SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003183-22-T1

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, Union County.
JAIKEEM L. JOHNSON, A/K/A JAIKEEM JOHNSON	:	Indictment No. 18-07-00447-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. William A. Daniel, J.S.C.,
	:	Hon. Regina Caufield, P.J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Date Filed: June 30, 2024

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PROCEDURAL HISTORY

A Union County grand jury issued Indictment No. 17-09-00667-I on September 19, 2017, charging defendant-appellant Jaikeem L. Johnson with 2nd-degree unlawful possession of a handgun without a permit, pursuant to N.J.S.A. 2C:39-5b(1) (Count 1); 4th-degree possession of hollow point bullets, pursuant to N.J.S.A. 2C:39-3f(1) (Count 2); 3rd-degree receiving stolen property, pursuant to N.J.S.A. 2C:20-7a (Count 3); 4th-degree resisting arrest, pursuant to N.J.S.A. 2C:29-2a(2) (Count 4); and 4th-degree credit card theft, pursuant to N.J.S.A. 2C:21-6c(1) (Count 5). (Da1 to 3)[1]

The Honorable William A. Daniel, J.S.C., conducted a hearing on defendant's motion to suppress on February 2 and 16, and March 12, 2018. (1T, 2T, 3T) Judge Daniel issued his decision denying the motion on the record on April 20, 2018, and in a written order on April 26, 2018. (4T6-24 to 33-2; Da4)

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[1] The following abbreviations are used throughout this brief:
Da = Defendant-Appellant's Appendix;
Ca = Defendant-Appellant's Confidential Appendix;
1T = February 2, 2018, Motion Hearing Transcript;
2T = February 16, 2018, Motion Hearing Transcript;
3T = March 12, 2018, Motion Hearing Transcript;
4T = April 20, 2018, Motion Hearing Transcript;
5T = April 30, 2018, Motion Hearing Transcript;
6T = October 31, 2022, Motion Hearing Transcript;
7T = November 3, 2022, Motion Hearing Transcript;
8T = December 12, 2022, Plea Hearing Transcript;
9T = March 10, 2023, Sentencing Hearing Transcript.

A Union County grand jury issued superseding Indictment No. 18-07-00447-I on July 26, 2018 charging Johnson with 2nd-degree unlawful possession of a handgun without a permit, pursuant to N.J.S.A. 2C:39-5b(1) (Count 1); 4th-degree possession of hollow point bullets, pursuant to N.J.S.A. 2C:39-3f(1) (Count 2); 3rd-degree receiving stolen property, pursuant to N.J.S.A. 2C:20-7a (Counts 3 and 5); 4th-degree resisting arrest, pursuant to N.J.S.A. 2C:29-2a(2) (Count 4); 4th-degree credit card theft, pursuant to N.J.S.A. 2C:21-6c(1) (Count 6).

On October 31, 2022, the Honorable Regina Caufield, P.J.S.C., conducted a hearing on defendant's motion to reconsider the suppression decision in light of our Supreme Court's decision in State v. Smith, 251 N.J. 244 (2022). Judge Caufield affirmed the prior decision denying suppression on the record on November 3, 2022, and issued a written order that same day. (7T36-5 to 49-24; Da5)

Defendant pleaded guilty to Count 1 of the indictment at a hearing on December 12, 2022. (8T40-6 to 43-1; Da11 to 16) Defendant received a Graves Act[2] waiver and the sentencing court imposed a 3-year sentence with 1-year of parole ineligibility in accordance with the plea agreement. (9T42-10 to 47-16; Da14, 17 to 19)

[2] N.J.S.A. 2C:43-6c.

Defendant filed notice of appeal as within time on October 30, 2023. (Da17 to 22) This Court issued an order granting that motion on July 19, 2023. (Da23)

STATEMENT OF FACTS

Suppression Hearing:

Officer Michael Nicolas of the Elizabeth Police Department testified that he was driving northbound in a patrol car on 2nd Street near Bond St. with his partner Officer Alexader Gonzalez on June 27, 2017, when, at around 8:00 p.m. he observed a red Dodge Charger traveling toward them, southbound, also on 2nd Street. (1T10-17 to 16-8, 18-24 to 19-1) Nicolas described the neighborhood as a "high crime area." (1T12-14 to 20) Although the sun had started to set, it was still sunny at the time, and Nicolas saw through the front windshield that the two front occupants of the vehicle were wearing dark-colored ski masks. (1T16-2 to 10, 17-20 to 21) Nicolas testified that he was headed north, and that the sun was setting behind his car illuminating the front of the Dodge. (1T16-6 to 21)

Nicolas said that his patrol car was traveling approximately 15 to 20 miles per hour and that he was unable to see into the Dodge as it passed within 3 feet. (1T17-10 to 17) Nicolas observed that, aside from the front windscreen, all the other windows in the car were heavily tinted. (1T17-6 to 9) Gonzalez also testified that he could not see through the side windows of the Dodge as it passed due to the tinting. (3T12-9 to 22) Both Nicolas and Gonzalez, believing that any level of tinting on the side windows in the front of the car was illegal, decided

to stop the Dodge to issue a ticket for the infraction. (1T17-23 to 25; 3T12-20 to 22) Neither officer activated their body-worn cameras ("BWC") at that time. (1T39-16 to 40-22; 3T18-1 to 3)

Nicolas executed a U-turn and pulled in behind the Dodge as it turned onto Bond Street and then made an immediate left onto Community Lane. (1T18-3 to 6) The Dodge then pulled into a parking space, at which point Nicolas activated his overhead lights and sirens. (1T19-6 to 10, 42-3 to 12) As Nicolas and his partner opened their doors and began to get out of the patrol car, the two front doors and the rear right door of the Dodge opened and three young men wearing black shirts and blue jeans got out at the same time. (1T19-14 to 23, 45-7 to 13) Gonzalez yelled at them to stop and get back into the vehicle. (1T20-13 to 17; 3T13-23 to 14-3) The young men instead closed the car doors and ran down Community Lane. (1T20-21 to 22; 3T14-7 to 18)

Gonzalez pursued two of the young men[3] on foot while Nicolas pursued the driver, whom he later identified as Jaikeem Johnson, with his patrol car. (1T20-23 to 22-2) As Johnson ran through a parking lot to Pine Street, off-duty officer Anthony Jackson, who happened to be walking on Pine Street, joined in the chase and yelled for Johnson to stop and that he was under arrest. (1T22-3

[3] Officer Gonzalez apprehended one of the individuals he who he identified at the suppression hearing as Jamar Gilford. Gifford was charged with Johnson in Counts 1 through 5 of the superseding indictment.

to 23-11) Johnson attempted to discard the keys to the Dodge during the chase. (1T23-19 to 24-17) Jackson caught up with Johnson on Pine Street and placed him under arrest. (1T24-18 to 25-3) The pursuit covered approximately one block. (1T51-23 to 25) Jackson recovered two sets of keys from the ground. (1T25-7 to 14) The officers conducted a search incident to arrest at that point and recovered a dark colored ski mask from Johnson's pants pocket. (1T25-7 to 14, 52-15 to 53-4) The officers secured Johnson and placed him in the back of the patrol car. (1T25-4 to 7)

When Nicolas returned to the area where the Dodge[4] had been parked, the doors and windows of the vehicle were still closed (1T29-15 to 30-5) Two additional backup officers had arrived at the scene by that point. (1T28-24 to 29-3) Nicolas could see the front section of the car through the front windshield but could not see the entire interior of the car from that vantage point and could not see into the back of the car due to the tint on the windows. (1T29-25 to 30-5) When Nicolas initially approached the car, he opened the front driver's door to see if there were any remaining occupants in the vehicle. (1T30-7 to 21) At that time Nicolas observed "a black and gray handgun on the driver's door

[4] It was learned at some later time that the car had been stolen. The original indictment contained no charge related to the theft of the Dodge. (Da1 to 3) Johnson and Gilford were charged related to the Dodge with receiving stolen property in Count 5 of the superseding indictment. (Ca3)

panel," and smelled a strong marijuana odor from the interior of the vehicle. (1T31-1 to 10) A further search of the car revealed two more handguns and suspected marijuana. (1T32-13 to 33-12)

Reconsideration Hearing:

The owner of the stolen Dodge, Laquanda Griggs, was subpoenaed by the defense to testify at the reconsideration hearing. (6T31-9; 7T14-2) Griggs testified that she owned the Dodge in June of 2017, drove it regularly, and was familiar it. (6T31-23 to 34-20, 37-13 to 14) She testified that she was able to see through all the windows in the car and that there would be no difficulty seeing inside the car. (6T34-24 to 36-8) Although she denied previously telling the police that the windows had a medium tint and maintained that denial when shown the transcript of her June 29, 2017, statement to the police, the parties agreed that in 2017, Griggs said that there was medium tinting on the windows during her statement to the police. (6T43-15 to 46-7, 50-24 to 54-20) The recording was replayed and indicated that Griggs said at the time that the windows were "[m]edium tinted and not dark." (6T54-1 to 14) Griggs agreed that, more recently, she told the police that the car windows had light tinting when she spoke to them prior to the hearing. (6T46-8 to 14) Both the State and the defense provided screen shots from the officers' BWCs that show that it is possible to see objects through the front side windows of the Dodge. (Da6 to 7)

The defense also submitted the ticket history of the Dodge which showed that 15 tickets were issued on 9 separate occasions between December 2016 and September of 2017. (Da24) None of the officers who issued the tickets on the 9 separate occasions ever issued a ticket for front-window tinting. (Ibid.)

LEGAL ARGUMENT

POINT I

THE SUPPRESSION AND RECONSIDERATION MOTION COURTS ERRED IN DENYING SUPPRESSION OF PHYSICAL EVIDENCE. (4T6-24 to 33-2; 7T36-5 to 49-24; Da4, 8)

Both the suppression motion court and the reconsideration motion court erred in denying suppression. First, suppression should have been granted by the reconsideration court because the police lacked a reasonable articulable basis that Johnson was committing a motor vehicle offense to justify stopping the Dodge. Additionally, suppression should have been granted because Nicolas had no objectively reasonable articulable basis to suspect that anyone was in the Dodge and that such an unknown person was armed and dangerous to justify a protective sweep. This Court must, therefore, reverse the denial of the suppression motion. U.S. Const. amends. IV XIV; N.J. Const. art. I, ¶ 7; Wong Sun v. United States, 371 U.S. 471 (1963).

Both the United States and New Jersey constitutions guarantee "[t]he right of the people to be secure against unreasonable searches and seizures." U.S. Const., amends. IV, XIV; N.J. Const., art. I, Par. 7. A warrantless stop or seizure is prima facie invalid unless it falls within one of the specific exceptions to the warrant requirement. State v. Patino, 83 N.J. 1, 7 (1980). The State bears the burden of proving by a preponderance of the evidence that a warrantless search

or seizure is legal. State v. Edmonds, 211 N.J. 117, 128 (2012). The State's failure to meet its burden as to both the stop and search in this case require suppression of the physical evidence seized by the police.

In reviewing a decision on a suppression motion, an appellate court defers the motion court's factual findings that are supported by sufficient credible evidence in the record. State v. Dunbar, 229 N.J. 521, 538 (2017). An appellate court, however, reviews a trial court's interpretation of the law and the legal consequences that flow from established facts de novo. State v. Lamb, 218 N.J. 300, 313 (2014). Because the motion court here misapplied the law to the facts it found, its decision is due no deference.

A. Suppression Should Have Been Granted Because the Officers Had No Reasonable Articulable Basis to Stop the Motor Vehicle for a Violation of N.J.S.A. 39:3-74 Based on Their Observation of Window Tinting on The Front Side Windows. (7T36-5 to 49-24; Da8)

At the initial motion hearing, the officers stated that they stopped the Dodge because they believed that no level of front window tinting was permissible on the front side windows of cars in New Jersey and that the front side windows of the Dodge were tinted. (1T17-23 to 25; 3T12-20 to 22) The motion court found the officers' credible, and because it understood the law at the time to mean that any tinting on the front windows was impermissible, it concluded that vehicle stop was therefore justified. (4T6-12 to 16, 22-23 to 23-

4) Following that hearing, our Supreme Court announced a new rule of law requiring the State to establish "'that tinting on the front windshield or front side windows inhibited officers' ability to clearly see the vehicle's occupants or articles inside' when relying upon a tinted windows violation as a basis for reasonable suspicion." State v. Haskins, 477 N.J. Super. 630, 644 (App. Div. 2024) (quoting Smith, 251 N.J. at 266). At the reconsideration hearing following the Court's decision in Smith, both parties presented pictures of the front windows of the Dodge establishing that they were in fact transparent. (See, Da8 to 9) Because the officers never testified that they could not see through the front side windows specifically, and the pictures establish that they were in fact, transparent, the State failed to meet its burden of proving a violation of N.J.S.A. 39:3-74 to justify the warrantless stop. This Court must reverse the denial of the defendant's motion to suppress.

A motor vehicle stop is a "seizure of persons" under both the Federal and State Constitutions. State v. Scriven, 226 N.J. 20, 33 (2016). To justify such a seizure, "a police officer must have a reasonable and articulable suspicion that the driver of a vehicle, or its occupants, is committing a motor-vehicle violation or a criminal or disorderly persons offense." Id. at 33-34. N.J.S.A. 39:3-74, which serves as the "basis for tinted windows citations," predates automotive window tinting and thus does not directly proscribe tinting. Smith, 251 N.J. at

251-52. Rather, the statutory language only prohibits operation of a vehicle with "non-transparent material" on the front windshield or front side windows. Id. at 251.

In Smith, the Supreme Court interpreted "th[is] plain language of N.J.S.A. 39:3-74" to mean "that reasonable and articulable suspicion of a tinted windows violation arises only when a vehicle's front windshield or front side windows are so darkly tinted that police cannot clearly see people or articles within the car." Id. at 253, 265 (emphasis added). That is because, in common parlance, the statutory term "non-transparent" only means not "able to be seen through." Id. at 265, 265 n.3 (citing the Merriam-Webster dictionary definition). The Court emphasized that, for a warrantless stop of a motor vehicle for "non-transparent" windows to be upheld, it is insufficient for the State to prove that windows were tinted, or even darkly tinted. Id. at 255-56. As the facts in Smith demonstrated, detectives may be able to see through even dark automotive window tinting. Id. at 252. Consequently, the Court underscored repeatedly that, "[i]n order to establish a reasonable suspicion of a tinted windows violation under N.J.S.A. 39:3-74, the State will therefore need to present evidence that tinting on the front windshield or front side windows inhibited officers' ability to clearly see the vehicle's occupants or articles inside." Id. at 266 (emphasis added). Thus, when

the state failed to elicit testimony from the officers that they were unable to see objects through the front side windows specifically, it failed to meet its burden.

In reviewing the stills extracted from the BWC footage after the search, the reconsideration court observed that "the photos of the front driver's side window of the [Dodge] to me appears to be tinted although not completely non-transparent." (7T46-23 to 25) The State even agreed at the hearing that it was possible to see through the front side window shown in the BWC footage still submitted by the defense. (7T33-8 to 12) Nevertheless, the reconsideration court concluded that "[w]hether light, medium or heavy is accurate, this Court accepts the . . . testimony of both detectives that as they passed the [Dodge] with the sun setting, I'm not saying it was dark, the sun was setting, they could not see into the [Dodge] through the front driver's side window." (7T47-12 to 17)

To be sure, both officers stated that they could not see into the car due to the heavy tinting on the windows when the car passed (1T17-6 to 17; 3T12-9 to 22), and subsequently Nicolas said that he opened the car door to see into the back section of the car because he could not see through the windows. (1T29-15 to 30-5) However, in both instances, the officers were looking for additional passengers in the back section of the car – not whether the front side windows were so dark as to be non-transparent in violation of N.J.S.A. 39:3-74. Both officers were able to see the driver and front seat passenger as the car approached

and tried to see if there were additional passengers in the back of the car as it passed. (1T16-2 to 10, 17-20 to 21; 3T11-3 to 9) Thus, their focus would have been the back side windows, not those in the front where they had already seen the driver and front passenger.

Contrary to the reconsideration court's assertion that the officers said that they "could not see into the [Dodge] through the front driver's side window" (7T47-12 to 17), the statements by the officers regarding their ability to see into the car were given in the context of their ability to see additional occupants in the back seats of the Dodge. (1T41-12 to 42-2; 2T41-15 to 22; 3T11-3 to 12-19) Officer Nicolas agreed that he was not able to see inside the Dodge as it passed. (1T17-15 to 21) Officer Gonzalez also said that he was unable to see through into the car when trying to see if there were people in the back compartment. (3T12-9 to 19) The officers never said they were unable to clearly see inside the car when looking through the front side windows specifically.

When Nicolas returned to the Dodge after apprehending Johnson, he said that he could see into the front of the car through the windshield, but that he could not see into the back compartment of the car. (1T29-15 to 30-5) He was never asked if he was able to see anything through the front side windows specifically. It would not have made sense for Nicolas to look through the front passenger windows to look for someone hiding in the back of the car because he

would not have been able to see into the most likely hiding spot – the footwell of the back seat. Additionally, Gonzales said that upon returning to the Dodge, he "could see the front end of the cabin area, if you will. But I couldn't see in the back, because that's where the majority of the tints are. I mean, you have the back windshield that was tinted very heavily. You have the side windows that were tinted very heavily." (2T83-18 to 24)

The reconsideration court looked at the pictures of the Dodge at the scene as it was being impounded and observed that it was possible to see through the front driver's side window and that the back side windows appeared to more darkly tinted. (6T21-5 to 8; 7T46-4 to 11) She stated that "the photos of the front driver's side window of the Charger to me appears to be tinted although not completely non-transparent. (7T46-23 to 25)

Additionally, Ms. Griggs, a disinterested third-party witness, testified that she was able to see through all the windows in the car and that there would be no difficulty seeing inside the car. (6T34-24 to 36-8) However, the reconsideration court did not find Griggs' testimony credible. (7T42-20 to 45-3) Instead, the court found that Griggs' earlier statement that the car had medium tints, made closer in time to when she owned the car, to be more credible. (7T46-8 to 11)

"Smith announced a new rule of law as it imposed a new obligation on the State—namely, the requirement to establish 'that tinting on the front windshield or front side windows inhibited officers' ability to clearly see the vehicle's occupants or articles inside' when relying upon a tinted windows violation as a basis for reasonable suspicion." Haskins, 477 N.J. Super. at 644 (quoting Smith, 251 N.J. at 266). Had the reconsideration court realized that the officers never testified about their ability to see through the front side windows specifically, it would have realized that the State failed to carry its burden. That failure, together with the reconsideration court's own evaluation of the BWC stills, which clearly show that it was possible to see objects through the front side windows of the car, requires reversal of the suppression decision.

B. The Motion Court Erred in Denying Suppression Because the State Failed to Establish a Reasonable Suspicion that Anyone in the Car was Armed and Dangerous to Justify a Protective Sweep Without Reliance on the Officers' Specious Designation of the Neighborhood as a "High Crime Area." (4T6-24 to 33-2; Da4)

A protective sweep of a car is permitted only when the circumstances give rise to a reasonable suspicion that a driver or passenger "is dangerous and may gain immediate access to weapons." State v. Gamble, 218 N.J. 412, 432 (2014) (citing Michigan v. Long, 463 U.S. 1032, 1049 (1983); State v. Lund, 119 N.J. 35, 48 (1990)). The purpose of a protective sweep is to "ferret out weapons that might be used against police officers." Id. at 433 (quoting State v. Davila, 203 N.J.

97, 129 (2010)). As such, the search "must be cursory and limited in scope to the location where the danger may be concealed." State v. Robinson, 228 N.J. 529, 534 (2017).

Our Supreme Court outlined the boundaries of the protective sweep doctrine as applied to vehicles initially in Lund, in which the Court adopted the protective-sweep exception to the warrant requirement articulated in Long but invalidated the search. In Gamble, the Court applied Long and Lund to uphold a sweep for weapons following an anonymous 911 call about a man with a gun.

In Lund, a trooper was riding alone when he conducted a routine traffic stop after dark on the Turnpike. 119 N.J. at 41. As the trooper pulled in behind the car on the shoulder, he observed the driver of the vehicle turn around and reach for the back seat. Ibid. The trooper's vantagepoint "did not allow him to see what the driver was doing." Ibid. During the stop, the driver failed to produce the vehicle registration and kept nervously looking toward the back seat. Ibid. The trooper looked in that area and observed a jacket stuffed into a corner on the side he'd seen the driver reach. Ibid. The trooper asked both the driver and his passenger to step out and patted them down for weapons. Id. at 41-42.

After the trooper found no weapons he had another trooper, who'd arrived in the interim, watch the two on the shoulder as he returned to the car. Id. at 42. Reaching into the crevice of the seat, the trooper felt a hard object and retrieved

a large manilla envelope. Ibid. Believing the object inside was a weapon or drugs, the trooper opened the envelope and found a large quantity of cocaine. Ibid.

While recognizing there are "[o]bviously . . . some cases in which 'furtive' movements or gestures by a motorist, accompanied by other circumstances," such as "evasive action, lying to the police, the presence of other incriminating information about the motorist or occupants of the car, the absence of identification, and even the lateness of the hour" can "ripen into a reasonable suspicion that the person may be armed and dangerous," the Court observed that "'it is not uncommon for drivers and passengers alike to be nervous and excited and to turn to look at an approaching police officer'" when pulled over by police. Id. at 47-48 (quoting State v. Schlosser, 774 P.2d 1132, 1137 (Utah 1989)). Thus, "ordinarily '[m]ere furtive gestures of an occupant of an automobile do not give rise to an articulable suspicion suggesting criminal activity.'" Id. at 47 (quoting Schlosser, 774 P.2d at 1137). Moreover, the Lund Court, noting the trooper hadn't testified "that he feared he was in danger but rather only that he was taking steps to make sure he could not be threatened," further concluded the record did "not establish a specific particularized basis for an objectively reasonable belief that the defendants were armed and dangerous." Id. at 48. Accordingly, the Court invalidated the search and suppressed the cocaine.

Conversely, in Gamble, police officers were responding to a high-crime neighborhood on a dispatch report of "shots fired" close to 11:00 p.m. 218 N.J. at 419. Soon thereafter, they "received another dispatch in response to an anonymous 9-1-1 call reporting an individual seated in a tan van with a gun in his lap." Ibid. No additional information was provided. Ibid. After spotting the van in the area reported, the officers pulled in behind it and illuminated the interior with a spotlight, setting off a scramble among the van's occupants. Ibid. The officers approached with their guns drawn and saw "the occupants moving frantically inside the vehicle, 'as if trying to hide something.'" Ibid.

The front-seat passenger complied with the officers' order to step out of the van. Id. at 420. The driver began to do so as well but then lunged back into the driver's seat. Ibid. Fearing the driver "might be trying to retrieve a weapon," the officer struck and pulled the driver out of the van. Ibid. When a protective frisk of the occupants did not reveal a weapon, one of the officer's returned to the driver's door and saw "the handle of a handgun protruding from the van's middle console 'as he entered the vehicle.'" Ibid. The Court held the anonymous calls, at least one a 911 call identifying the color and type of vehicle as well as its approximate location, the lateness of the hour, the high-crime area, and the officers' ability to see into the car with their spotlight, which revealed the occupants moving around as if trying to hide something, provided reasonable

and articulable suspicion "sufficient to justify an investigatory stop." Id. at 431. "In addition to the totality of the circumstances that warranted the investigatory stop," the Court found the "[d]efendant's retreat to the driver's seat as [the officer] got closer created a reasonable suspicion that defendant was dangerous and could gain immediate access to a weapon, specifically the handgun that had been reported in the 9-1-1 call," justifying a protective frisk. Id. at 432.

The Court explained "[t]he officers' reasonable suspicion that there was a gun in the van that would be within easy reach when defendant and his passenger returned to the vehicle, and the officers' reasonable concerns for their safety and the safety of others did not evaporate when they failed to find a weapon on either defendant or his passenger" given their conduct after the stop. Id. at 432-33. The Court held that the police may execute a "cursory" sweep of a motor vehicle for weapons "limited in scope to the location where the danger may be concealed" before allowing the occupants to return to their car. Id. at 433. Applying that standard to the facts, the Court in Gamble found the officer's "narrowly confined visual sweep of the passenger compartment, which revealed a handgun protruding from the center console, was permissible." Ibid.

The motion court here concluded the officers had "reasonable and articulable suspicion to believe that there may be someone in that vehicle who may pose a threat to his safety and/or to the members of the public standing

there around that vehicle, the crowds that were forming." (4T29-21 to 25) The speculative standard applied by the motion court here falls short of that required by the Court in Lund and Gamble. The Court in those cases held that in order to justify a protective sweep of a vehicle, the police must have a reasonable articulable suspicion that a driver or passenger "is dangerous and may gain immediate access to weapons." Gamble, 218 N.J. at 432.

Here, the state cannot even prove that Nicolas had a reasonable suspicion that was someone in the car. They saw three people get out of the car and all of them fled the scene. When Nicolas opened the driver's door, Johnson was in custody inside the patrol car. They never saw anyone remain in the car, any motion suggesting someone was still in the car, or anyone approach the car. Consequently, Nicolas had no knowledge whatsoever to suggest that there was anyone in the car when he opened the door to look inside.

Additionally, there is no reason to believe that there was a weapon in the car. The police did not receive a tip that someone was armed or that there had been a shooting. See e.g., Gamble, 218 N.J. at 431. Nor were the people inside the car failing to comply with police orders or making furtive movements as if to conceal something. Id. at 418, 431. And there was no evidence that any of the car's occupants had a violent criminal history or prior weapons offenses. See State v. Pineiro, 181 N.J. 13, 29 (2004) (explaining that although the defendants had histories of drug

activity, neither had a violent criminal history to justify a frisk). Instead, Nicolas previously saw two people in the car who were wearing ski masks and those people, and a third person from the rear of the passenger compartment ran away after their vehicle parked and the police told them to stop.

One of the factors the motion court relied on in concluding that a protective sweep of the Dodge was reasonable was the vehicle's presence in a "high crime area." (4T24-16 to 29-25) However, the officers failed to provide support for the notion that the neighborhood's characteristics fit that description. Our Supreme Court addressed the prerequisites for using the designation of "high crime area" in State v. Goldsmith, 251 N.J. 384 (2022). The Goldsmith Court emphasized that "[t]he State must do more than simply invoke the buzz words 'high-crime area' in a conclusory manner." Id. at 404. Instead, the Court determined that the State "must provide at least some evidence to support the assertion that a neighborhood should be considered as 'high-crime.'" Id. at 405. In that case the officers justified their stop of Goldsmith in part due to his presence in what they described as a "high crime area." Ibid. One officer claimed that the area was "[v]ery well-known for -- for weapons. In the past there's been shootings and it's an open air drug -- drug sale[s]." Ibid. The officer further stated that he saw five to ten drug transactions and arrested fugitives in the area. Ibid.

Here, Nicolas testified that "[t]here's been numerous different types of criminal activity there; robberies, homicides, shootings, openair narcotics, as well as a high volume of gang activity in the area." (5T12-17 to 20) Nicolas said he was involved in "numerous investigations and arrests in the area" but could not say how many. Although the officer in Goldsmith provided greater detail, the Court determined there that the State could not invoke buss words like "high crime area" based on a vague description of the area without further detail regarding the timeframe and context when the officer observed the drug transactions and the number fugitives he had arrested and the timeframe when the arrests occurred. 251 N.J. at 404-05. Consequently, the motion court here should not have relied on the officer's description of the area as "high crime" in deciding whether a protective sweep was justified.

Additionally, even if there had been an objective, reasonable basis to believe that there was a weapon in a vehicle, the sweep was unlawful because there was no imminent danger that a suspect could exercise immediate control of a weapon in the vehicle. In Robinson, the Supreme Court held that, even though the officers had reasonable, articulable suspicion that the vehicle contained a weapon, the protective sweep was invalid because the individuals in the car were detained or prevented from accessing the car, thus eliminating any risk posed to the officers by any weapon in the vehicle. 228 N.J. at 548. The Robinson Court looked to the facts

that the officer "addressed the potential danger with prompt and effective action," when the number of police officers outnumbered the occupants of the vehicle (five officers to four occupants), the officers had frisked, arrested, and handcuffed the two people with outstanding warrants, while the other two were cooperative and monitored by officers. Id. at 549. Although two of the four occupants were not physically restrained, the Court still concluded they were sufficiently under the control of the police to alleviate a risk that they might reenter the vehicle and access a weapon. In short, the officers "assumed and maintained control of the vehicle and the scene," and because of this "prudent police work," no one was in a position to access any weapon. Ibid. Based on these circumstances, the Court found that it was unreasonable to conclude "that any of the vehicle's four occupants was potentially capable of gaining 'immediate control of weapons.'" Ibid. (quoting Long, 463 U.S. at 1049)

Here, only Johnson was present at the scene because the other two occupants had fled. In addition to Jackson, the armed off-duty Officer who assisted in apprehending Johnson (1T51-5 to 8), two backup officers had already arrived at the scene when Nicolas returned to the Dodge and opened the driver's door. (1T28-24 to 29-3) Thus, the police outnumbered the suspects at the scene by four to one, and that lone suspect, Johnson, was secured in the back of the patrol car.

Thus, Nicolas' only basis for a protective sweep was that he saw two individuals driving in a car wearing ski masks in June and that those individuals together with a backseat passenger ran when the officers ordered them to stop. When Nicolas entered the car Johnson was under arrest in the back of the patrol car. He was found to be unarmed and attempted no violent act during the flight. The other individuals had fled the scene. Officer Nicolas had no basis to believe that anyone else was even in the vehicle and no information establishing that such a notional occupant would be armed and dangerous. The circumstances here fail to establish an objective, reasonable basis for suspecting that there was a dangerous individual in the car with access to a weapon. Nicolas' entry into the Dodge for the purpose of a protective sweep was therefore unlawful and the evidence seized must be suppressed.

C. The Motion Court Erred in Denying Suppression Because the Police Exceeded the Narrow Boundaries of a Protective Sweep. (4T6-24 to 33-2; Da4)

Finally, if this Court is not convinced that the protective sweep here was unconstitutional, it must find that the search exceeded the legitimate scope of a protective sweep. See State v. Cohen, 254 N.J. 308, 320 (2023) (noting that "a search which is reasonable at its inception may [nonetheless] violate the Fourth Amendment by virtue of its intolerable intensity and scope") (alteration in original) (quoting Terry v. Ohio, 392 U.S. 1, 18 (1968)). It is long settled law

that when the police officers have a reasonable suspicion of danger they should employ "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." State v. Privott, 203 N.J. 16, 31 (2010) (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)). In upholding a "narrowly confined visual sweep of the passenger compartment," the Court in Gamble held a protective sweep of a car "must be cursory and limited in scope to the location where the danger may be concealed." 218 N.J. at 433.

Here, to support the purported protective sweep of the Dodge, the State cited Nicolas' testimony that he was concerned that there might be an individual hidden in the car. He was able to see into the front section of the passenger compartment where the driver and front passenger sit. Yet, he opened the driver's door first. If Nichols sought to determine whether there was someone hiding in the back section of the passenger compartment, the most effective and least intrusive means of determining that would have been to open one of the rear passenger doors. Instead, by opening the driver's door, he exposed the interior of the driver's door panel where the gun was located. Because Nichols failed to employ the least intrusive means to dispel his suspicion, he crossed the boundary of the protective sweep into that of the full search. Consequently, this court should reverse the denial of the suppression motion.

CONCLUSION

For the reasons set forth above this Court should reverse the suppression denial, suppress all evidence seized from the car, and remand this matter to allow defendant the opportunity to withdraw his guilty plea.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-3183-22T1

THE STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	Criminal Action
v.	:	On Appeal from a Final Judgment of Conviction of the Superior Court
JAIKEEM L. JOHNSON, AKA JAIKEEM JOHNSON	:	of New Jersey, Law Division, Union County
Defendant-Appellant	:	
	:	Sat Below: Hon. William A. Daniel, J.S.C., Hon. Regina Caulfield, P.J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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DATED: October 22, 2024

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COUNTER-STATEMENT OF PROCEDURAL HISTORY[1]

On September 19, 2017, a Union County Grand Jury returned Indictment No. 17-09-00667, charging defendant-appellant Jaikeem L. Johnson with second-degree unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5b(1) (count one); fourth-degree possession of hollow point bullets, in violation of N.J.S.A. 2C:39-3f(1) (count two); third-degree receiving stolen property, in violation of N.J.S.A. 2C:20-7a (count three); fourth-degree resisting arrest, in violation of N.J.S.A. 2C:29-2a(2) (count four); and fourth-degree credit card theft, in violation of N.J.S.A. 2C:21-6c(1) (count five). (Da1 to 3).

Thereafter, defendant filed a Notice of Motion to Suppress. A Motion to Suppress hearing was held before the Honorable William A. Daniel, J.S.C., on February 2, 2018, February 16, 2018, and March 12, 2018. (1T; 2T; 3T). On April 20, 2018, Judge Daniel issued an oral decision denying defendant's motion.

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[1] Da refers to the defendant-appellant's appendix.
Ca refers to the defendant-appellant's confidential appendix.
1T refers to the motion hearing transcript dated February 2, 2018.
2T refers to the motion hearing transcript dated February 16, 2018.
3T refers to the motion hearing transcript dated March 12, 2018.
4T refers to the motion hearing transcript dated April 20, 2018.
5T refers to the motion hearing transcript dated April 30, 2018.
6T refers to the motion hearing transcript dated October 31, 2022.
7T refers to the motion hearing transcript dated November 3, 2022.
8T refers to the plea hearing transcript dated December 12, 2022.
9T refers to the sentencing hearing transcript dated March 10, 2023.

(4T6-24 to 33-2). On April 26, 2018, a written order was filed. (Da4).

On July 26, 2018, a Union County Grand Jury returned superseding Indictment No. 18-07-00447, charging defendant with second-degree unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5b(1) (count one); fourth-degree possession of hollow point bullets, in violation of N.J.S.A. 2C:39-3f(1) (count two); third-degree receiving stolen property, in violation of N.J.S.A. 2C:20-7a (counts three and five); fourth-degree resisting arrest, in violation of N.J.S.A. 2C:29-2a(2) (count four); and fourth-degree credit card theft, in violation of N.J.S.A. 2C:21-6c(1) (count six).

Thereafter, defendant filed a Notice of Motion for Reconsideration. On October 31, 2022, the Honorable Regina Caufield, P.J.S.C., conducted a hearing on defendant's motion. (6T). On November 3, 2022, Judge Caulfield issued an oral decision and written order denying defendant's motion. (7T36-5 to 49-24).

On December 12, 2022, defendant pleaded guilty to count one. (8T40-6 to 43-1; Da11 to 16). On March 10, 2023, the court imposed a three-year sentence with one year of parole ineligibility in accordance with the plea agreement. (9T42-10 to 47-16; Da14; Da17 to 19).

On October 30, 2023, defendant filed a Notice of Appeal as within time. (Da17 to 22). On July 19, 2023, this Court granted defendant's motion. (Da23). This brief in opposition follows.

COUNTER-STATEMENT OF FACTS

Motion to Suppress Facts:

On June 27, 2017, Elizabeth Police Officer Michael Nicholas was patrolling the area of Second and Bond Street with his partner Alex Gonzalez. (1T10-17 to 13-8; 2T58-12 to 59-12). The officers were in plainclothes, but they were wearing police identifiers and were driving an unmarked, but well-known black Ford Explorer that is equipped with a light bar in the front window, audible siren, and an automated license plate scanner. (1T13-9 to 14-22; 3T9-2 to 8). The area the officers were patrolling was known as a "high crime area," where different forms of criminal activity, including robberies, homicides, shootings, open air narcotics and gang activity, have occurred, and Officer Nicholas testified that he had been involved in numerous investigations and arrests in that area. (1T12-8 to 13-3; 3T8-12 to 23).

At approximately 8:00 p.m., the officers were travelling north on Second Street, when they observed a red Dodge Charger, travelling southbound, directly at them. (1T16-4 to 9). The sun was setting behind the officers and illuminated the front of the Charger. (1T16-21 to 24). The officers could see through the front windshield of the vehicle and observed the front two occupants of the Charger were wearing dark-colored ski masks. (1T16-9 to

24; 3T11-3 to 12). However, the officers could not see into the remainder of the vehicle because all of the windows, besides the front windshield, were heavily tinted.. (1T17-6 to 17; 2T83-15 to 84-4; 3T12-9 to 16).

Upon seeing the tinted windows, the officers decided to conduct a motor vehicle stop. (1T17-22 to 25; 3T12-20 to 25). The officers conducted a U-turn and, as they proceeded behind the Charger, the vehicle made an immediate left onto Community Lane and attempted to pull into a parking space. (1T18-1 to 21; 3T13-1 to 16). Before the vehicle came to a stop, Officer Nicholas activated his lights and sirens. (1T19-2 to 11; 2T64-25 to 65-8). Officers Nicholas and Gonzalez then exited their vehicle. (1T19-14 to 16).

As the officers opened their door, the driver door, passenger door, and rear passenger side door of the Charger opened. Ibid. Three black males, who were on the younger side and were wearing black-colored shirts and blue jeans, exited the charger. (1T19-24 to 20-10). Officer Gonzalez yelled at them to "Stop. Police. Get back in the vehicle." (1T20-11 to 14; 2T65-12 to 17; 3T13-23 to 25). The occupants did not comply and instead slammed the doors of the Charger closed and took off running down Community Lane. (1T20-18 to 22; 2T66-3 to 7).

Officer Nicholas chased after the driver of the vehicle, who was later identified as defendant, while Officer Gonzalez chased after the front seat passenger, who was later identified as co-defendant Jamar Gilford. (1T20-23 to 21-21; 2T66-8 to 11; 3T15-6 to 17-3). While Officer Nicholas chased defendant, he called for backup to assist him in his pursuit. (1T22-3 to 14). Officer Anthony Jackson, who was off-duty, saw Officer Nicholas giving chase, so he yelled "Stop. Police. You're under arrest," and he began to pursue defendant. (1T22-25 to 23-8). Defendant did not comply with Officer Jackson's commands and he continued running. (1T23-6 to 15).

While defendant was running, he attempted to discard a set of keys, throwing them on the balcony of a residence. (1T23-19 to 24-8). However, the keys came back down and defendant discarded them on the ground. (1T24-9 to 17). Eventually, Officer Jackson was able to catch up with defendant and placed him in handcuffs. (1T24-18 to 25). Officer Jackson then searched defendant's person and found a dark-colored ski mask in his left rear pants pocket. (1T25-10 to 14). He then placed defendant in the rear of Officer Nicholas' patrol vehicle. (1T25-4 to 9).

Meanwhile, Officer Gonzalez was pursuing co-defendant Gilford eastbound on the 100-block of Community Lane. (1T26-1 to 22; 1T26-24 to

27-5; 2T66-12 to 15). Officer Gonzalez continuously advised co-defendant Gilford to stop, that Officer Gonzalez was police, and that co-defendant Gilford was under arrest. (1T27-6 to 11; 3T17-8 to 17). Co-defendant Gilford did not comply with those commands. (1T27-12 to 14; 3T17-18 to 21). Eventually, however, Officer Gonzalez apprehended co-defendant Gilford. (1T26-5 to 22; 3T18-4 to 6).

Officer Gonzalez then searched co-defendant Gilford's person and recovered two clear Ziplock-type bags, one with a green residue, suspected CDS marijuana, and another with a green vegetative substance, suspected CDS marijuana. (1T28-2 to 9; 3T18-18 to 22). Officer Gonzalez then walked co-defendant Gilford back to where the Dodge Charger was located, and secured co-defendant Gilford in a patrol car. (1T28-15 to 21; 3T18-23 to 25).

After Officer Nicholas placed defendant in the rear of his vehicle, the officer returned to the Dodge that defendant was driving. (1T29-9 to 14). The doors and windows were closed and Officer Nicholas could not see inside the car. (1T29-9 to 24). Additionally, even though the front windshield was not tinted, Officer Nicholas could not see to the back of the vehicle. (1T30-3 to 5). As a result, Officer Nicholas conducted a protective sweep. Specifically, he approached the vehicle and opened the front driver's side door and cleared

the back of the vehicle to ensure no one else was inside the car. (1T30-6 to 31-10). Upon opening the door, Officer Nicholas observed a black and gray handgun in the driver's side door panel. (1T31-5 to 15). He also smelled the strong odor of marijuana emanating from the vehicle's interior compartment. (1T31-8 to 10). Officer Nicholas immediately secured the firearm and cleared the weapon of rounds. (1T32-4 to 12).

Officer Nicholas and Officer Gora then searched the rest of the vehicle. (1T32-13 to 21). Officer Gora opened the front passenger side door and located another handgun that was in the passenger's side door panel. (1T32-22 to 33-2). A third handgun was recovered from the rear right passenger side door panel. (1T33-3 to 12). Additionally, suspected marijuana was recovered from the center console and a black ski mask was found in the rear bench seat. (1T33-3 to 12).

The third occupant of the vehicle was never apprehended. (1T34-3 to 6).

Motion For Reconsideration Facts:

Laquanda Griggs, the owner of the Dodge Charger, testified on behalf of defendant. (6T31-18 to 25). She stated that she was contacted by the police in June of 2017 and that she had owned the Charger for a year at that time. (6T33-24 to 34-4). She could not recall how frequently she drove that vehicle, but nevertheless claimed that "you could see through" the windows. (6T34-21 to 35-12). She stated that she did not put the tint on the windows, but that the front and back windows on each side and the windshield had tints. (6T35-13 to 20).

On cross-examination, Ms. Griggs claimed that she was unaware the vehicle had tinted windows when she purchased it. (6T38-8 to 11). Additionally, during the cross-examination she was shown images of her vehicle; sometimes she stated the windows did not appear tinted, while other times she admitted they "look pretty dark." (6T42-13 to 43-10). Eventually, she was confronted with a statement she provided to Detective Cozzier on June 29, 2017, wherein she stated the windows were "medium tinted." (6T44-12 to 46-18; 6T53-25 to 54-2).

Plea Facts:

On December 12, 2022, defendant pleaded guilty. (8T). Defendant admitted that he was driving a vehicle on June 27, 2017, in Elizabeth, New Jersey and that he was aware there were a few guns in the vehicle. (8T40-7 to 20). He further admitted that there was a gun in the door panel of the seat where he was sitting. (8T40-21 to 24). Defendant also admitted that he was close enough to grab the loaded gun if he wanted to. (8T41-7 to 18).

LEGAL ARGUMENT

POINT I

THE MOTION COURTS PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS AND MOTION FOR RECONSIDERATION. (4T6-24 to 33-2; 7T36-5 to 49-24; Da4; Da8).

Defendant claims both motion courts erred in failing to suppress the evidence in this case because the police lacked a reasonable and articulable suspicion to stop the motor vehicle and because the officer had no basis to conduct a protective sweep. Defendant's claim is without merit. As both the Motion to Suppress and Motion for Reconsideration courts properly found, the officers' conduct in this case was lawful. The officers provided credible testimony that they could not see through the drivers' side window and, therefore, the courts aptly found the officers had a reasonable and articulable suspicion that the vehicle violated Title 39 and, thus, the officers could lawfully stop and detain the vehicle and its occupants. Moreover, the courts correctly found that the officers could conduct a protective sweep of the vehicle for their safety because the officers could not see inside the vehicle, they did not apprehend all of the suspects, and they did not know if any confederates were inside the car. These findings are amply supported by the

record and, thus, they should not be disturbed on appeal. Accordingly, defendant's appeal should be denied and his conviction should be affirmed.

The "standard of review on a motion to suppress is deferential . . . ." State v. Nyema, 249 N.J. 509, 526 (2022); accord State v. Sims, 250 N.J. 189, 210 (2022). On appeal, "a trial court's factual findings in support of granting or denying a motion to suppress must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. S.S., 229 N.J. 360, 374 (2017) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). Therefore, "[a] trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). However, an appellate court owes no deference to "conclusions of law made by lower courts in suppression decisions," which are reviewed de novo. State v. Boone, 232 N.J. 417, 426 (2017) (citing State v. Watts, 223 N.J. 503, 516 (2015)).

Applying this standard here, it is clear that the motion courts did not abuse their discretion in denying defendant's Motion to Suppress. Accordingly, defendant's appeal should be denied and his conviction should be affirmed.

A. The Motion Courts Properly Found That The Officers Had A Reasonable And Articulable Suspicion That Defendant's Vehicle Violated Title 39 And, Therefore, The Stop Was Lawful. (4T4-24 to 23-4; 7T36-5 to 49-24; Da8).

Defendant claims the motion courts erred in denying his Motion to Suppress because the officers did not have a reasonable, articulable basis to stop the motor vehicle. Defendant's claim is without merit. The Motion to Suppress Court properly found the officers provided credible testimony that they could not see through the front side windows of the Charger because they were tinted and, therefore, the officers had a reasonable and articulable suspicion that defendant's vehicle was in violation of N.J.S.A. 39:3-74. The Motion for Reconsideration Court also correctly rejected defendant's claim that the driver's window was insufficiently tinted to provide a basis for the stop. Both courts' findings are amply supported by the record and, therefore, they should not be disturbed on appeal. Thus, defendant's appeal should be denied and his conviction should be affirmed.

"The Fourth Amendment and Article I, Paragraph 7 of the State Constitution guarantee individuals the right to be free from unreasonable searches and seizures." State v. Carter, 247 N.J. 488, 524 (2021). "When police stop a motor vehicle, the stop constitutes a seizure of persons, no matter how brief or limited." State v. Nyema, 249 N.J. 509, 527 (2022).

Police may stop a vehicle if they have a reasonable and articulable suspicion that a motor vehicle offense has been committed. Delaware v. Prouse, 440 U.S. 648, 663 (1979); accord State v. Bacome, 228 N.J. 94, 103 (2017). Such offenses include minor motor vehicle equipment violations. See State v. Bernokeits, 423 N.J. Super. 365, 370 (App. Div. 2011) ("A motor vehicle violation, no matter how minor, justifies a stop without any reasonable suspicion that the motorist has committed a crime or other unlawful act." (citing Prouse, 440 U.S. at 663)). "To be lawful, an automobile stop 'must be based on reasonable and articulable suspicion that an offense, including a minor traffic offense, has been or is being committed.'" Bacome, 228 N.J. at (quoting State v. Carty, 170 N.J. 632, 639-40 (2002)). The reasonable suspicion standard requires "some minimal level of objective justification for making the stop." State v. Nishina, 175 N.J. 502, 511 (2003) (emphasis added) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)); cf. State v. Puzio, 379 N.J. Super. 378, 382-84 (App. Div. 2005) (reversing the defendant's drunk driving conviction because the officer conducting the motor vehicle stop did not have an objectively reasonable basis for believing that defendant had committed a motor vehicle offense).

Importantly, "the State is not required to prove that the suspected motor-vehicle violation occurred." State v. Locurto, 157 N.J. 463, 470 (1999). Rather, "[c]onstitutional precedent requires only reasonableness on the part of the police, not legal perfection. Therefore, the State need prove only that the police lawfully stopped the car, not that it could convict the driver of the motor-vehicle offense." State v. Williamson, 138 N.J. 302, 304 (1994); see also State v. Sutherland, 231 N.J. 429, 439 (2018).

Here, the motion courts aptly found that the officers had a reasonable and articulable suspicion that defendant's vehicle violated N.J.S.A. 39:3-74 because the officers could not see through the front windows and, therefore, the stop was lawful. This ruling is supported by the record and should not be disturbed on appeal.

Pursuant to N.J.S.A. 39:3-74,

> Every motor vehicle having a windshield shall be equipped with at least one device in good working order for cleaning rain, snow or other moisture from the windshield so as to provide clear vision for the driver, and all such devices shall be so constructed and installed as to be operated or controlled by the driver.
>
> No person shall drive any motor vehicle with any sign, poster, sticker or other non-transparent material upon the front windshield, wings, deflectors, side shields, corner lights adjoining windshield or

> front side windows of such vehicle other than a certificate or other article required to be so displayed by statute or by regulations of the commissioner.
>
> No person shall drive any vehicle so constructed, equipped or loaded as to unduly interfere with the driver's vision to the front and to the sides.
>
> [N.J.S.A. 39:3-74.]

As the Appellate Division recognized in State v. Cohen, darkly tinted windows can provide a lawful basis to initiate a motor vehicle stop based on this statute. Cohen, 347 N.J. Super. 375, 380-81 (App. Div. 2002) (where the officer's reasonable suspicion was "based upon his initial observation that the [defendant's] windows were so darkly tinted as to obstruct vision . . . ."). And, in 2022, in State v. Smith, 251 N.J. 244 (2022), the Supreme Court clarified what was required for tints to amount to a violation of N.J.S.A. 39:3-74. The Smith Court ruled that under N.J.S.A. 39:3-74, reasonable and articulable suspicion of a tinted windows violation arises "when a vehicle's front windshield or front side windows are so darkly tinted that police cannot clearly see people or articles within the car." Smith, 251 N.J. at 253. Accordingly, "[i]n order to establish a reasonable suspicion of a tinted windows violation under N.J.S.A. 39:3-74, the State will . . . need to present evidence that tinting on the front windshield or front side windows inhibited

officers' ability to clearly see the vehicle's occupants or articles inside." Id. at 266.

As both motion courts properly found, the State established the officers had a reasonable and articulable suspicion that defendant's vehicle violated N.J.S.A. 39:3-74 and, therefore, the officers' stop of the vehicle was lawful. This finding was amply supported by the record and should not be disturbed on appeal.

The Motion to Suppress Court correctly found that both officers provided credible testimony. (4T6-12 to 16). Specifically, the court found that Officer Nicholas provided credible testimony that

> as he passed by this Dodge Charger, he looked to his left and he noticed that the front and rear windows of the Charger were tinted. And he couldn't see in the vehicle because of the tinting. He also noticed that the rear windshield was tinted as he passed by. He couldn't see inside the car, except for what he saw through the front windshield as that car approached.
>
> [4T8-12 to 18].

The court further noted that Officer Nicholas also testified that when the occupants of the vehicle fled, the officers still could not see inside the vehicle due to the tinting and that all of the windows were tinted except for the front

windshield. (4T10-7 to 10). Additionally, the Motion to Suppress Court aptly found that Officer Gonzalez testified

> that as the police vehicle passed by the red Charger, you couldn't see in the side windows because the windows were obstructed. He testified that that amounted to a motor vehicle violation, obstruction, tinted windows more accurately referred to as obstruction of vision I believe it is.
>
> [4T13-15 to 20].

Based on these credibility and factual findings, which must be deferred to on appeal so long as they are supported by "sufficient credible evidence in the record[,]" State v. Nelson, 237 N.J. 540, 551 (2019), the court aptly found the officers had a reasonable and articulable suspicion that defendant violated N.J.S.A. 39:3-74. (4T22-5 to 24-2).

The record clearly supports these findings. During the Motion to Suppress hearing, Officer Nicholas testified, "all the other windows except for the windshield were tinted heavily." (1T17-7 to 9). And, when he was asked if he was able to see inside the vehicle when they crossed paths, he responded "No, I was not." (1T17-15 to 17). Officer Nicholas further explained that when he returned to the vehicle, the windows and doors were closed and he could not see inside because of the tinted windows. (1T29-15 to 24; 2T41-8 to 22). And, eliminating any ambiguity about which windows Officer Nicholas

was referencing, the officer explicitly stated that the front windshield was not tinted, but the front windows, rear windows, and rear windshield were all tinted. (2T33-23 to 34-5).

Officer Gonzalez similarly testified that the reason for the stop and the issuance of the motor vehicle summons was because the front windows were improperly tinted. (2T59-19 to 60-1; 2T80-18 to 20; 3T14-19 to 25). Specifically, he stated "we noticed that the front driver's side windows were tinted, which is illegal in the State of New Jersey." (2T59-24 to 60-1). He also testified that he issued the "obstructed view" motor vehicle summons because of "the tinted windows in the front driver and passenger side of the vehicle." (2T60-24 to 61-2). Moreover, Officer Gonzalez testified that he could not see through the side windows of the car because the windows on the side and back of the vehicle were heavily tinted. (2T83-19 to 84-1; 3T12-9 to 16). Thus, the record clearly establishes the officers could not "clearly see people or articles within the car" because of the front window tints and, therefore, the Motion to Suppress Court properly found the officers had a reasonable and articulable suspicion that defendant's vehicle was in violation of N.J.S.A. 39:3-74.

The Motion for Reconsideration Court also aptly denied defendant's motion. Indeed, in denying defendant's motion, the Motion for Reconsideration Court specifically analyzed the facts of this case and how they should be viewed under Smith. In reaching its conclusion, the court aptly rejected Ms. Griggs testimony because she was not a credible witness, (7T44-18 to 45-9), and correctly relied upon the officers' credible testimony. Doing so, the court properly found that Officer Nicholas

> Said I couldn't see clearly in, I just was trying to find out how many people were in the car. We passed by, I could see -- he said look, I could see through the windshield, that was clear, but it was, and I'm paraphrasing, it was dark enough, the windows he said were dark, darkly tinted, I couldn't see through. And the fact that in D-1 you can see some part of -- it's a little -- it's somewhat transparent, I wouldn't say it's transparent, I wouldn't call it non-transparent, it's tinted. The detective said I couldn't see through, it was tinted. His heavy is Griggs's medium. I accept his testimony, it was found credible. And Judge Daniel had the chance to sit next to the detectives, listen to them, watch them, issue a lengthy oral decision, he found them credible and nothing presented to this Court changes this Court's determination in terms of their credibility. And I certainly don't find that they were not credible or mistaken, not based upon the transcripts and anything presented to this Court, including Ms. Griggs's testimony. So the motion is, again, denied.
>
> [7T49-3 to 24 (emphasis added)].

Accordingly, the Motion for Reconsideration Court properly denied defendant's motion.

Although defendant may disagree with the trial the courts' findings, disagreement does not amount to error, let alone an abuse of discretion. Indeed, defendant's claim of error is premised upon an unreasonable interpretation of the officers' testimony. Although the officers testified that all of the side windows were tinted and that they could not see into the vehicle, defendant nevertheless claims the State failed to meet its burden because the officers never specified whether they could not see through the front side windows, rear side windows, or both. Thus, defendant claims, the State failed to prove the officers could not see through the front windows. This claim is without merit.

The officers repeatedly and unequivocally testified that they could not see inside the vehicle. If they could see through the front side windows, they could not have provided such testimony. Moreover, when Officer Nicholas described clearing the vehicle, he testified, "[u]pon getting back to the vehicle, I approached it and opened the driver's door in order to clear the back of the vehicle, which I couldn't see through the windows." (1T30-7 to 10) (emphasis added). Stated differently, Officer Nicholas, who was at the front door, could

not see through the front window to determine who was inside and, therefore, he opened the door. Although that conduct occurred after the stop, it unequivocally establishes that when the officers testified that they could not see through the windows, they meant all of the side windows, including the front side windows. While an explicit statement that they could not see through the front side windows would have been ideal, given the totality of the testimony, it is clear, beyond a reasonable doubt, that the officers could not see through the front side windows. As such, defendant's claim of error should be rejected, his appeal denied, and his conviction affirmed.

Indeed, the State notes that it did not need to prove the windows actually violated N.J.S.A. 39:3-74, but rather that the officers had a reasonable and articulable suspicion that a violation occurred. The motion courts properly found that was established. It cannot be, and is not, contested that the front windows of the Charger were tinted. Rather, the sole issue was the degree of the tinting. At the Motion to Suppress, the only proof in support or against that issue was the officers' credible testimony that they could not see into the vehicle. The trial court properly found that the officers' uncontested testimony established the State's burden.

The Motion for Reconsideration Court then properly found that defendant failed to negate that finding. At the Motion for Reconsideration, defendant introduced Ms. Griggs testimony, which was found not to be credible and a still photo that was taken from the body-worn camera video. (Da7). The State countered with other stills taken from the body-worn camera video. (Da6). Notably, these photos could have been admitted at the Motion to Suppress, but were not. Regardless, it is respectfully submitted that these photos establish two things: (1) the visibility through the front window is affected by the surrounding circumstances such as lighting, view point, and background, and (2) the bottom photograph in Da6 clearly shows that the front windows are tinted to such a degree that an officer driving by would not be able to see inside the vehicle. As such, the Motion for Reconsideration Court properly found that the additional submissions, which did not actually reflect how the officers saw the window at the time of the stop, did not negate the officers' credible testimony and, therefore, the court correctly found that there was no basis to disturb the Motion to Suppress Court's ruling.

In sum, the officers provided credible testimony that, as they were driving next to the Charger, they could not see through the Chargers' front windows because of the tinting. This testimony proved the officers had

reasonable and articulable suspicion that the Charger was in violation of N.J.S.A. 39:3-74 as defined in Smith and, thus, the officers could lawfully conduct a motor vehicle stop. Accordingly, both motion courts properly denied defendant's motion.

B. The Motion To Suppress Court Properly Denied Defendant's Motion Because The Officers Lawfully Conducted A Protective Sweep. (4T6-24 to 33-2; Da4).

Defendant claims the Motion to Suppress Court erred in denying his motion because the officers did not have a lawful basis to conduct a protective sweep of the vehicle. Defendant's claim is without merit. As the Motion Court properly found, the officers performed a lawful protective sweep because of the totality of the circumstances, which included a motor vehicle stop in a high crime area, suspicious individuals who were wearing ski masks inside a car in the middle of summer and their subsequent failure to comply with lawful commands to stop, tinted windows of the suspect vehicle that prevented the officers from seeing inside, the presence of an unexpected confederate who fled the scene and was not apprehended, and the crowd of people that was gathering, provided the officers with a need to perform the sweep for officer safety. This finding is supported by the record and by caselaw and therefore, it should not be disturbed on appeal.

The protective sweep doctrine is a recognized exception to the warrant requirement. Under federal and New Jersey search-and-seizure jurisprudence, a police officer's warrantless search of the passenger compartment of a vehicle, following a lawful traffic stop, is a constitutional protective sweep when the circumstances give rise to a reasonable suspicion that a driver or passenger "is dangerous and may gain immediate access to weapons." State v. Gamble, 218 N.J. 412, 432 (2014) (citing Michigan v. Long, 463 U.S. 1032, 1049 (1983); State v. Lund, 119 N.J. 35, 48 (1990)). A protective sweep, permitted in order to "ferret out weapons that might be used against police officers," Id. 218 N.J. at 433 (quoting State v. Davila, 203 N.J. 97, 129 (2010)), "must be cursory and limited in scope to the location where the danger may be concealed," Ibid.

The protective sweep exception derives from the United States Supreme Court's holding in Terry v. Ohio, 392 U.S. 1 (1968) (authorizing the limited intrusion of a police "stop and frisk" of a pedestrian where there is reasonable suspicion that the individual may have engaged in criminal activity). In Terry, the Supreme Court held that a police officer may initiate an investigatory stop in the presence of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at

21. When an officer conducts such a stop, he or she may frisk the individual for weapons without probable cause for the protection of the police officer "where he has reason to believe that he is dealing with an armed and dangerous individual." Id. at 27.

In Long, the United States Supreme Court applied the protective sweep exception in an automobile setting. Michigan v. Long, 463 U.S. 1032, 1049 (1983). There, the Court authorized a limited search of a vehicle's passenger area for purposes of officer safety. Ibid. The Court observed in Long that such a "protective sweep" should be restricted to those areas where a weapon could be hidden or placed if an officer "possesses a reasonable belief based on specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant" the officer's belief that the suspect poses a danger and "may gain immediate control of weapons." Ibid. (quoting Terry, 392 U.S. at 21.) (internal quotation marks omitted).

In Lund, our Court adopted the federal test for vehicular protective sweeps that had been articulated in Long. State v. Lund, 119 N.J. 35, 48-50 (1990). Hence, the coterminous federal and state constitutional standard for a valid protective sweep is whether the State demonstrates "specific and articulable facts that, considered with the rational inferences from those facts,

warrant a belief that an individual in the vehicle is dangerous and that he or she 'may gain immediate control of weapons.'" State v. Robinson, 228 N.J. 529, 547 (2017) (quoting Long, 463 U.S. at 1049.) (emphasis added). See also State v. Gamble, 218 N.J. 412, 432 (2014). The police may perform a warrantless protective sweep of a vehicle's passenger compartment where the totality of circumstances support "a reasonable suspicion that a driver or passenger 'is dangerous and may gain immediate access to weapons.'" Robinson, 228 N.J. at 534 (quoting Gamble, 218 N.J. at 432).

Moreover, the protective sweep exception in the automobile setting does not turn solely on the potential presence of a weapon in a vehicle. Robinson, 228 N.J. at 548. Instead, it addresses the imminent danger to police when a driver or passenger will be permitted access to a vehicle that may contain a weapon or may be in a position to evade or overpower the officers at the scene. Ibid. (citing Gamble, 218 N.J. at 431-32; Lund, 119 N.J. at 48).

Applying this standard here, it is clear that the Motion to Suppress Court properly found the protective sweep was valid. As the court stated:

> In this case, the defendants were under arrest already when the officer opened the door to the vehicle. And defense counsel argues where's the urgency in this case. They were in police custody. Well, in this case the police, Officer Nicholas, Officer Gonzalez, just saw -- they were just surprised minutes

earlier by a third individual fleeing from that vehicle. While the vehicle was right there in front of them, they couldn't see into the vehicle because of the illegal tinted windows that surrounded this vehicle, except for the front windshield.

And there was somebody at large and they had just seen two individuals in the front of the vehicle with ski masks on. And they had just arrested Officer Johnson (sic) found to be in possession of a ski mask and they arrested Mr. Johnson. I'm sorry. Found to be in possession of a ski mask and Mr. Gilford. This unfolded rapidly.

The officer, Officer Nicholas, acted reasonably by opening the door of the vehicle from which three individuals had just fled in different directions to see if there was someone else in that car. Had there been no tint, had the windows been clear like the front windshield, there would have been no need to open the front door. That's not the situation here though. He had the right. He had the legal authority.

He had a reasonable and articulable suspicion to believe that there may be someone in that vehicle who may pose a threat to his safety and/or to the members of the public standing there around that vehicle, the crowds that were forming. The search, the sweep was limited in scope to sticking his head through the pane of the front doorway area into the vehicle and looking toward the back seat. He went no further than he needed to go to see if someone was back there. He didn't see anybody back there.

He proceeded out of the vehicle from where he was leaning into the vehicle and then saw in plain view this weapon. He was in an area that he had the lawful right to be in at the time he observed the weapon in plain view because the officer had a legitimate purpose for opening the door, looking in the vehicle.

> This was not a precursor type search. Because he had the right to do this cursory search and because he was rightfully in the area -- in an area when he observed this first weapon in plain view. His actions -- the motion to suppress those items found within the vehicle is denied.
>
> [4T28-49 to 30-17]

As explained herein, these findings were amply supported by the record and the court's legal conclusion was supported by case law.

Officers Nicholas and Gonzalez attempted to conduct a motor vehicle stop in a high crime area and instead of encountering a compliant motorist, three people, wearing ski masks in the middle of summer, fled the car. This conduct gave the officers reasonable and articulable suspicion that the suspects might be dangerous. Indeed, the occupants of the vehicle were wearing ski masks in a vehicle in the summer, which is atypical conduct and inherently suspicious. More importantly, the occupants were not compliant with the officers' commands, obstructed the administration of justice, and fled. This further heightened the officers concern for their safety. The presence of a third confederate also raised the officers concern for their safety because the officers were presented with an unexpected additional suspect, who also was non-compliant. The existence of a third occupant became particularly problematic and concerning because he was not apprehended by police.

Moreover, because the occupants closed the doors to the vehicle and because the windows were darkly tinted, the officers could not see inside the rear passenger compartment and therefore, the officers were unaware if the third occupant returned to the vehicle while the officers were chasing the defendants or whether another confederate remained inside the car. Additionally, a crowd began to form as the officers were resolving the situation. The confederate could have been in that crowd or any member of that crowd could have gained access to the vehicle. Accordingly, the motion court properly found the officers had a legitimate concern for their safety, and thus, the court correctly found the officers were permitted to conduct a quick, limited search to ensure no one was inside the vehicle.

Defendant nevertheless claims the officers could not conduct a protective sweep because the officers eliminated any danger that may have existed. Citing State v. Robinson, 228 N.J. 529, 547 (2017), defendant claims the situation did not present a danger to the officers because defendant was apprehended, detained in a police vehicle, and outnumbered by police officers. Defendant's claim is without merit. This case is factually and legally distinguishable from Robinson and, therefore, defendant's reliance upon same is misplaced.

In Robinson, a single officer in a marked patrol car conducted a valid motor vehicle stop, saw four people in the car, and noticed that none of the occupants were wearing a seatbelt. 228 N.J. at 536. Shortly after making the stop, the officer was advised by his department's dispatcher that the driver of the car had an outstanding warrant for a drug offense. Id. at 537. The dispatcher also told the officer to use caution because the defendant was known to carry weapons. Ibid. The dispatcher further advised the officer that one of the passengers also had an outstanding traffic warrant. Ibid. The officer called for backup and was met by four other uniformed officers, who assisted in directing two of the four occupants out of the car, as well as handcuffing, and arresting them. Id. at 537-38. The officers detained, but failed to arrest, the other two occupants. Id. at 538.

The officers then patted down the two detained individuals, but found no weapons. Ibid. The two men, who remained uncuffed, were then told to stand on the roadside as the officers monitored them. Ibid. The testifying officer stated that he did not see either of the detained passengers reach for a weapon, attempt to hide anything, or resist the officers' directions. Ibid. The sergeant on the scene then directed one of the officers to conduct a sweep of the car's interior to check for weapons. Ibid. After searching the front driver and

passenger areas, the officer lifted a purse found on the front passenger seat. Ibid. The officer testified that he felt the outline of a gun when he felt the bottom of the purse. Id. at 538-39. The gun was retrieved by the officer, all passengers were secured, and the five officers on the scene then decided to obtain a search warrant. Id. at 539.

The Supreme Court found the on-the-spot search of the car that produced the handgun was not within the warrant requirement's protective sweep exception. Robinson, 228 N.J. at 549. The Court concluded that, although the circumstances justified a reasonable suspicion a weapon was in the vehicle, the five officers' "swift and coordinated action eliminated the risk that any of the four occupants would gain immediate access to the weapon." Id. at 535.

Contrary to defendant's claim, this case is unlike Robinson. Although both of the cases began as motor vehicle stops, unlike the defendants in Robinson, who were compliant, the defendants here fled. Although both cases involved prudent police work, unlike the facts of Robinson, a confederate in this case was not apprehended. Indeed, despite the officers' best efforts, unlike Robinson, where the risk of danger was eliminated, here, a danger remained: the unknown passenger. Moreover, although defendant asserts the

officers did not have a reason to believe the defendants were dangerous individuals, he completely disregards the suspicious behavior of three people wearing ski masks in a vehicle in the middle of summer and, more importantly, their subsequent obstruction by flight from police. Additionally, although the officers did not find weapons on either defendant's person, that does not remove the need for concern. Id. at 548. see Gamble, 218 N.J. at 432-33. Thus, contrary to defendant's claim, unlike Robinson, danger necessitating a protective sweep remained in this case and, therefore, the motion court properly found the officers' conduct was lawful.

C. The Motion Court Correctly Denied Defendant's Motion Because The Protective Sweep Was Properly Executed. (4T6-24 to 33-2; Da4).

For the first time on appeal, defendant claims the protective sweep in this matter was unlawful because of the manner in which the protective sweep occurred. Specifically, defendant claims the officer improperly opened the front driver's side door to conduct the sweep instead of the rear passenger seat. Defendant's claim is without merit. The officer lawfully conducted a brief and limited search of the interior compartment of the vehicle, an area where an individual could have been hiding. Therefore, defendant's claim should be rejected, his appeal denied, and his conviction affirmed.

When viewing the circumstances of each case, a court must avoid "the distorted prism of hindsight" and recognize "that those who must act in the heat of the moment do so without the luxury of time for calm reflection or sustained deliberation." State v. Frankel, 179 N.J. 586, 599 (2004). A court must "examine the conduct of those officials in light of what was reasonable under the fast-breaking and potentially life-threatening circumstances that were faced at the time." Ibid.

Officer Nicholas conducted a protective sweep of the vehicle out of concern that a confederate might be lying in wait inside the car. (1T30-14 to 21). Although the officer was never asked why he opened the front door to see inside the rear, his doing so was not unreasonable or improper. Indeed, given the concern that an individual might be lurking inside the car, it was reasonable to open the front door to look into the back of the vehicle, thereby placing a seat between the officer and potential harm as opposed to directly in harm's way.

Moreover, the protective sweep that occurred was limited to the location where the danger may be concealed and was narrowly confined to a visual sweep of the passenger compartment. It did not last longer than it should have and did not result in a search of areas that could not hide a person. Rather, the

search only expanded after Officer Nicholas observed a firearm in plain view and smelled marijuana, which supported a more fulsome search pursuant to the automobile exception. However, the protective sweep itself was quick, limited, and focused on one aim: eliminating the potential danger of a person in the vehicle. As such, defendant's claim is without merit. The protective sweep did not exceed the scope of what was permissible.

CONCLUSION

For the foregoing reasons, the State respectfully requests that defendant's conviction and sentence be affirmed.

Respectfully submitted,

JAMES O. TANSEY
Designated Prosecutor of Union County
for Purposes of this Appeal

s/Milton S. Leibowitz

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