at 19. "Parties must make known their positions at the suppression hearing so that the trial court can

[2] The State also disputes that Amaryllis Gross involuntarily consented to the search. (Sb 26-32) George relies on his initial brief with respect to that issue.

rule on the issues before it." Witt, 223 N.J. at 419 (emphasis added). If a party fails to "properly present[ ]" an issue "to the trial court when an opportunity for such a presentation is available," the court on appeal "will decline to consider" the issue. Ibid. See also State v. Legette, 227 N.J. 460, 467 n.1 (2017) (declining to consider State's argument about inevitable discovery because it was raised "for the first time on appeal").

Notwithstanding the State's argument to the contrary, it is the State that bears the burden to prove that a defendant lacks standing to challenge a search. State v. Brown, 216 N.J. 508, 529 (2014). The State in this case did not argue, let alone prove, that George lacked standing to challenge the seizure of the gun he was charged with possessing. This issue was not discussed in the State's brief on the suppression motion, nor was it argued orally to the motion court. (Dsa 1-4; 1T) The State is thus barred from pursuing this issue on appeal and the Court should not consider it.

Even on the merits, however, the State's standing argument must fail. The State asserts that "[a]lthough defendant had automatic standing to challenge the gun's seizure by virtue of being charged with a possessory offense," he did not possess a reasonable expectation of privacy in Gross's apartment and therefore cannot challenge the search. (Sb 19-20) This argument simply has no basis in New Jersey law.

As our Supreme Court has held, again and again, "[w]henever a defendant 'is charged with committing a possessory . . . offense -- as in this case -- standing is automatic, unless the State can show that the property was abandoned or the accused was a trespasser.'" State v. Shaw, 237 N.J. 588, 617 (2019) (quoting State v. Randolph, 228 N.J. 566, 572 (2017)); see also State v. Johnson, 193 N.J. 528, 541-42 (2008) (reaffirming that "a defendant has standing if he is charged with an offense in which possession of the seized evidence at the time of the contested search is an essential element of guilt") (internal quotation marks omitted). The Supreme Court has repeatedly rejected the exact argument the State advances here -- that a defendant must show that he has a reasonable expectation of privacy in the place searched. For example, in Randolph, the State "argue[d] that automatic standing does not relieve defendant of his obligation to show that he had a reasonable expectation of privacy in the apartment searched." 228 N.J. at 583. The Court explained that it had "dismissed a similar argument in Johnson, stating, 'the State's proposed approach merely places another layer of standing -- the federal standard -- on top of our automatic standing rule.'" Ibid. (quoting Johnson, 193 N.J. at 546). The Court added that it had "roundly rejected hinging a defendant's right to challenge a search based on 'a reasonable expectation of privacy' analysis." Ibid. (citing Johnson, 193 N.J. at 546 and State v. Alston, 88 N.J. 211, 226-27 (1981)). See also Brown, 216 N.J. at 529

(reaffirming that New Jersey has "rejected the amorphous legitimate expectations of privacy in the area searched standard" and further places the "burden of establishing that the defendant does not have standing to challenge the search" on the State) (internal quotation marks and citations omitted). Accordingly, the State's argument that George did not have a reasonable expectation of privacy in Gross's apartment is entirely irrelevant.

The State's reliance on State v. Evers is misplaced because the defendant in that case did not have automatic standing. 175 N.J. 355 (2003). Instead, the Supreme Court was faced with the novel question of whether a defendant has a "reasonable expectation of privacy in the contents of e-mail he forwarded to fifty-one intended recipients," including a police officer. Id. at 369-70. The Court held that there is no societally recognized reasonable expectation of privacy in that circumstance and thus police receipt of the email did not implicate the New Jersey Constitution. Ibid. As explained above, New Jersey courts "do not engage in a reasonable expectation of privacy analysis when a defendant has automatic standing to challenge a search." Randolph, 228 N.J. at 583-84. However, New Jersey courts do engage in such an analysis "in determining whether a defendant has a protectible Fourth Amendment and Article I, Paragraph 7 right of privacy in a novel class of objects or category of places." Ibid. Evers involved a "novel class of objects" and therefore warranted

a reasonable expectation of privacy analysis. On the other hand, this case calls for the application of "traditional principles of automatic standing to a place that historically has enjoyed a heightened expectation of privacy -- the home. No unique circumstances call for this Court to engage in an additional reasonable expectation of privacy analysis as a supplement to our standing rule." Randolph, 228 N.J. at 584.

To the extent that the State is arguing that George can be stripped of his automatic standing because he abandoned the gun, the State did not meet its required burden of proof. See State v. Carvajal, 202 N.J. 214, 223-24 (2010) ("The State bears the burden of proving by a preponderance of the evidence that the defendant abandoned the property and therefore has no standing to object to the search."). "[F]or standing purposes, property is abandoned if: (1) a person has either actual or constructive control or dominion over property; (2) he knowingly and voluntarily relinquishes any possessory or ownership interest in the property; and (3) there are no other apparent or known owners of the property." Carvajal, 202 N.J. at 225 (quoting Johnson, 193 N.J. at 549). Here, the State failed to show that George knowingly and voluntarily relinquished control over the gun.

The State did not, and cannot, point to any evidence that George knowingly and voluntarily relinquished any possessory ownership in the gun

when he gave it to Gross. To the contrary, the BWC footage shows that George gave Gross the gun for safekeeping; he instructed her to bring it to a specified apartment so that it could be stored there until he could retrieve it. (Da 27; BWC4-A 29:00-29:20, 43:50 to 44:00) George did not do what the defendant in Gartrell did and run away from his suitcase, leaving it unattended in a busy Newark Penn Station. State v. Gartrell, 256 N.J. 241, 253-54 (2024). Nor did George do what the defendants in Farinich did when they dropped their suitcases and fled from the baggage claim at Newark Airport. Gartrell, 256 N.J. at 253 (citing State v. Farinich, 179 N.J. Super. 1, 3-4, 7 (App. Div. 1981), aff'd o.b., 89 N.J. 378 (1982)). Rather than abandon the gun, George entrusted it to Gross before the police came. Consequently, the State's abandonment argument lacks merit.[3]

In sum, because it was not raised below, this Court should not consider the State's standing argument. Nevertheless, if the argument is considered, it must be rejected because George has automatic standing to challenge the seizure of the gun and the State failed to prove abandonment.

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[3] The State relies exclusively on federal and out-of-state cases to support its abandonment argument. (Sb 20) But it is New Jersey caselaw -- and not federal or out-of-state caselaw -- that is controlling here. "For standing purposes, Article I, Paragraph 7 provides broader protection to the privacy rights of New Jersey citizens than the Fourth Amendment." See Brown, 216 N.J. at 528. Accordingly, even if George would not have standing to challenge the search under federal law, he does under New Jersey law.

B. Rasheedah Gross Did Not Provide Valid Consent For The Search Of Amaryllis Gross's Bedroom.

The State is wrong that Gross's daughter, Rasheedah, provided valid consent for the search of Gross's bedroom. First, the State failed to prove that Rasheedah had the authority to consent to a search of her mother's bedroom. Second, just as the State failed to prove that Gross's consent was voluntarily given, it failed to prove that Rasheedah's consent was voluntarily given. Accordingly, the search was unlawful and the gun must be suppressed.

The fact that Rasheedah is the leaseholder of the apartment does not mean that she had the authority to consent to a search of every room in the apartment. To the contrary, "[a]uthority to consent to search a particular area of a home turns on common usage." State v. Cushing, 226 N.J. 187, 201 (2016). Applying this test, both this Court and the New Jersey Supreme Court have found that a homeowner lacked authority to consent to a search of another person's bedroom inside the home. See id. at 201-02 (grandmother lacked authority to consent to a search of grandson's bedroom inside her home); State v. Marcellus, 472 N.J. Super. 269, 275 (App. Div. 2022) (recognizing that although "defendant's aunt had the authority to consent to an entry into the home and a search of the residence" "her authority only went so far" and did not extend to a search of defendant's mother's bedroom inside the home).

The State bears the burden of proving a third party's "common authority"

to consent to a search. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). In this case, the State failed to prove Rasheedah's "common authority" to consent to a search of her mother's bedroom. Although Gross told police that she lived in another state, the record shows that she was more than just an overnight guest at her daughter's apartment. In fact, when police inquired about the room where the gun was stored, both Gross and Rasheedah confirmed that it was Rasheedah's "apartment" but Gross's "room." Sergeant Velez then asked if Gross "has her own room" in the apartment, to which both women responded affirmatively. (BWC4-A at 37:35 to 37:50) This evidence demonstrates that Gross stays with her daughter regularly, and there is no indication that Rasheedah uses her mother's bedroom in any manner. Accordingly, the State failed to prove that Rasheedah had the authority to consent to a search of the bedroom.

Even if she did have "common authority" to consent to a search of the bedroom, Rasheedah's consent was not freely and voluntarily given. The surrounding circumstances leading up to Rasheeda's signing of the consent-to-search form were inherently coercive, for several reasons.

First, when Rasheedah signed the consent form, her mother appeared to be detained by police. Earlier that evening, Officer Ortiz told Rasheeda, who was standing in the courtyard of the apartment complex: "we're detaining your

mother for questioning." (BWC4-A 23:50 to 24:10) The next time Rasheedah saw her mother, Gross was being escorted by at least three police officers towards Rasheedah's apartment. (BWC4-A 34:55 to 35:15) The implication was that Gross was still subject to a detention. Undoubtedly, the fact that her mother appeared to be detained by police at the time Rasheedah signed the consent form is a factor that weighs against voluntariness.[4]

Second, Rasheedah was not told that police were planning to search her apartment until they were already inside of it, and there is no indication that she consented to their initial entry. While still outside the apartment building, Rasheedah saw her mother being escorted by police towards her unit. She followed and asked what was going on, but Sergeant Velez refused to explain,

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[4] Relying on United States v. Drayton, 536 U.S. 194, 205-08 (2002), the State argues that "the arrest of another in the presence of the consenting party does not automatically equal coercion of the consenting party." (Sb 25) George agrees and does not contend that Rasheedah's consent was made involuntary solely due to the fact of her mother's detention. Rather, it must be considered along with all the other evidence of coercive circumstances.

In addition, Drayton is distinguishable. There, defendant's travel companion was arrested after he consented to a search of his person and police found drugs on him. 536 U.S. at 205-208. Police subsequently asked defendant if they could search his person, and he consented. Ibid. The Supreme Court rejected the notion that the defendant was coerced into consenting to the search in light of his companion's arrest, reasoning, "if anything, [his companion]'s arrest should have put [defendant] on notice of the consequences of continuing the encounter by answering the officers' questions." Ibid. Here, by contrast, the circumstances suggested to Rasheedah that her mother would face negative consequences if either woman refused to cooperate with police, not if they agreed to cooperate.

instead replying, "let's talk upstairs." (BWC4-A 35:15 to 35:30) This response certainly negated any notion that Rasheeda had the authority to refuse police entry into her unit. To make matters worse, police never even asked Rasheedah (or Gross, for that matter) for permission to enter the unit. When they arrived at the door, Velez told both women: "just go in, I'm just gonna have you sign something." (BWC4-A 38:15 to 38:35) Rasheedah was thus instructed by police to go inside her apartment, not asked by them if she would permit them to enter. Once inside, the officers asked Rasheedah for identification, and when she asked why they needed it, she was told: "because it's your apartment." She responded in an exasperated tone, "I know, but what's going on first?" (BWC4-A 38:50 to 39:09) The record thus reveals that police kept Rasheedah in the dark about what was occurring until they were already inside her home -- and essentially mid-search. See State v. Lamb, 218 N.J. 300, 314 (2014) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (citation omitted). Moreover, although they ultimately told her that she did not have to sign the consent form, the fact that police had already entered her home without asking permission to do so implied that she did not genuinely have the option of refusing consent.

Third, Rasheedah knew that police would find contraband inside the apartment, and she knew that they knew it too. While inside the apartment,

before the consent forms were signed, Gross told Rasheedah in front of police that she took possession of the gun. (BWC4-A 43:50 to 44:45) Gross's boyfriend later exited the bedroom and, referring to the gun, said to police, "it's right there." (BWC4-A 45:40 to 46:05) As explained in George's initial brief, one factor tending to show that consent was coerced is that the consenting person knew the search would reveal contraband. (Db 12) See State v. King, 44 N.J. 346, 352-53 (1965). Here, Rasheedah was presented with direct evidence that there was a gun inside her apartment while police were present. The notion that she could refuse to consent to a search under that circumstance is a false one.

At bottom, the State failed to prove that Rasheedah's ultimate decision to sign the consent form was not the product of inherently coercive circumstances. In all likelihood, Rasheedah was highly worried that her mother would be in trouble with police if she refused to let them search. Moreover, despite police ultimately informing her of her right to refuse, the behavior of the officers leading up that moment -- namely, their failure to ask for permission to enter the home or to even tell Rasheedah what was happening until they were already inside -- strongly implied that she did not actually have a say in the matter. For this reason, in conjunction with the State's failure to prove that Rasheedah had the authority to consent to a search of her mother's bedroom in particular, the State cannot rely on Rasheedah's signing of the consent form to justify the

warrantless search.

CONCLUSION

For the reasons set forth here and in George's initial brief, this Court must reverse the trial court's decision denying the suppression motion. George respectfully requests that the matter be remanded to the trial court to provide him with an opportunity to withdraw his plea.

Respectfully submitted,

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