SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0136-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KWASEED A. HALL,

Defendant-Appellant.

Submitted March 30, 2022 – Decided May 5, 2022

Before Judges Hoffman and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 17-03-0316.

Joseph E. Krakora, Public Defender, attorney for appellant (Frank M. Gennaro, Designated Counsel, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After pleading guilty to armed robbery, unlawful possession of a weapon, and possession of a weapon for an unlawful purpose, defendant appeals from the judgment of conviction entered by the Law Division on August 19, 2019. Defendant contends the trial court erred when it denied suppression of physical evidence obtained during a search of defendant's vehicle in violation of defendant's Fourth Amendment rights. Defendant further argues the trial court erred when it failed to merge his conviction for possession of a weapon for an unlawful purpose with his robbery conviction.

Following our review, we discern no basis to disturb the trial court's denial of defendant's suppression motion; however, we agree with defendant's merger argument, as does the State. We therefore affirm defendant's convictions but remand for the trial court to enter an amended judgment of conviction reflecting the merger of defendant's conviction for possession of a weapon for an unlawful purpose with his robbery conviction.

I.

We glean the following facts from the record. On April 26, 2016, defendant entered a 7-Eleven and robbed the store's clerk at gunpoint, threatening to shoot the clerk unless he complied with defendant's demands. On May 1, 2016, defendant possessed another unlicensed handgun while traveling

in a car in Edison. On that date, Edison Police Officer Daniel Hansson, then a seven-year veteran of the police force, was parked in a marked vehicle in the parking lot of a gas station along Route 1. When a Hyundai Elantra (the vehicle) drove past him in the parking lot and pulled out onto Route 1, Officer Hansson noticed one of the vehicle's two rear-license-plate lightbulbs was unlit, rendering "the license plate. . .illegible." Officer Hansson also noticed "the brake light above the trunk" was not illuminated. Based on these observations, Officer Hansson stopped the vehicle.

As he approached the vehicle, Officer Hansson "immediately detected the odor of alcohol." Defendant, the driver of the vehicle, told Officer Hansson he did not have his driver's license, but only a state identification card. According to Officer Hansson, defendant appeared "nervous."

Defendant admitted to drinking one beer; however, he initially told Officer Hansson he had not consumed alcohol before operating the vehicle. Officer Hansson directed defendant to step out of the vehicle.

At some point, Officer Hansson noticed there was a passenger in the vehicle. Defendant said he knew his front-seat passenger, Laquan Benbow, only as "El." Officer Hansson then spoke with Benbow, who told Officer Hansson his name was "Nishawn." Benbow opened the passenger-side door, enabling

Officer Hansson immediately to detect the odor of burnt marijuana. Officer Hansson asked Benbow to step out of the vehicle "[b]ecause of the odor of [burnt] marijuana." Benbow denied smoking marijuana; nevertheless, he complied with Officer Hansson's directions and stepped out of the vehicle.

Officer Hansson learned from police dispatch that defendant "was not a licensed driver." Officer Hansson requested another officer conduct field sobriety tests on defendant while he searched the vehicle for marijuana and containers of alcohol. Officer Hansson began his search under the passenger seat, where he saw the butt of a handgun. When Officer Hansson paused the search to inform the other officers that he found a gun, defendant took off running. Officer Hansson and a backup officer chased defendant, catching him quickly. Officer Hansson then resumed his search of the vehicle, finding a bookbag containing 9-millimter hollow-point ammunition, a ski mask, gloves, and a 9-millimter handgun under the driver's seat.

On March 22, 2017, defendant was indicted for second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5- 2(a)(1) and N.J.S.A. 2C:15-1(a)(2) (count one); three counts of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39- 5(b)(1) (counts two, five, and six); second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count three); first-

degree armed robbery, N.J.S.A. 2C:15-1(a)(2) (count four); fourth-degree possession of hollow-nose bullets, N.J.S.A. 2C:39-3(f)(1) (count seven); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2) (count nine); and third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a) (count ten). Benbow was also indicted on counts one through seven; however, he was charged separately on count eight. Defendant was also separately charged with six counts of second-degree certain persons not to possess a firearm, in violation of N.J.S.A. 2C:39-7(b)(1).

On October 12, 2017, defendant moved to suppress the items Officer Hansson recovered during his warrantless search of defendant's vehicle. The motion judge held an evidentiary hearing on defendant's motion to suppress. During the hearing, Officer Hansson testified to the events already described, which the officers' bodycam footage corroborated.

On March 28, 2018, the judge denied defendant's motion to suppress. The judge found Officer Hansson had probable cause to search the vehicle pursuant to the automobile exception to the Fourth Amendment's warrant requirement. On June 6, 2019, defendant plead guilty to armed robbery, possession of a handgun for an unlawful purpose, and unlawful possession of a handgun. In exchange for defendant's pleading guilty, the State agreed to recommend that he

serve concurrent prison terms of ten years subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, for the armed-robbery offense, and five years with a three-and-a-half-years of parole ineligibility for the handgun offenses. The plea agreement further provided for the dismissal of all remaining charges against defendant.

On July 26, 2019, the judge sentenced defendant to an aggregate ten years in prison for all charges consistent with the plea agreement. The judge dismissed the remaining charges against defendant before entering a judgment of conviction on August 19, 2019. On September 10, 2019, defendant filed this appeal, raising the following arguments for our consideration:

> POINT I
>
> THE TRIAL COURT IMPROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE.
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> POINT II
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> THE CONVICTION FOR POSSESSION OF A FIREARM FOR AN UNLAWFUL PURPOSE MUST MERGE INTO THE ROBBERY COUNT.

II.

Our review of an order denying a motion to suppress following an evidentiary hearing is deferential. We "uphold the factual findings underlying

the trial court's decision so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Nyema, 249 N.J. 509, 526 (2022) (quoting State v. Ahmad, 246 N.J. 592, 609 (2021)). "A trial court's legal conclusions, however, and its view of 'the consequences that flow from established facts,' are reviewed de novo." Ibid. (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

Both the United States and New Jersey Constitutions protect individuals against unreasonable searches and seizures, which must be based upon probable cause. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Warrantless searches are presumptively unreasonable, and thus invalid, unless the State proves by a preponderance of the evidence that the search "falls within one of the few well-delineated exceptions to the warrant requirement." State v. Elders, 192 N.J. 224, 246 (2007). The automobile exception is a well-recognized exception to the warrant requirement. State v. Wilson, 178 N.J. 7, 13 (2003).

We first consider whether Officer Hansson had reasonable suspicion to stop defendant's vehicle and probable cause to search the vehicle. Not all searches and seizures require probable cause to pass constitutional muster. A motor vehicle stop constitutes a seizure within the meaning of the Fourth Amendment, State v. Sloane, 193 N.J. 423 (2008); however, the stop may be

based on "reasonable suspicion." State v. Alessi, 240 N.J. 501, 518 (2020). An officer's stop of a vehicle is reasonable under the Fourth Amendment if based on "specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity." Ibid. (citing State v. Mann, 203 N.J. 328, 338 (2010)).

Defendant asserts that Officer Hansson's original stop of defendant's vehicle was not based upon reasonable suspicion, therefore making the original stop an unconstitutional seizure of defendant. We disagree.

Officer Hansson noticed he could not make out the contents of defendant's license plate, as required under New Jersey law, because defendant's license-plate bulbs were not illuminated. See N.J.S.A. 39:3-61. This alone constitutes "specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of [a traffic violation]." Alessi, 240 N.J. at 518.

We now consider whether the smells of alcohol and marijuana upon approaching the vehicle created probable cause to search defendant's vehicle. "Probable cause has been defined in many ways, defying scientific precision." State v. Evers, 175 N.J. 355, 447 (2003). It is a "common sense, practical standard" dealing with "probabilities" and the "practical considerations of

everyday life on which reasonable and prudent men, not legal technicians, act" Ibid. (citing State v. Sullivan, 169 N.J. 204, 211 (2001)). This standard is "less than the legal evidence necessary to convict though more than mere naked suspicion." Ibid. (citing State v. Mark, 46 N.J. 262, 271 (1966)). It is a "well-grounded" suspicion that a crime has been committed or that evidence will be found in a particular place to be searched. Ibid. (citing State v. Waltz, 61 N.J. 83, 87 (1972)).

Upon approaching the vehicle, Officer Hansson noticed a strong smell of alcohol before directing another officer to conduct field sobriety tests on defendant. Officer Hansson then smelled marijuana emanating from the vehicle while speaking with Benbow. Upon detecting the smells of alcohol and marijuana, "common sense" and practicality would lead the reasonably prudent person to conclude there is a fair probability that contraband or evidence of some crime would be found in defendant's vehicle. Evers, 175 N.J. at 447. The record provides no other basis to find Officer Hansson's search of defendant's vehicle was unreasonable. Accordingly, the search of defendant's vehicle did not violate his Fourth Amendment rights.

We next address defendant's argument that Officer Hansson's search of defendant's car was unreasonable because the probable cause justifying the

search did not arise from "unforeseeable and spontaneous" circumstances, as required by State v. Witt, 223 N.J. 409 (2015). Again, we disagree.

In State v. Witt, our Supreme Court established that warrantless roadside automobile searches are permissible only when they are "based on probable cause arising from unforeseeable and spontaneous circumstances . . . ." 223 N.J. at 450. Following the "bright line rule" announced in Witt, we have described Witt's effect: "the current law of this State now authorizes warrantless on-the-scene searches of motor vehicles in situations where: (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." State v. Rodriguez, 459 N.J. Super. 13, 22 (App. Div. 2019).

The Witt Court provides insight into the "unforeseeable and spontaneous" circumstances requirement:

> [The] requirement of "unforeseeabilty and spontaneity[]" does not place an undue burden on law enforcement. For example, 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. In this way, we eliminate the concern expressed in [State v. Cooke, 163 N.J. 657, 667-668 (2000)] -- the fear that "a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs." In the case of the parked car, if the circumstances giving

> rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies.
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> [Witt, 223 N.J. at 447-448 (emphasis added) (citations omitted).]

Later in its opinion, the Court stated:

> We also part from federal jurisprudence that allows a police officer to conduct a warrantless search at headquarters merely because he could have done so on the side of the road. "Whatever inherent exigency justifies a warrantless search at the scene under the automobile exception certainly cannot justify the failure to secure a warrant after towing and impounding the car" at headquarters when it is practicable to do so. Warrantless searches should not be based on fake exigencies. Therefore, under Article I, Paragraph 7 of the New Jersey Constitution, we limit the automobile exception to on-scene warrantless searches.
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> [Id. at 448-449.]

In Rodriguez, we analyzed the "unforeseeable and spontaneous" requirement. In that case, the trial court concluded "once the basis to impound a vehicle becomes clear, police officers have no right to proceed with an on-the-spot roadside search, even if the officers have probable cause of criminality that arose spontaneously." 459 N.J. Super. at 22-23. We disagreed, noting:

> We respectfully do not construe Witt to convey such a limitation upon the automobile exception. Nothing in Witt states that a roadside search of a vehicle based upon probable cause cannot be performed if the vehicle is going to be impounded. We instead read Witt as

> affording police officers at the scene 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.
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> [Id. at 23.]
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> . . . .
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> Viewed in its proper context, the Court's reference in Witt to "fake exigencies" signifies that the police cannot rely upon a contrived justification to search an impounded vehicle without a warrant merely because the vehicle could have been searched earlier at the roadside. The whole tenor of the Witt opinion is to eliminate the need for police to establish "exigencies" at the roadside to proceed with a warrantless search.
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> [Id. at 24.]

Witt and Rodriguez indicate that the "unforeseeable and spontaneous" prong serves as a check so that "[p]olice officers [cannot] sit on probable cause and later conduct a warrantless search, for then the inherent mobility of the vehicle would have no connection with a police officer not procuring a warrant." Witt, 223 N.J. at 431-432. Indeed, the Witt Court stated that "the language in Alston[,]" the case Witt sought to restore, "ensured that police officers who possessed probable cause well in advance of an automobile search sought a warrant." Id. at 431.

Officer Hansson's probable cause clearly arose from unforeseeable and spontaneous circumstances. Officer Hansson stopped defendant's vehicle because his license plate was not properly illuminated. He eventually noticed one of defendant's brake lights was not functioning properly. Upon stopping defendant's vehicle and communicating with defendant, Officer Hansson smelled alcohol. Once Officer Hansson began to converse with Benbow, he smelled marijuana. Neither the smell of alcohol nor the smell of marijuana would be foreseeable in the context of a motor vehicle stop for an improperly illuminated license plate.

We now turn to whether defendant's conviction for possession of a weapon for an unlawful purpose. The parties agree that defendant's conviction for possession of a weapon for an unlawful purpose should have been merged into the armed robbery count. We agree. The record establishes no basis for defendant's possession of the weapon other than to commit the armed robbery. It therefore should have merged into the armed robbery count. See State v. Tate, 216 N.J. 300, 307 (2013) (merging a conviction of possession of a weapon for an unlawful purpose with a conviction for aggravated manslaughter). We remand for the trial court to enter an amended judgment of conviction reflecting

the merger of defendant's conviction for possession of a weapon for an unlawful purpose with his conviction for armed robbery.

Affirmed and remanded for entry of an amended judgment of conviction. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION