

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
APP. DIV. DOCKET NO: A-3647-23
MIDDLESEX COUNTY INDICTMENT NO: 23-03-339-I

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
	:	
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction
	:	in the Superior Court of New Jersey
v.	:	Law Division-Criminal Part,
	:	Middlesex Vicinage
JOSE FLORES,	:	
	:	Sat Below:
Defendant-Appellant.	:	
	:	Hon. Andrea G. Carter, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF
DEFENDANT-APPELLANT JOSE FLORES

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DEFENDANT IS PRESENTLY CONFINED

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
STATEMENT OF PROCEDURAL HISTORY.....	1
STATEMENT OF FACTS	2
LEGAL ARGUMENT.....	4
POINT I	4
THE COURT BELOW ERRED IN DENYING DEFENDANT’S MOTION TO SUPPRESS EVIDENCE SEIZED WITHOUT A WARRANT BECAUSE THE FACTS GIVING RISE TO PROBABLE CAUSE WERE NOT SPONTANEOUS OR UNFORESEEABLE. (Raised Below)(Da45-Da48)).	4
POINT II	11
THERE WAS NO BASIS IN THE TESTIMONY WHICH WOULD PERMIT THE OFFICERS TO EXPAND THE SCOPE OF THE SEARCH TO THE TRUNK OF THE VEHICLE (raised below (Da49-Da54)).	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<u>State v. Alston</u> , 88 N.J. 211 (1981).....	5, 6
<u>State v. Cooke</u> , 163 N.J. 657 (2000)	5
<u>State v. Guerra</u> , 93 N.J. 146 (1983)	12
<u>State v. Hill</u> , 115 N.J. 169 (1989)	5
<u>State v. Johnson</u> , 193 N.J. 528 (2008)	5
<u>State v. Kahlon</u> , 182 N.J. Super. 331 (App. Div. 1980)	12
<u>State v. Letman</u> 235 N.J. Super. 337 (App. Div. 1989).....	12
<u>State v. Patino</u> , 83 N.J. 1 (1980)	11, 12
<u>State v. Pena-Flores</u> , 198 N.J. 6 (2009)	5, 11
<u>State v. Pittman</u> , No: A-2309-20 (App. Div. Oct. 19, 2023)	9, 10
<u>State v. Rodriguez</u> , 459 N.J. Super. 13 (2019)	5
<u>State v. Smart</u> , 253 N.J. 156 (2023)	6, 7, 8
<u>State v. Witt</u> , 223 N.J. 409 (2015)	5, 6

<u>State v. Young</u> , 87 N.J. (1981).....	12
---	----

Rules

<u>N.J.R.E.</u> 104	1
---------------------------	---

Constitutional Provisions

Article I, Paragraph 7	4, 6
Fourth Amendment of the Federal Constitution	4, 6

INDEX TO APPENDIX

Middlesex County Indictment No: 23-03-339-I	Da1
Defendant's July 7, 2023, Motion to Suppress	Da4
Judge Carter's October 24, 2023, Order Denying Defendant's Motion to Suppress Evidence	Da10
Judge Carter's October 24, 2023, Statement of Reasons in Support of the Denial of Defendant's Motion to Suppress Evidence	Da11
Defendant's November 7, 2023, Motion to Expand the Record	Da27
Defendant's November 7, 2023, Motion for Reconsideration	Da29
Judge Carter's November 15, 2023, Amended Statement of Reasons in Support of the Denial of Defendant's Motion to Suppress Evidence, Expand the Record and Reconsideration	Da31
Plea Forms	Da55
July 19, 2024, Judgment of Conviction	Da65
Notice of Appeal	Da69

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Judge Carter’s October 24, 2023, Order Denying Defendant’s Motion to Suppress Evidence	Da10
Judge Carter’s October 24, 2023, Statement of Reasons in Support of the Denial of Defendant’s Motion to Suppress Evidence	Da11
Judge Carter’s November 15, 2023, Amended Statement of Reasons in Support of the Denial of Defendant’s Motion to Suppress Evidence, Expand the Record and Reconsideration	Da31
July 19, 2024, Judgment of Conviction	Da65

STATEMENT OF PROCEDURAL HISTORY

Middlesex County Indictment No. 23-03-339-I, filed on March 30, 2023, charged defendant with three counts of third-degree possession of CDS; two counts of second-degree possession of CDS with intent to distribute; one count of third-degree possession of CDS with intent to distribute; three counts of second-degree possession of CDS with intent to distribute near public property; third-degree money laundering; and fourth-degree possession with intent to distribute drug paraphernalia. (Da1-Da3).

Defendant moved to suppress physical evidence seized without a warrant on July 7, 2023. (Da4-Da9). On September 26, 2023, the Hon. Andrea G. Carter, J.S.C., conducted a hearing pursuant to N.J.R.E. 104(a). (1T)¹. On October 24, 2023, Judge Carter denied defendant's motion to suppress by way of order and written opinion. (Da10-Da26).

On November 7, 2023, defendant moved to expand the motion record and for reconsideration of the court's Order denying his motion to suppress. (Da27-

¹ 1T refers to transcript of September 26, 2023, hearing.

2T refers to the transcript of the March 22, 2024, Plea Hearing.

3T refers to the Transcript of the July 19, 2024, Sentencing.

Da29). On November 15, 2023, Judge Carter denied both motions in an Amended Statement of Reasons. (Da31-Da54).

On March 22, 2024, defendant pleaded guilty to count four of the indictment, amended to third-degree possession of CDS with the intent to distribute, in exchange for a recommended sentence of four years in state prison. (Da55-Da59)(2T). On July 19, 2024, Judge Carter sentenced defendant in accordance with the negotiated plea agreement. (Da65-Da68).

Defendant filed a Notice of Appeal on July 23, 2024. (Da69).

STATEMENT OF FACTS

Officer Anthony Colon of the Perth Amboy Police Department was the only witness who testified during the September 26, 2023, hearing. Colon testified that he is a detective with the “Special Investigations Bureau[]” – a unit of the Perth Amboy Police Department that handles “narcotics cases, illegal gambling cases, some major crimes [and] overdoses.” (1T:6-15 to 25). On June 15, 2022, Colon was in the area of Washington Street and Amboy Avenue on “[n]arcotics patrol.” (1T:8-13 to 23). He described “narcotics patrol” as “[d]riving around looking for narcotics related incidents.” (1T:8-24 to 9-1). Colon and his partner, Detective Batista, were travelling in an unmarked car. (1T:10-4 to 6). In fact, the car was

not equipped with a Mobile Video Recorder so that it would remain “more discrete[.]” (1T:10-10 to 12).

At approximately 5:30 p.m., Colon and Batista began surveilling Gerald Toomer—an individual known to them from prior narcotics arrests. (1T:10-13 to 19). They observed Toomer pacing back and forth while using a cellular phone. (1T:10-19 to 21). Colon testified that he decided to surveil Toomer based on his “training and experience and [Toomer’s] prior history . . .” (1T:10-19 to 24). Colon also testified that the area where Toomer was observed was a high-crime area, like much of Perth Amboy. (1T:56-58). After Toomer spent “a few minutes” on his phone, the officers watched him run over and enter a vehicle that was stopped in traffic. (1T:11-7 to 18). Colon then decided to follow that car. (1T:13-2 to 11). He noticed that the driver of the vehicle made “numerous turns down side streets within the city.” (1T:13-14 to 17).

After following the car, Colon observed the vehicle pull into 563 North Park Drive. (1T:14-2 to 4). Toomer then walked over to a Toyota Highlander which was parked in the roadway. (1T:14-4 to 6). Colon testified that he observed Toomer approach the car and hand the driver of the Highlander (later identified as defendant) U.S. currency in exchange for an “unknown white substance[.]” which, he believed was a hand-to-hand drug transaction. (1T:14-19 to 15-4).

“[A]s soon as” Colon made that observation, he approached the Highlander while Batista approached Toomer, who was walking away toward 563 North Park Drive. (1T:16-4 to 12). Batista saw a clear plastic bag on the ground near Toomer which contained what he believed to be cocaine. (1T:18-7 to 13). “At that point” the officers detained defendant, Toomer and Kevin Pardee, the driver of the other vehicle. (1T:19-8 to 11). Colon, Batista, Detective Luis Almanzar and David Salazar then searched defendant’s Highlander and recovered contraband which forms the basis of this indictment. (1T:19-12 to 20-12). Although the detective never testified as to where the drugs were located in the Highlander, the State stipulated that they were recovered from the trunk. (Da52-Da53).

LEGAL ARGUMENT

POINT I

THE COURT BELOW ERRED IN DENYING DEFENDANT’S MOTION TO SUPPRESS EVIDENCE SEIZED WITHOUT A WARRANT BECAUSE THE FACTS GIVING RISE TO PROBABLE CAUSE WERE NOT SPONTANEOUS OR UNFORESEEABLE. (Raised Below)(Da45-Da48)).

Under the Fourth Amendment of the Federal Constitution and Article I, Paragraph 7 of our State Constitution, judicially authorized search warrants are

strongly preferred before law enforcement officers conduct a search. State v. Johnson, 193 N.J. 528, 552 (2008). The automobile exception is a recognized exception to the warrant requirement. State v. Hill, 115 N.J. 169, 173 (1989). Pursuant to State v. Witt, 223 N.J. 409, 450 (2015), “searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible.” This 2015 decision set aside the exigent circumstances test for vehicle searches under State v. Cooke, 163 N.J. 657 (2000), and State v. Pena-Flores, 198 N.J. 6 (2009), and returned to the automobile search standard of State v. Alston, 88 N.J. 211 (1981). Witt, 223 N.J. at 450. In 1981 the Alston Court acknowledged that “the exigent circumstances that justify the invocation of the automobile exception are the unforeseeability and spontaneity of the circumstances giving rise to probable cause ... and the inherent mobility of the automobile stopped on the highway.” Alston, 88 N.J. at 233; Witt, 223 N.J. at 431. Further, under Alston “the unanticipated circumstances that give rise to probable cause must occur quickly.” Id., citing Alston, 88 N.J. at 234.

Accordingly in New Jersey nonconsensual roadside vehicle searches may be conducted without a warrant if “(1) the police have probable cause to believe the vehicle contains evidence of a criminal offense; *and (2) the circumstances giving rise to probable cause are unforeseeable and spontaneous.*” (emphasis added) State v. Rodriguez, 459 N.J. Super. 13, 15, 22 (2019), citing Witt, 223 N.J.

at 447-448. Under New Jersey's automobile exception, the unanticipated circumstances that give rise to probable cause must occur swiftly, and those officers who possessed probable cause in advance of an automobile search must still seek a warrant. Witt, 223 N.J. at 431-432. Otherwise, “the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant.” Id. at 432.

Further, the Witt Court has determined that Alston's requirement of “unforeseeability and spontaneity” does not place an undue burden on law enforcement and comports with Art. I, Para 7 of the New Jersey Constitution. Id. at 447-448. This more onerous test departs from the federal standard for automobile searches because our “State Constitution provides greater protection against unreasonable searches and seizures than the Fourth Amendment.” Witt, 223 N.J. at 448. Furthermore, in reinstating Alston's two-factor automobile exception test, the Witt Court determined this standard “properly balances the individual's privacy and liberty interests and law enforcement's investigatory demands.” Witt, 223 N.J. at 447.

In March of last year, our Supreme Court reaffirmed the importance of the unforeseeability and spontaneity requirements in State v. Smart, 253 N.J. 156 (2023). In that case, just as in this case, a detective's attention was drawn to a car the officer believed was used by a drug dealer. Id. at 161. The officer surveilled

the car for over an hour, during which he saw the defendant engage in what the officer believed to be a drug transaction. Ibid. Armed with reasonable, articulable suspicion, police pulled the car over, but saw no sign of drugs. Id. at 162. Still suspecting the car contained drugs, police called for “a canine, whose positive drug ‘hit’ established probable cause.” Ibid. Police immediately searched the car, resulting in the seizure of drugs and weapons. Ibid.

The trial court suppressed the evidence, finding police needed a warrant to search the car because the circumstances giving rise to probable cause “were not ‘unforeseen and spontaneous,’ ” precluding application of the automobile exception under Witt. This court affirmed and the matter was appealed to our Supreme Court. The Court found the circumstances which ripened into probable cause in Smart could “hardly be characterized as unforeseeable” and “were anything but spontaneous.” Smart, 253 N.J. at 172-73.

They were not spontaneous in that “they did not develop . . . suddenly or rapidly.” Id. at 173. “Rather, the circumstances unfolded” after a lengthy surveillance and the officers had suspected the defendant of drug trafficking for some time. As to foreseeability, the Court noted the police “anticipated and expected they would find drugs” in the defendant’s car and “made the decision to conduct a canine sniff to transform their expectations into probable cause to support a search.” Id. at 173. The Court found that the circumstances giving rise

to probable cause were not “unforeseeable and spontaneous” but were instead, “deliberate, orchestrated, and wholly connected with the reason for the subsequent seizure of the evidence[.]” Id. at 172. In reaching its conclusion, the Smart Court considered, among other things, “narcotics trafficking in the area; lengthy surveillance of defendant and the vehicle [and] reasonable and articulable suspicion that the defendant had engaged in a drug deal . . .” Id. at 160.

The events giving rise to probable cause in this case were anything but unforeseeable and spontaneous. Colon was very candid during his testimony. He is a detective in a narcotics unit. He was on narcotics patrol. His attention was drawn to Toomer based upon Toomer’s prior narcotics arrests. He was in an area he considered to be “high crime.” Toomer was acting suspiciously and, based on his “training and experience,” Colon believed Toomer to be engaged in narcotics activity. Accordingly, Colon decided to follow and surveil Toomer while he drove throughout the city before ultimately witnessing a hand-to-hand drug transaction. Under facts markedly similar to those in Smart, after detaining all involved after the suspected drug transaction, the officers were able to confirm that the transaction involved suspected cocaine when they retrieved the bag purportedly thrown by Toomer. Colon found precisely what he expected to find when he began surveilling Toomer. To argue that this is “unforeseeable” borders on the fanciful.

Nor was it “spontaneous.” Colon and his partner surveilled Toomer and watched him act suspiciously on a street corner. They followed him as he entered a vehicle and drove throughout the city until he reached his destination and engaged in a hand-to-hand transaction. The events were not “sudden” or “rapid” but unfolded over a lengthy period of time, beginning with Colon’s observations on the corner of Washington Street and Amboy Ave.

This court’s unpublished decision in State v. Pittman, No: A-2309-20 (App. Div. Oct. 19, 2023)² further clarified the Smart principles in facts very similar to this case. In Pittman, a detective with the “special investigations unit” of the Woodbridge Police Department (whose primary function was narcotics enforcement), was on “ ‘proactive patrol’ with another officer.” Id. at *1. They were “ ‘driving around’ in an unmarked car ‘looking for suspicious activity.’” Ibid. The detective recognized the defendant’s vehicle and he was aware that the defendant was involved in narcotics trafficking based on information received from a confidential informant. Id. at *2. After about forty-five minutes, the detective watched the defendant retrieve a plastic bag from his trunk. Ibid. After another twenty-five minutes, another man entered the passenger seat of the defendant’s car. Ibid. As he approached, the detective saw the passenger with

² Pursuant to R. 1:36-3, a copy of this opinion is attached hereto to Defendant’s Appendix. (Da85-Da89).

cash in his hand. Ibid. Not seeing any drugs in plain view, the detective called for a K-9 sniff. Ibid. After the dog hit, the detective retrieved drugs from the vehicle without a warrant and the State sought to justify the warrantless search under the automobile exception.

This Court found that the search was unconstitutional under Smart, as it was “virtually indistinguishable . . .” Id. at *4. Specifically, as the trial court found, “it was the narcotics detective’s ‘suspicions of . . . [d]efendant’s narcotics activity’ which prompted the lengthy surveillance of defendant’s car, and formed the basis of the stop, the request for a canine sniff and the ultimate search of the car.” Ibid.

Accordingly, since it was the narcotics detective’s familiarity with Toomer that prompted the lengthy surveillance which ultimately led to the search of defendant’s car, Witt and Smart command that the officers were required—prior to searching defendant’s vehicle—to obtain judicial approval in the form of a search warrant. The search here failed to comport with the well-defined parameters of New Jersey’s automobile exception and the court below erred in denying defendant’s motion to suppress the evidence.

POINT II

THERE WAS NO BASIS IN THE TESTIMONY WHICH WOULD PERMIT THE OFFICERS TO EXPAND THE SCOPE OF THE SEARCH TO THE TRUNK OF THE VEHICLE (raised below (Da49-Da54)).

According to the testimony, “as soon as” the officers observed the purported exchange with codefendant Toomer, they activated their lights, detained defendant and searched his car. No contraband was recovered from the passenger compartment of the vehicle, all of it was recovered from the trunk.

In State v. Patino, 83 N.J. 1 (1980), our Supreme Court clearly drew a distinction between the passenger compartment and other areas of the car, at a time, pre-Pena-Flores, when New Jersey recognized the automobile exception to the warrant requirement. In reviewing the reasonableness of the scope of that search, the Supreme Court held that “the bare circumstance of a small amount of marijuana does not constitute a self-evident proposition that more marijuana or other contraband might be elsewhere in the automobile.” Id. at 12. The Court explained that the mere presence of marijuana did not “give rise to an inference that would lead a police officer of ordinary prudence and experience conscientiously to entertain a strong suspicion that additional criminal contraband is present in the trunk of the automobile.” Ibid. The search of the interior of the car

did not reveal any contraband, so the further search of the trunk “was purely investigatory and the seizure a product of luck and hunch, a combination of insufficient constitutional ingredients.” Ibid.

In the same way, there is no basis in the testimony to suspect that any additional contraband would be discovered in the trunk of defendant’s vehicle. In all of the cases distinguishing Patino, the State was always able to articulate a basis to search the trunk itself. See e.g. State v. Guerra, 93 N.J. 146 (1983)(affirming search of trunk after officer determined that persistent smell of marijuana could not have been coming from passenger compartment); State v. Young, 87 N.J. (1981)(where, after drugs were recovered in the passenger compartment of the vehicle, defendant disavowed ownership or knowledge of suitcase found in backseat of automobile, information in possession of troopers was sufficient to suggest that other crimes were being committed and to constitute probable cause to search car and its contents, including locked suitcase on backseat.); State v. Kahlon, 182 N.J. Super. 331 (App. Div. 1980)(affirming search of the trunk because officer testified, after recovering a small amount of marijuana, he still could not pinpoint where the smell was emanating from); State v. Letman 235 N.J. Super. 337 (App. Div. 1989)(affirming search of the trunk where police officer who had made valid stop of vehicle and valid arrest after seeing cocaine in plain sight in passenger compartment had advised defendants of their Miranda rights and in response to

question whether there was anything in the trunk driver stated that he had placed bag in trunk but did not know its contents, which statement was made under circumstances of extreme nervousness).

In this case, the testifying officer offered no facts upon which a reasonable person could conclude that additional contraband would be found in the trunk. He only testified that defendant and codefendant Toomer exchanged a single bag of suspected cocaine for US currency. No additional cocaine was found in the passenger compartment. Nor did the officers recover any other CDS, paraphernalia or other contraband in the passenger compartment. Defendant made no statements about the trunk that would have aroused the suspicions of the officers. Accordingly, the search of the trunk in this case was infirm and runs afoul of Patino and its progeny.

CONCLUSION

For the foregoing reasons, defendant's conviction must be reversed, along with Judge Carter's order denying his motion to suppress evidence seized without a search warrant.

Respectfully submitted,

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Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3647-23T4

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	
	:	On Appeal from a Final Judgment of
Plaintiff-Respondent,	:	Conviction of the Superior Court of
	:	New Jersey, Law Division, Middlesex
v.	:	County.
JOSE FLORES,	:	Sat Below:
	:	
Defendant-Appellant.	:	Hon. Andrea G. Carter-Latimer, J.S.C.

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January 22, 2025

TABLE OF CONTENTS

	<u>PAGE</u>
<u>COUNTERSTATEMENT OF PROCEDURAL HISTORY</u>	1
<u>COUNTERSTATEMENT OF FACTS</u>	3
A. <u>The motion-to-suppress hearing.</u>	3
1. <u>Motion Judge’s Rulings.</u>	7
B. <u>Defendant’s Guilty Plea.</u>	8
<u>LEGAL ARGUMENT</u>	9
<u>POINT I</u>	
THE JUDGE CORRECTLY DENIED THE MOTION TO SUPPRESS EVIDENCE SEIZED FROM DEFENDANT’S VEHICLE.	9
A. <u>Standard of Review.</u>	9
B. <u>The facts giving rise to probable cause were spontaneous and unforeseeable.</u>	11
<u>POINT II</u>	
THE DETECTIVES PROPERLY CHECKED THE SPARE-TIRE COMPARTMENT IN THE CARGO SPACE OF DEFENDANT’S SUV.	20
<u>CONCLUSION</u>	27

TABLE TO APPENDIX¹

Body-Camera Footage	Pa1
<u>State v. Richards</u> , No. A-1114-23 (App. Div. Dec. 4, 2024)	Pa2 to 25
<u>State v. Summa</u> , No. A-0369-22 (App. Div. Apr. 9, 2024)	Pa26 to 40

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>CASES</u>	
<u>Ornelas v. United States</u> , 517 U.S. 690 (1996)	10
<u>State v. Alston</u> , 88 N.J. 211 (1981)	13
<u>State v. Cohen</u> , 254 N.J. 308 (2023).....	21
<u>State v. Elders</u> , 192 N.J. 224 (2007).....	10, 13
<u>State v. Esteves</u> , 93 N.J. 498 (1983).....	20
<u>State v. Frankel</u> , 179 N.J. 586 (2004).....	13
<u>State v. Handy</u> , 206 N.J. 39 (2011)	10
<u>State v. Johnson</u> , 42 N.J. 146 (1964).....	10
<u>State v. Mann</u> , 203 N.J. 328 (2010).....	10
<u>State v. Moore</u> , 181 N.J. 40 (2004)	25
<u>State v. Patino</u> , 83 N.J. 1 (1980)	passim

¹ The judge had this body-camera footage to review when deciding defendant's motion to reconsider the denial of his suppression motion, and it is essential to considering the issues raised in Point II. See R. 2:6-1(a)(1)(I). Richards and Summa are unpublished opinions that are appended in accordance with Rule 1:36-3.

<u>State v. Pittman</u> , No. A-2309-20 (App. Div. Oct. 19, 2023)	15, 19
<u>State v. Reyes</u> , 237 N.J. Super. 250 (1989)	12
<u>State v. Richards</u> , No. A-1114-23 (App. Div. Dec. 4, 2024)	passim
<u>State v. Robinson</u> , 200 N.J. 1 (2009).....	10, 12
<u>State v. Rodriguez</u> , 459 N.J. Super. 13 (App. Div. 2019)	14, 21, 22
<u>State v. Smart</u> , 253 N.J. 156 (2023)	passim
<u>State v. Summa</u> , No. A-0369-22 (App. Div. Apr. 9, 2024)	passim
<u>State v. Walker</u> , 213 N.J. 281 (2013)	11
<u>State v. Wilson</u> , 478 N.J. Super. 564 (App. Div. 2024)	20, 22, 23, 25
<u>State v. Witt</u> , 223 N.J. 409 (2015).....	12, 13, 14
<u>United States v. Ross</u> , 456 U.S. 798 (1982).....	21

STATUTES

N.J.S.A. 2C:21-25A.....	1
N.J.S.A. 2C:35-5(b)(2)	1
N.J.S.A. 2C:35-5(b)(5)	1
N.J.S.A. 2C:35-7.1a.....	1
N.J.S.A. 2C:35-10(a)(1).....	1
N.J.S.A. 2C:36-3	1

OTHER AUTHORITIES

The Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution	12
--	----

RULES

<u>R. 2:6-1(a)(1)(I)</u>	ii
--------------------------------	----

R. 2:6-2 12

Rule 1:36-3.....ii

TABLE OF CITATIONS

- “Da” refers to the appendix to defendant’s brief.
- “Db” refers to defendant’s brief.
- “Pa” refers to the State’s appendix to this brief.
- “1T” refers to pretrial-motion proceedings on September 26, 2023.
- “2T” refers to plea proceedings on March, 22 2024.
- “3T” refers to sentencing proceedings on July 19, 2024.
- “4T” refers to reconsideration and motion-to-expand proceedings on November 15, 2023.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On March 30, 2023, a Middlesex County Grand Jury returned Indictment No. 23-03-0399-I against defendant Jose Flores for drug-related offenses and their distribution. (Da1-3). Defendant was charged with three counts of third-degree possession of a controlled dangerous substance (CDS), in violation of N.J.S.A. 2C:35-10(a)(1), under Counts One, Two, and Three; two counts of second-degree possession with intent to distribute (PWID) CDS, in violation of N.J.S.A. 2C:35-5(b)(2), under Counts Four and Six; one count of third-degree PWID CDS, in violation of N.J.S.A. 2C:35-5(b)(5), under Count Five; three counts of second-degree PWID CDS near public property, in violation of N.J.S.A. 2C:35-7.1a, under Counts Seven, Eight, and Nine; one count of third-degree money laundering, in violation of N.J.S.A. 2C:21-25A, under Count Ten; and one count of fourth-degree PWID drug paraphernalia, in violation of N.J.S.A. 2C:36-3, under Count Eleven.² (Da1-3).

On July 7, 2023, defendant filed a motion to suppress evidence that was seized during a warrantless search of defendant's SUV. (Da6). After an evidentiary hearing on September 26, 2023, (1T), the Honorable Andrea G. Carter-Latimer, J.S.C, denied the motion on October 24, 2023, in a written

² Co-defendant Gerald Toomer was charged with one count of third-degree possession of CDS under Count Twelve. (Da3). He pleaded guilty as charged in March 2024, and has not joined in this appeal.

order and opinion, finding the SUV search lawful under the automobile exception. (Da10-26).

On November 7, 2023, defendant filed a motion for reconsideration of the denial as well as a motion to expand the record with a body-camera recording of the SUV search, challenging the search of the SUV's contiguous cargo area. (Da27-29). On November 15, 2023, after hearing oral argument, Judge Carter denied both motions in an Amended Statement of Reasons, finding the search of the cargo area was "reasonable in scope" and "strictly tied to and justified by the circumstances which rendered its initiation permissible." (Da31-54; 4T).

On March 22, 2024, defendant pleaded guilty to Count Four of the indictment, amended to third-degree possession of CDS with intent to distribute. (Da55-59; 2T12-7 to 25). In exchange for defendant's guilty plea, the State recommended a four-year flat prison term. (Da55-59; 2T7-10 to 12. 3T18-5 to 8). On July 19, 2024, Judge Carter sentenced defendant in accordance with the plea agreement. (Da65-68; 2T18-5 to 8) .

On July 23, 2024, defendant filed a Notice of Appeal with this Court. (Da69).

COUNTERSTATEMENT OF FACTS

A. The motion-to-suppress hearing.

The following facts are derived from the motion testimony of Detective Anthony Colon and the motion judge's fact-findings. As of the date of the suppression hearing on September 26, 2023, Detective Colon was a nine-year veteran police officer of the Perth Amboy Police Department (PAPD), and a member of the department's Special Investigations Unit since May 2022 that primarily focuses on narcotics-related offenses. (1T6-15 to 7-25). Detective Colon's training at the police academy included identifying CDS, such as cocaine, identifying drug paraphernalia for those substances, and recognizing the indicia of drug distribution. (1T6-20 to 8-5). Over his career, Detective Colon had performed hundreds of motor-vehicle stops as well as recovered CDS in about a hundred of those instances. (1T8-6 to 12).

On June 15, 2022, around 5:30 p.m., Detective Colon was with PAPD Detective Benjamin Batista, in the area of Washington Street and Amboy Avenue in Perth Amboy, on a routine narcotics patrol in an unmarked vehicle. (1T8-12 to 10-12). This area was known to detectives to be a high narcotic, high crime area, among the legitimate businesses that were also in the area. (1T56-17 to 57-8).

While on patrol, Detectives Colon and Batista saw an individual, Gerald

Toomer, whom Colon recognized from prior narcotics arrests, pacing back and forth at the corner of Washington Street and Amboy Avenue, on a cell phone. (1T10-9 to 21). Colon's attention was drawn to Toomer because of the way he was pacing back and forth at that corner, looking down at his phone and up constantly, looking around as if he was waiting for someone. (1T8-12 to 21-14). Given Colon's prior training and experience, and knowledge of Toomer's narcotics-related history from bookings, the detectives continued to observe Toomer. (1T10-22 to 25).

After about five to ten minutes went by, Toomer stopped pacing and ran from the corner into a vehicle, a GMC Terrain, that was stopped in traffic at a red light. (1T11-8 to 13-1). After Toomer got into the GMC Terrain, the detectives began to follow the vehicle to continue the observation. (1T11-14 to 16). As the detectives followed the vehicle, it made "numerous turns down side streets" within Perth Amboy, without dropping anyone off, conducting counter surveillance as if the occupants were making sure they were not being followed. (1T13-14 to 21). Detectives followed the vehicle until it parked in the driveway of 563 North Park Drive. (1T14-16 to 19).

Once parked, the detectives observed Toomer get out of the vehicle and approach the driver's window of a Toyota Highlander SUV that was double parked in the middle of the public street. (1T14-16 to 15-2). The driver, later

identified as defendant, remained in the vehicle. (1T15-14 to 16-19). The detectives, who were about “20 feet, 30 feet” away, then observed Toomer hand paper currency to the driver of the Highlander through the window in exchange for a white substance wrapped in a plastic bag. (1T14-19 to 16-1).

Due to the totality of circumstances along with Detective Colon’s training and experience, Colon believed that they had witnessed a hand-to-hand drug transaction. (1T15-2 to 4). After the suspected narcotics sale concluded, he immediately activated the unmarked patrol car’s inside emergency lights, exited the car, and approached the Toyota Highlander, as Detective Batista approached Toomer displaying his badge. (1T16-4 to 12). At that moment, Toomer was walking back toward 563 North Park Drive. (1T16-10 to 12).

When Detective Colon approached the Highlander, defendant was still seated in the driver’s seat with currency in his hand. (1T17-10 to 12). While defendant still had the money in his hand, Colon ordered him to keep his hands on the steering wheel where he could see them, at which point, defendant said that Toomer had given him \$400 for gas. (1T17-15 to 19).

While Detective Colon was speaking with defendant, Detective Batista was simultaneously speaking with Toomer and Steven Pardee, the driver of the GMC Terrain that Toomer arrived in. (1T17-22 to 19-5). The detectives had

no prior information that Toomer was going to engage in a CDS transaction; their attention was initially drawn to Toomer “out of the blue.” (1T29-17 to 22; 1T49-22 to 52-1). During this time, Batista recovered the white substance, wrapped in a clear plastic baggie, that Toomer had tossed onto the ground at 563 North Park Drive in plain view. (1T18-7 to 13). The white substance, based on Colon’s training and experience, looked like cocaine, was packaged how cocaine typically is packaged, and was in an amount consistent with the currency defendant had. (1T18-8 to 19-5). It was at this point, based on the totality of circumstances, that the detectives conducted a search of the Toyota Highlander SUV.

As can be seen from a body camera’s footage of the search, a detective knelt on the rear-passenger seat and reached into the open cargo area of the SUV. (Pa1 at 0:10:30). The cargo area of the vehicle is contiguous to the passenger compartment in that there is no separation or barrier between the passenger-seating area and the rear cargo space. (Pa1 at 0:10:30). Within reach of the rear-passenger seat, the detective uncovered a stash of CDS by lifting up the spare-tire compartment that is located within the cargo area. (1T19-10 to 12; Pa1 at 0:10:30). As depicted in the body-camera footage, the uncovering detective reached over a rear-passenger seat, that was folded down, to check under a floor mat in the cargo area, where spare tires and related tools are kept.

(Pa1 at 0:10:30). As a result of the search, the detectives seized: ninety-four grams of cocaine, 350 decks of heroin stamped “rock and roll,” 295 Alprazolam pills, \$582 in US currency, and five boxes of sandwich baggies commonly used to package narcotics. (1T20-3 to 12). Besides the ten grams of cocaine that Toomer had tossed, nothing additional was seized from Toomer. (1T20-18 to 20).

1. Motion Judge’s Rulings.

The judge ruled that the events leading up to the search of the Toyota Highlander, and the seizure of the contraband, were the result of spontaneous and unforeseeable circumstances. (Da25). The judge found that though the detectives were familiar with Toomer’s criminal history and witnessed him pacing back and forth on the sidewalk, which they deemed suspicious, the detectives’ observations were “spontaneous.” (Da25). The judge further found that the subsequent hand-to-hand exchange between Toomer and defendant, the exchange of the \$400 for the baggie of a white substance, and the baggie’s seizure from the ground near Toomer were “all spontaneous and unforeseeable circumstances.” (Da25). Finding that the detectives had probable cause, the judge denied the motion to suppress. (Da26).

On reconsideration, after having the body-camera footage to review of the SUV search, the judge made the same findings. (Da31-53). In addition,

the judge ruled that the search of the cargo area was “reasonable in scope” and “strictly tied to and justified by the circumstances which rendered [the search’s] initiation permissible.” (Da54). The judge specifically found that the detectives had probable cause to search the SUV’s interior for drug distribution, that the SUV’s interior would encompass the cargo area for which there need not be a separate probable-cause finding, and that the facts presented here were indeed factually distinguishable from those presented in State v. Patino, 83 N.J. 1 (1980). (Da53-54).

B. Defendant’s Guilty Plea.

On March 22, 2024, defendant pleaded guilty to Count Four of the indictment, amended to third-degree possession with intent to distribute cocaine, admitting the following facts under oath. (2T8-14 to 9-16).

Defendant admitted that he was in the city of Perth Amboy on June 15, 2022, and that he was the subject of a motor vehicle stop. (2T12-7 to 12).

Defendant admitted that his vehicle was searched during the police interaction and that the detectives found cocaine. (2T12-13 to 18). Defendant admitted that he knew the cocaine was illegal; and that when he possessed it on June 15, 2022, he intended to possess it to share or sell it with others, constituting possession with intent to distribute. (2T12-19 to 24). This appeal follows.

LEGAL ARGUMENT

POINT I

THE JUDGE CORRECTLY DENIED
THE MOTION TO SUPPRESS
EVIDENCE SEIZED FROM
DEFENDANT'S VEHICLE.

The motion judge properly ruled that defendant's SUV was lawfully searched under the automobile exception, because the circumstances giving rise to probable cause arose unforeseeably and spontaneously. This case's particular facts occurred "rapidly" and "suddenly" and were unlike the facts of State v. Smart, 253 N.J. 156 (2023). Only minutes had passed between the detectives' initial observations of co-defendant Toomer, and the hand-to-hand transaction they witnessed between Toomer and defendant. As the detectives witnessed defendant selling drugs from inside his SUV, the detectives had probable cause to search the passenger compartment and any cargo area that was contiguous with it. For these reasons, the seizure of the CDS from defendant's SUV was valid, and the judge's denial of the suppression motion should be affirmed.

A. Standard of Review.

An appellate court's scope of review of a judge's factual findings and credibility determinations is limited; they must be upheld so long as they are "supported by sufficient credible evidence in the record." State v. Handy, 206

N.J. 39, 44 (2011) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). This is particularly true when, as here, fact-findings by the trial court are “substantially influenced by [its] opportunity to hear and see the witnesses and to have the ‘feel’ of the case.” Elders, 192 N.J. at 244 (citing State v. Johnson, 42 N.J. 146, 161 (1964)).

This same rule applies even if an appellate court “might have reached a different conclusion were it the trial tribunal.” State v. Robinson, 200 N.J. 1, 15 (2009) (quoting Johnson, 42 N.J. at 162). Indeed, a “trial court’s findings should be disturbed only if they are so clearly mistaken ‘that the interests of justice demand intervention and correction.’” Ibid; accord Ornelas v. United States, 517 U.S. 690, 699 (1996) (cautioning that reviewing courts “should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers”). Only the trial court’s legal conclusions are not afforded such deference. State v. Mann, 203 N.J. 328, 337 (2010).

Here, on September 26, 2023, Detective Colon testified at the suppression hearing. His credibility was tested on cross-examination, and the motion judge was in the unique position to observe his demeanor, posture, tone, and responsiveness. In the end, the judge found Detective Colon’s testimony to be “credible in that he was prepared, appeared to know what he

was talking about and made good eye-contact on direct questioning, cross-examination by defense counsel, and [in responding to] questions posed by the court.” (Da34). The judge found that, at the time of the hearing, Detective Colon was a nine-year veteran of the Perth Amboy Police Department, involved in hundreds of narcotics investigations, and that his responses to questioning appeared “reasonable, sufficiently detailed, and consistent.” (Da34). Overall, the judge found Detective Colon’s testimony credible and believable. (Da34).

The judge’s findings of fact based on Detective Colon’s credited testimony are thus entitled to deference and should not be disturbed. See State v. Walker, 213 N.J. 281, 290 (2013) (noting testimony of witness—whose credibility had been tested on cross-examination, was largely uncontested, and found credible by judge—was entitled to deference).

B. The facts giving rise to probable cause were spontaneous and unforeseeable.

This Court should affirm the motion judge’s sound ruling that the search of defendant’s SUV was valid under the automobile exception. The judge properly found that Detective Colon’s testimony demonstrated that the probable cause that gave rise to the valid automobile search was spontaneous and unforeseeable.

On appeal, defendant has only challenged the motion judge’s finding

that the circumstances giving rise to probable cause were spontaneous and unforeseeable, and that the scope of that probable cause reasonably included the search of the SUV's contiguous and open cargo area for further evidence of drug distribution. The issues before this Court are thus limited to these matters on appeal, as defendant has waived any others. See R. 2:6-2; Robinson, 200 N.J. at 18-22; State v. Reyes, 237 N.J. Super. 250, 263 (1989).

Defendant argues that because Detectives Colon and Batista were part of the narcotics unit of their department, generally on patrol and on the lookout for narcotics-trafficking in the area, and encountered the drug-trafficking circumstances giving rise to search defendant's SUV step-by-step, as their investigation suddenly and swiftly unfolded, that whatever they saw could not be unforeseeable or spontaneous. That argument, however, if carried to its logical conclusion, would virtually eliminate the automobile exception since police work, in general, is usually gathered step-by-step. Nothing in State v. Witt, 223 N.J. 409 (2015), or Smart supports such a strained interpretation of the law.

The Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guarantee the right of people to be secure against unreasonable searches by requiring warrants issued upon probable cause. Although "[o]ur jurisprudence under both constitutional

provisions expresses a preference that police officers secure a warrant before they execute a search,” “[w]arrantless searches are permissible . . . if ‘justified by one of the few specifically established and well-delineated exceptions to the warrant requirement,’ such as the automobile exception, which the State must prove by a preponderance of the evidence. Witt, 223 N.J. at 422 (quoting State v. Frankel, 179 N.J. 586, 597-98 (2004)); Elders, 192 N.J. at 254.

In New Jersey, on-the-scene searches of motor vehicles are permitted under the automobile exception where the police have probable cause to believe the vehicle contains contraband or evidence of a criminal offense, and where the circumstances giving rise to the probable cause are “unforeseeable” and “spontaneous.” Witt, 223 N.J. at 447-448. “Whether the circumstances giving rise to probable cause were unforeseeable and spontaneous is a fact-sensitive inquiry that should be analyzed case by case.” Smart, 253 N.J. at 173. The Court considers probable cause to arise “spontaneously” where the facts develop “suddenly” or “rapidly.” Ibid. The automobile exception is not nullified “merely because ‘the particular occupants of the vehicle may have been removed from the car, arrested, or otherwise restricted in their freedom of movement.’” Witt, 223 N.J. at 428 (quoting State v. Alston, 88 N.J. 211, 234 (1981)). This Court has recognized that “police officers at the scene [have] the discretion to choose between searching the vehicle immediately if they

spontaneously have probable cause to do so, or to have the vehicle removed and impounded and seek a search warrant later.” See State v. Rodriguez, 459 N.J. Super. 13, 23 (App. Div. 2019).

This is not a case where officers were sitting on probable cause they had developed beforehand, looking for defendant to show up in a car so they could search it without a warrant. See Witt, 223 N.J. at 447-48 (noting that “if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so”) (emphasis added). Nor is this case like Smart, where the police had been surveilling the defendant for hours based on a month-old tip from an informant and a months-old report from a citizen.

In Smart, detectives had a two-months-old report from a concerned citizen that connected a particular residence and a vehicle, a GMC, with drug deals. 253 N.J. at 160. The detectives also had a month-old tip from a confidential informant that the GMC belonged to a known drug dealer named “Killer.” Ibid. During their surveillance at an apartment complex, in an area known for drug trafficking, they located a GMC Terrain, operated by Smart who matched the description of the man described in the informant’s tip. Id. at 161. Upon seeing Smart, the officers began their nearly two hours of surveillance of him, which included following him to three different locations

before ultimately making a motor-vehicle stop. Ibid. Then, after defendant refused consent to search, the detectives called for a canine to be brought to the scene to develop probable cause to search the vehicle without a warrant. Id. at 162. Nothing of the sort happened here. While the Court found that the circumstances of Smart were not spontaneous and unforeseeable, the Court recognized that whether “the circumstances giving rise to probable cause were unforeseeable and spontaneous is a fact-sensitive inquiry that should be analyzed case by case.” 253 N.J. at 173.

Contrary to defendant’s assertion, this case is more like State v. Richards, No. A-1114-23 (App. Div. Dec. 4, 2024) (Pa2 to 25) and State v. Summa, No. A-0369-22 (App. Div. Apr. 9, 2024) (Pa26 to 40), than Smart or State v. Pittman, No. A-2309-20 (App. Div. Oct. 19, 2023). In Richards, the police conducted “general surveillance” of a parking lot of a grocery store that was known to have narcotics activity take place there. Slip op. at 3. A police officer saw Richards go to different vehicles and speak with the drivers through their windows. Richards, slip op. at 3-4. Officers eventually saw Richards go inside the store, but approached him as he returned to his vehicle, where he was asked if he had anything illegal inside of it. Richards, slip op. at 4-5. Richards said that he had a small amount of cocaine inside, which led the officer to search the vehicle and find more CDS. Richards, slip op. at 6. In

upholding the car search, this Court held that where probable cause arises out of “general surveillance,” the probable cause may still be spontaneous and unforeseeable even if in a location where there is known narcotics-trafficking activity. Richards, slip op. at 6. The Court distinguished Richards from Smart in that, in Smart, there was a two-month long investigation prior to the motor vehicle stop—versus Richards where defendant was observed for less than an hour—pointing out that the amount of time leading up to the stop is an indicator as to whether facts arise spontaneously or unforeseeably. Ibid.

Similarly, in Summa, while on an unrelated motor vehicle stop, police officers were approached by a motorist who said that they saw a van with Pennsylvania license plates make a sudden turn into an empty industrial parking lot and that it looked suspicious. Summa, slip op. at 3. The officers went to the lot to investigate, saw the parked vehicle, and then approached to make contact with its occupants. Ibid. During the interaction with the defendant driver, the officer noticed scarring on the defendant’s arms, indicative of possible narcotics activity as well as the odor of marijuana emanating from the defendant’s person. Summa, slip op. at 4. The officer walked around the vehicle, which was a van, and noticed the odor of marijuana emanating from it. Ibid. After the defendant driver refused consent to search the vehicle, a canine was called, which gave a positive indication for CDS.

Summa, slip op. at 5. A search of the rear of the van, which included a lockbox located in that area, lead to the seizure of CDS. Ibid. This Court in Summa held this was also a case in which the probable cause was spontaneous and unforeseeable. Summa, slip op. at 3. This Court again recognized that facts that give rise to probable cause progressively and in a step-by-step manner as a result of a field investigation can still be spontaneous and unforeseeable. Summa, slip op. at 5.

Here, like in Richards and Summa, but unlike in Smart, Detectives Colon and Batista were not out looking for co-defendant Toomer nor any particular vehicle associated with him on June 15, 2022. Unlike in Smart, Detectives Colon and Batista had no prior information regarding the vehicle driven by co-defendant Pardee that was carrying Toomer, nor about defendant's vehicle. Also unlike in Smart, in which the officers saw what they believed to be narcotics activity over the course of two hours on top of the prior information they received in the months before their surveillance operation, the probable cause here did not arise until Detectives Colon and Batista saw the suspected narcotics transaction between defendant and Toomer. Detectives Colon and Batista's observations were for less than an hour, and they never saw anything specifically about narcotics activity until the hand-to-hand transaction at 563 North Park Street. In our case, also in

contrast to Smart, the detectives were not given any specific information about Toomer or defendant's activities; they just happened to see Toomer at a location in which they were already at, the intersection of Washington Street and Amboy Avenue. Detectives Colon and Batista also only observed Toomer for a few minutes before Toomer got into a vehicle driven by Pardee. As in Richards, just because law enforcement is surveilling a particular location alone does not mean that whatever they observe during that time makes it spontaneous or foreseeable.

Like in Richards and Summa, the facts giving rise to probable cause here came about progressively. Detectives Colon and Batista saw co-defendant Toomer pacing back and forth on a street corner, which they did not particularly expect when they were out on patrol that evening. Detectives only watched Toomer for a few minutes before they saw him get into a car driven by Pardee. That drive across Perth Amboy was also only for a few minutes, during which they saw the vehicle drive in an evasive manner until it reached 563 North Park Drive, which was the meet location with defendant. Upon the detectives' arrival, Toomer was already out of Pardee's vehicle and approaching defendant's driver window, which was where the detectives witnessed the hand-to-hand transaction instantaneously. All of this arose step-by-step, indicative of investigation-worthy behavior, that culminated in the

sudden witnessing of a narcotics transaction in progress. Detectives Colon and Batista also did not know that Toomer would discard the suspected CDS right on the ground and in plain view. Like this Court found in Richards and Summa, these facts arose in a spontaneous and unforeseeable manner.

This case is unlike Pittman, where the officers had been surveilling for more than an hour and then called a canine to establish probable cause to search a vehicle for drugs. Here, unlike Pittman, co-defendant Toomer was observed by Detectives Colon and Batista for approximately five to ten minutes before their surveillance turned mobile. It was only after a short time of following Toomer and Pardee in their vehicle that they arrived at their destination of 563 North Park Drive in Perth Amboy. And it was upon their immediate arrival at that location that the detectives witnessed the narcotics transaction between Toomer and defendant Flores. This is certainly in line with facts developing “rapidly” and “suddenly,” and unlike the facts of Smart, in that it was within only minutes of the detectives’ observations of Toomer that led them to the spontaneously observed drug deal with defendant, that the detectives had no information about beforehand. Instead of Pittman, this Court should be persuaded by its sound holdings in Richards and Summa.

For the foregoing reasons, this Court should affirm the motion judge’s sound ruling that the probable cause arose spontaneously and unforeseeably.

POINT II

THE DETECTIVES PROPERLY
CHECKED THE SPARE-TIRE
COMPARTMENT IN THE CARGO
SPACE OF DEFENDANT’S SUV.

Defense counsel contends that the open cargo area of defendant’s SUV was beyond the scope of the automobile search, since it was a separate trunk and there was insufficient probable cause to search there. But this open space was not separate from the passenger compartment, as the narcotics found in the vehicle were reached while the detective was kneeling on the rear passenger-row seat to access the cargo area’s spare-tire compartment. And the probable cause was in fact sufficient for the detectives to search these areas of the SUV due to the crime they were investigating, narcotics trafficking, as well as the fact that the cargo space was contiguous with the passenger compartment.

“The scope of a warrantless search of an automobile is defined by the object of the search and the places where there is probable cause to believe that it may be found.” State v. Esteves, 93 N.J. 498, 508 (1983). For an automobile-exception search to be lawful in its physical scope, the probable cause to search must be as to items or affects that, by their nature, could be concealed in the container that was opened. State v. Wilson, 478 N.J. Super. 564, 578 (App. Div. 2024). If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its

contents that may conceal the object of the search. United States v. Ross, 456 U.S. 798, 824 (1982). While the search of a vehicle’s trunk must be supported by probable cause that criminal contraband is present therein, it does not necessarily require an additional showing of probable cause separate from the probable-cause showing for the vehicle’s interior. See State v. Cohen, 254 N.J. 308, 327-28 (2023). Overall, “the warrantless search of a car ‘must be reasonable in scope’ and ‘strictly tied to and justified by the circumstances which rendered its initiation permissible.’” Ibid. (quoting Patino, 83 N.J. at 10-11).

For example, in State v. Rodriguez, 459 N.J. Super. 13 (App. Div. 2019), this Court upheld the search of a Jeep’s open cargo area, finding that the initial probable cause supporting the search of the vehicle’s interior passenger area supported the search of the cargo area as well. Specifically, in Rodriguez, the defendant’s Jeep was pulled over due to a traffic violation. 459 N.J. Super. at 16. On the officer’s approach to the stopped vehicle, he smelled the odor of marijuana, which was illegal under any circumstance at the time, emanating from inside that vehicle. Id. at 17. After the defendant declined consent to search the vehicle and was seated in the rear of the police cruiser, the officer performed a search of the vehicle. Ibid. Beginning in the front of the vehicle, the officer uncovered more than \$10,000 in U.S. currency. Ibid. The officer

then continued his search to the cargo area of the Jeep, which was “contiguous with the passenger compartment.” Ibid. The search of the cargo area uncovered twenty-seven bags of marijuana inside of one bag. Ibid. This Court upheld the search of both areas, finding that the initial probable cause that allowed for the search of the vehicle’s passenger area also extended to the contiguous cargo area within the Jeep. Id. at 27.

Like in Rodriguez, defendant here was operating a vehicle, a Toyota Highlander, which is a hatchback SUV, that also contained an open cargo area that was “contiguous to the passenger compartment.” And, like in Rodriguez, the probable cause that arose from the detectives’ initial observations supported the search of both the passenger compartment and contiguous cargo area for the object of the search.

Here, as can be seen in the body-camera footage, the detectives found narcotics in the contiguous cargo area’s spare-tire compartment, which was lifted while the detective was kneeling on the rear passenger-row seat. Under the circumstances of this case, accessing and lifting the spare-tire compartment was no different from checking the glove box, or a center console, for the object of the search. The detective here could access the narcotics from that passenger seat and into the contiguous cargo area of defendant’s SUV. Just like the glove box in Wilson, 478 N.J. Super. at 584, the spare-tire

compartment fell within the “spatial boundaries of [the] lawful automobile exception search” here.³

Because Detectives Colon and Batista witnessed a hand-to-hand transaction from inside defendant’s vehicle, there was probable cause to believe that CDS would be found in the passenger and contiguous cargo areas, the spare-tire compartment was within those areas, and the spare-tire compartment was a container that would hold the object of the search for which there was probable cause. Indeed, just like a glove box or center console, the spare-tire compartment was a location in which CDS could easily be stored. As the CDS was recovered from a location contiguous with the passenger compartment, and in an area where the object of the search—drugs—would be found, it was within the scope of the probable cause.

Contrary to defendant’s assertion, this case is unlike Patino. In Patino, the police performed a motor-vehicle stop during which the officer noticed on the floor, next to the driver seat, a clear-plastic container containing suspected marijuana. Ibid. After Patino was arrested for possession of the marijuana,

³ In Wilson, this Court held that a glove box “fell within the spatial boundaries of a lawful automobile exception search” because there was probable cause to believe contraband would be found in the passenger compartment (i.e., the compartment being searched), the glove box was located within that compartment, and the glove box was a container that could hold the object of the search for which there was probable cause. 478 N.J. Super. at 584.

the officer searched the passenger compartment, the locked glove compartment, and later the vehicle's trunk, where the officer recovered a plastic bag of cocaine. Ibid. The Patino Court held that while the officer was permitted to arrest the defendant and search the passenger compartment of the vehicle, it found that the trunk was beyond the scope of the search in those circumstances. Id. at 6.

The Patino Court reasoned that there was “no rational basis presented for the trooper’s conclusion that evidence of a small amount of marijuana was suggestive of criminal acts beyond the observed possession offense.” Id. at 10. The Court also reasoned that the presence alone of the contraband, marijuana, would not lead a reasonable officer to entertain the “strong suspicion that additional contraband is present in the trunk.” Ibid. In doing so, the Court made a distinction between the presence of a small amount of CDS consistent with personal use from larger amounts of drugs that provide an officer with probable cause to believe more contraband was being transported. Ibid. The Court held: “A small amount of marijuana does not alone without other circumstances that suggest participation in drug traffic or possession of more contraband provide justification to extend the zone of the exigent search further than the persons of the occupants or the interior of the car.” Ibid. (emphasis added).

Unlike in Patino, where the observation of a half-empty container of marijuana gave rise to probable cause for mere simple possession, the probable cause permitting the search of defendant's vehicle here arose from the detectives' direct observation of narcotics trafficking from the vehicle. Detectives Colon and Batista saw the exchange of money from co-defendant Toomer into the hands of defendant in exchange for suspected CDS cocaine. As it is quite common for drug dealers to hide their narcotics in other areas of the vehicle leading up to a sale, or to break down the drug load for different buyers, it was reasonable for the detectives to search other areas of the vehicle to locate additional contraband, especially the areas contiguous with the passenger compartment. Unlike the facts of Patino, there were additional facts here that indicated that this incident was more than a mere possessory offense and that this was narcotics trafficking. The facts of Patino are thus inapposite here, where the circumstances of defendant's drug trafficking from his vehicle supported a fair probability that additional drug contraband would be elsewhere in the vehicle. See Wilson, 478 N.J. Super. at 577-78 (holding "[p]robable cause exists where, given the totality of circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place'") (quoting State v. Moore, 181 N.J. 40, 46 (2004)).

For the foregoing reasons, the recovery of the CDS from the cargo space

of defendant's SUV was valid. This Court should so affirm.

CONCLUSION

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

Respectfully submitted,

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Dated: January 22, 2025