SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2533-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DOMINIC L. MCGRIFF,

Defendant-Appellant.

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Argued September 27, 2021 – Decided April 22, 2022

Before Judges Sumners and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 17-03-0490.

Kevin E. Young argued the cause for appellant (Herlihy, Young & Niemiec, attorneys; Kevin E. Young, on the briefs).

Samuel Marzarella, Chief Appellate Attorney, argued the cause for respondent (Bradley D. Billhimer, Ocean County Prosecutor, attorney; Samuel Marzarella, of counsel and on the brief).

PER CURIAM

Following the denial of his motion to suppress evidence, defendant Dominic L. McGriff pleaded guilty to second-degree possession with intent to distribute a controlled dangerous substance (CDS), cocaine, N.J.S.A. 2C:35-5(a)(1) and (b)(2). He appeals from the order denying his motion to suppress the cocaine seized from his car following a motor vehicle stop. We reject the court's determination the challenged motor vehicle stop was supported by a reasonable and articulable suspicion of criminal activity, and, because the court did not fully analyze the factors essential to its conclusion the seizure of the evidence was attenuated from the unlawful stop, we remand for reconsideration of the attenuation issue.

I.

An August 15, 2016 complaint-warrant charged defendant with possession of cocaine, N.J.S.A. 2C:35-10(a)(1); possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(b)(2); and eluding, N.J.S.A 2C:29-2(b). A grand jury later returned an indictment charging defendant with (1) third-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(1); and (2) second-degree possession with intent to distribute a CDS, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2).

Defendant later filed a motion to suppress the evidence obtained as a result of what he claimed was an unconstitutional warrantless stop and seizure of his vehicle. The suppression hearing occurred over the course of two days.

The motor vehicle stop occurred in connection with the planned August 25, 2016 execution of a no-knock search warrant at a home in Beachwood and a separate search warrant for a red BMW registered to the home's owner. The affidavits supporting both warrants set forth substantially the same information.

The affidavits state a concerned citizen contacted the Toms River Police Department Special Enforcement Team (TRPD/SET) and reported defendant resided at the Beachwood home and was possibly distributing cocaine at area bars and clubs. The affidavits further describe that members of the TRPD/SET investigated the report and conducted two controlled buys of suspected cocaine from defendant through a confidential informant during the weeks of August 7 and August 14, 2016.

According to the affidavits, the confidential informant contacted defendant in the presence of the police and arranged for the buys at agreed upon locations. Investigating officers observed defendant exit the Beachwood home, enter a red BMW, and travel "directly to the prearranged buy location[s]," where the officers observed the informant approach the BMW and briefly interact with

defendant. Following the two interactions, and while under constant observation of the investigating officers, the informant traveled to a prearranged "debrief" location and provided officers with cocaine the informant said was purchased from defendant.

The affidavits further state a TRPD/SET officer learned defendant had seventeen prior arrests and four prior felony convictions, including for possession and distribution of CDS, resisting and eluding, and other violent crimes. The investigation further revealed defendant was staying at the Beachwood home with a large pit-bull.

The affidavits requested a no-knock warrant because CDS "can be easily destroyed," "persons dealing in CDS are often in possession of dangerous weapons," defendant's criminal history made it more likely he may resist or destroy evidence, and the presence of the pit-bull at the home posed a risk to law enforcement. The court issued a no-knock search warrant for the Beachwood home that in pertinent part authorized the police "to enter and search . . . the premises . . . and to search . . . such persons as may be therein and thereon." The court issued a separate search warrant for the BMW.

At the suppression hearing, the State presented Toms River Police Department detective Duncan McCrae and officer Ryan Quinn. Defendant testified on his own behalf.

The officers testified that prior to execution of the warrants on August 25, 2016, a briefing was held to discuss the execution strategy. The strategy adopted involved six or seven officers in unmarked vehicles taking up surveillance positions in the vicinity of the Beachwood home. Their plan was to wait until defendant left the home and then stop him in his vehicle once he was "safely away from the residence," at which point, other officers would execute the search warrant on the residence.

McCrae testified this strategy was adopted because there was a child in the home and the presence of the pit-bull posed a risk to officer safety. McCrae also explained the strategy ensured no one in the residence would observe the motor vehicle stop and potentially destroy any evidence located within the home.

McCrae testified he took his surveillance position at approximately 3:15 p.m. and had an unobstructed view of the Beachwood home's front door as well as the BMW. At around 5:30 p.m., McCrae observed defendant exit the home, enter the BMW, and turn down an adjacent street. McCrae briefly lost sight of

the BMW and followed in the direction defendant had driven. When he regained sight of the BMW, it was parked in a driveway adjacent to the residence, on the street defendant had driven, but defendant was not inside the vehicle. McCrae then took a new surveillance position out of view of the home, "down the block a significant . . . distance."

Quinn testified that at approximately 6:00 p.m., he observed defendant exit the residence and enter a white Honda Accord. He communicated this information, as well as the direction in which defendant had driven, to the other officers. After receiving the information from Quinn, McCrae drove from his location, observed "the back end of the Honda[,]" and began following the car. McCrae's vehicle was not equipped with lights or sirens. As he followed defendant's vehicle, he "radioed Detective Petrecca from the Ocean County Prosecutor's Office[,] who was in a vehicle . . . equipped with lights and sirens[,]" and directed Petrecca to stop defendant's vehicle.

McCrae followed defendant as he proceeded from the Beachwood home onto Route 9, but he yielded his position directly behind defendant to Petrecca to allow Petrecca to activate his lights and sirens to effectuate a stop of defendant's vehicle. Once behind defendant, Petrecca activated his lights and sirens, and in response, defendant pulled over and stopped his vehicle on the

shoulder of Route 9. The stop occurred between approximately three-quarters of a mile to one mile from the Beachwood home.

Defendant testified that when he stopped on Route 9, Petrecca's vehicle with the lights and sirens was a car length behind him. He also testified an unmarked vehicle – McCrae's vehicle – that lacked lights or sirens and looked like a "regular car" pulled between his vehicle and Petrecca's.

McCrae exited his vehicle and walked toward the Honda, but defendant pulled away. Defendant testified he did not observe anyone exit a vehicle or approach him. He stated the shoulder of the road was narrow, and he was unable to fully pull off the roadway because there was a guardrail. He explained the speed limit was fifty miles per hour, and other cars were "flying [past] to the point where they were . . . shaking [his] vehicle."

Defendant testified that after McCrae's vehicle pulled in directly behind him and in front of Petrecca's car, he believed Petrecca had pulled over McCrae's unmarked vehicle. Defendant also explained he did not feel that "it was safe for him to be pulled over" at that location, so he drove away from the location of the stop.

After pulling away, defendant first drove down Route 9. McCrae testified the lights and sirens on Petrecca's vehicle remained activated from the time

Petrecca initially activated them to effectuate the initial stop and thereafter when defendant pulled away and proceeded down Route 9. Defendant testified the vehicle with the activated lights and sirens "jumped right back behind" him as he drove away from the location of the initial stop. He stated he did not immediately pull over because there was no safe place to do so.

As Petrecca followed defendant with his lights and sirens activated, defendant made a right hand turn off Route 9 onto another street and then a second right hand turn onto Dover Road, where defendant pulled over and stopped. McCrae separately pursued defendant in his vehicle. McCrae testified the location of the second stop was "approximately three-quarters of a mile" from the initial stop.

McCrae described the location of the second stop as a "residential area with a very, very small shoulder" that he did not consider to be a "safer location." He testified there were four places defendant could have safely stopped his vehicle after leaving the initial stop, but defendant drove past them.

At the scene of the second stop, McCrae approached defendant's vehicle, asked defendant to get out, and arrested defendant for eluding. During a search of defendant incident to his arrest, McCrae recovered $1,300 in cash from defendant.

Quinn arrived on the scene after defendant's arrest and went to defendant's vehicle to secure it. He testified the front driver's side door of the vehicle was open, and, as he stood outside the vehicle, he observed a bag with what appeared to be cocaine on the front floorboard. He recovered the bag and secured the vehicle, which was towed for the purpose of obtaining a warrant to search it.

McCrae agreed "the motor vehicle stop and . . . the search and seizure of [defendant's] vehicle" and the impounding of the vehicle "took place prior to the execution of the search warrant" at the Beachwood home. The record on appeal does not disclose what evidence, if any, was obtained from the home or red BMW during the searches authorized by the search warrants. Defendant did not challenge the seizure of evidence, if any, from those locations in his suppression motion.

Following the testimony at the suppression hearing, the court heard argument on defendant's motion. The State claimed the stop of the Honda was proper because it was authorized by the search warrant for the Beachwood home. The warrant for the home included a preamble noting the search warrant affidavit claimed there was probable cause to search the Beachwood home, "along with any and all persons arriving at, departing from and located therein at the time of execution of the warrant sought herein reasonably believed to be

associated with this investigation." The warrant, however, directly authorized the officers only to "enter and search . . . the premises [of the home], and to search with the necessary and proper assistance such persons as may be therein or thereupon."

Defendant argued the warrant authorized the search of those "therein or thereupon" the premises of the Beachwood home but did not permit the stop of his vehicle, the Honda, about a mile from the premises. He asserted that under Bailey v. United States, 568 U.S. 186 (2013),[1] the stop of the Honda was beyond the "immediate vicinity" of the home, and therefore the officers required a separate and independent basis supporting the motor vehicle stop.

The State argued the warrant authorized a stop of defendant's vehicle because he was observed leaving the home, and the stop was authorized under a "commonsensical overall approach to the totality of the circumstances" in construing the search warrant. The State also claimed that because the stop occurred "between a half mile and three-quarters of a mile from the house[,]" it was arguably within the "immediate vicinity" of the execution of the search

[1] The Court in Bailey held that "[o]nce an individual has left the immediate vicinity of a premises to be searched . . . detentions must be justified by some other rationale" such as a "a brief stop for questioning based on reasonable suspicion . . . or an arrest based on probable cause." Bailey, 568 U.S. at 202.

warrant at the home, and the stop away from the home was justified based on safety concerns.

The court found the motor vehicle stop did not "fall[] within the extended fluid concept of the warrant." The court found what it characterized as the 'command' section of the search warrant authorized a search only of individuals who were "therein" and "thereupon" the premises at the time of the execution of the warrant. Thus, the court found the stop was not supported by the warrant to search the Beachwood home.

The court also addressed the State's alternative argument that the stop was independently supported by reasonable articulable suspicion. Defendant argued McCrae's testimony that defendant was not observed committing any motor vehicle offenses required the conclusion there was not a reasonable articulable suspicion supporting the stop. The State claimed the information in the search warrant affidavits describing the two prior controlled buys, which was known to McCrae when he ordered Petrecca to stop defendant's vehicle, as well as defendant's "suspicious behavior of . . . moving the [BMW] around the corner and then leaving in another vehicle," supported a reasonable articulable suspicion supporting an investigatory stop of defendant in the Honda.

The court accepted the State's argument, finding the initial stop was a lawful investigatory stop supported by reasonable and articulable suspicion defendant "was engaged in . . . additional activity, criminal activity." To support its conclusion, the court cited defendant's history of distribution, the two controlled buys that preceded the search warrant applications, and the information in the search warrant affidavits describing defendant's use of a vehicle during the controlled buys. The court found the fact defendant was not driving the BMW he had used during the controlled buys, but instead was driving the Honda, did not "have any [c]onstitutional significance."

The court also determined that even if the initial stop of the vehicle was unlawful, the second stop was sufficiently attenuated from the initial stop to render the seizure of the CDS following the second stop lawful. Defendant argued the State did not prove attenuation because the grand jury did not charge defendant with eluding and his actions following the first stop did not constitute eluding. He relied on his testimony the initial stop was confusing and he thought McCrae's unmarked vehicle had been pulled over by Petrecca after McCrae parked between defendant's vehicle and Petrecca's. Defendant argued he left the scene of the first stop, and later stopped some distance away, because he sought a safer location for the stop.

The State argued the second stop was attenuated from the first because defendant failed to remain stopped after he was pulled over by Petrecca. The State also argued, contrary to defendant's testimony, the second location was not a safer location. The State asserted defendant drove past "numerous" safe locations to stop and instead drove "another three-quarters of a mile," from the initial stop, during which he made "at least two turns."

The court cited State v. Williams (Williams I), 192 N.J. 1, 15 (2007), which addresses the standard for deciding an attenuation claim, and found the evidence obtained from defendant's vehicle was sufficiently attenuated from the initial investigatory stop. The court rejected defendant's contention he left the scene of the initial stop to travel to a safer place, and credited McCrae's testimony there were several places defendant could have pulled over between the locations of the first and second stops, and "he chose not to." The court found there was probable cause to believe defendant committed the crime of eluding by leaving the scene of the first stop, and therefore the second stop and defendant's arrest were lawful. Relying on State v. Crawley, 187 N.J. 440 (2006), and State v. Seymour, 289 N.J. Super. 80 (App. Div. 1996),[2] the court

[2] Crawley and Seymour hold a defendant does not have the right to disobey an unlawful police command and may be prosecuted for eluding or obstructing by

also found the officers were performing a lawful function when they initially stopped defendant, "they continued to wear that authority through the ultimate stop," and the discovery of the CDS occurred in the "context" of defendant's arrest for eluding.

Thus, the court found the stop of defendant's vehicle that resulted in the seizure of the CDS was supported on two grounds – as a valid investigatory stop and, alternatively, if the first stop was unlawful, the second stop was sufficiently attenuated such that it was lawful. The court denied defendant's suppression motion.

Defendant later pleaded guilty to one count of second-degree possession of CDS with intent to distribute in violation of N.J.S.A. 2C:35-5(a)(1) and (b)(2). The court imposed a six-year sentence with a three-year period of parole ineligibility.

Defendant appeals from the order denying his suppression motion and from his conviction. He presents the following arguments for our consideration:

> POINT ONE
>
> THE MOTION JUDGE'S REASONING THAT THE POLICE COULD PULL OVER THE WHITE HONDA FOR REASONABLE SUSPICION, SIMPLY

refusing to comply or by fleeing from the command. Crawley, 187 N.J. at 460-61; Seymour, 289 N.J. Super. at 87.

BECAUSE THEY BELIEVED THE DRIVER WAS A DRUG DEALER AND ALLEGEDLY INVOLVED IN PRIOR CONTROLLED PURCHASES, WAS ERRONEOUS.

POINT TWO

THE MOTION JUDGE'S FINDING THAT [DEFENDANT] ELUDED THE POLICE FOLLOWING THE UNCONSTITUTIONAL VEHICLE STOP, WAS MERELY THE BEGINNING AND NOT THE ENDING OF THE ATTENUATION-DOCTRINE ANALYSIS; THE COURT MISAPPLIED THE LAW TO THE FACTS.

A. TEMPORAL PROXIMITY FAVORS [DEFENDANT].

B. THERE WERE NO INTERVENING CIRCUMSTANCES TO ATTENUATE THE UNCONSTITUTIONAL STOP AND THE SEIZURE OF THE EVIDENCE.

C. THE MISCONDUCT IN THE PRESENT CASE WAS TO ADVANCE A FLAGRANTLY UNCONSTITUTIONAL PURPOSE.

II.

In our review of a court's order denying a suppression motion following an evidentiary hearing, we "must 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. Ahmad, 246 N.J. 592, 609 (2021) (quoting

State v. Elders, 192 N.J. 224, 243 (2007)). The factual findings of the trial court should only be set aside when those findings are "clearly mistaken." State v. Zalcberg, 232 N.J. 335, 344 (2018). We review the court's legal conclusions de novo. State v. Hathaway, 222 N.J. 453, 467 (2015).

The Fourth Amendment of the United States Constitution as well as Article I, Paragraph 7 of the New Jersey Constitution guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "[A] '"seizure" of "persons"' occurs within the meaning of those provisions" when police conduct a motor-vehicle stop, "however brief or limited." State v. Scriven, 226 N.J. 20, 33 (2016) (quoting State v. Dickey, 152 N.J. 468, 475 (1998)). "A search that is executed pursuant to a warrant is 'presumptively valid.'" State v. Boone, 232 N.J. 417, 427 (2017) (quoting State v. Watts, 223 N.J. 503, 513 (2015)). "[A] defendant bears the burden of proof when challenging evidence gathered pursuant to a validly issued search warrant." State v. Atwood, 232 N.J. 433, 438 (2018). On the other hand, where evidence is seized during a vehicle stop without a warrant, "[t]he State has the burden of proof to demonstrate by a preponderance of the evidence that the warrantless seizure was valid." Id. at 437-38 (alteration in original) (quoting State v. O'Neal, 190 N.J. 601, 611 (2007)).

The State argues on appeal that the court erred by finding the initial motor vehicle stop was not authorized by the search warrant for the Beachwood home. Although the State did not cross-appeal from the order denying the suppression motion, we consider the State's argument because a prevailing party is free to argue any legal point on appeal that supports the finding below "[w]ithout having filed a cross-appeal." Courier-Post Newspaper v. Cnty. of Camden, 413 N.J. Super. 372, 392 n.8 (App. Div. 2010) (quoting Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435, 443 (App. Div.1984)).

The State claims the court read the search warrant in a "hyper-technical way" and the search warrant should have been construed as an "all persons present" warrant permitting defendant's detention beyond the premises of the Beachwood home. Alternatively, the State argues the white Honda in which defendant was observed leaving the home was within the scope of the warrant as property "intended for use" or which "had been used" in drug trafficking.

While a search warrant generally provides "categorical authority to detain incident to the execution of a search warrant" that authority "is limited to the immediate vicinity of the premises to be searched." Bailey, 568 U.S. at 199. Although the Supreme Court has not established a bright-line rule defining the "spatial constraint defined by the immediate vicinity of the premises to be

searched," id. at 201, it has held a defendant detained "about a mile" from the premises to be searched was "beyond any reasonable understanding of the immediate vicinity of the premises in question[,]" id. at 190, 201. On the other hand, a warrant authorizing the search of "all persons present reasonably believed to be connected to [the] property" or similar language, State v. Bivins, 226 N.J. 1, 11 (2016) (alteration in original), may "authorize searches of persons seen departing from the scene of the search, provided that their presence at the scene when the warrant is being executed is proven[,]" id. at 13.

"[O]fficers searching a person's home . . . under authority of a search warrant are authorized to use only those investigatory methods, and to search only those places, appropriate in light of the scope of the warrant." State v. Reldan, 100 N.J. 187, 195 (1985) (citing Harris v. United States, 331 U.S. 145, 152 (1947)). To determine whether a search was conducted within the scope of its authorizing warrant, we begin with an "examination of the terms of the search warrant, which must be strictly respected." State v. Bivins, 435 N.J. Super. 519, 524 (App. Div. 2014), aff'd, 226 N.J. 1 (2016). In doing so, we recognize "[a] warrant should be read in a commonsensical manner to achieve its lawful purposes." In re L.Q., 236 N.J. Super. 464, 470 (App. Div. 1989). We then consider the conduct of the police "in accomplishing the object of the search."

Bivins, 435 N.J. Super. at 524. "The critical question is whether the search conformed to the authorization given by the warrant and was not otherwise unreasonable." Reldan, 100 N.J. at 202.

The State relies on language in the search warrant's preamble explaining patrol officer Samantha Sutter, who submitted the search warrant affidavits, applied for a search warrant on grounds she had probable cause to believe there was evidence of criminal activity at the Beachwood home and "with any and all persons arriving at, departing from and located therein at the time of the execution of the warrant . . . reasonably believed to be associated with the investigation." As noted, however, the warrant language authorizing the search was limited to the "premises hereinabove named" – the Beachwood home – and "such persons who may be therein or thereupon" those premises.

Based on the warrant's plain language, we reject the State's claim the warrant authorized the officers to stop defendant in the Honda approximately a mile from the premises – the Beachwood home – identified in the warrant. The warrant authorizes a search of the home and "such persons as may be therein and thereupon" the home. We interpret the "therein and thereupon" to have both spatial and temporal limitations. See Bailey, 568 U.S. at 201 (explaining there is "[a] spatial constraint defined by the immediate vicinity of the premises to be

searched [that] is . . . required for detentions incident to the execution of a search warrant"). That is, the warrant authorizes a search of individuals who are therein and thereon the premises – the home – at the time of the execution of the warrant.

There is no evidence defendant was found "therein" or "thereupon" the premises at the time of the execution of the search warrant at the home . To the contrary, the evidence establishes, and the State does not dispute, defendant was stopped at a location remote from the premises, and the execution of the warrant did not begin, and was purposely delayed by the officers, until defendant had been stopped at the remote location. The court did not err by interpreting the search warrant in a manner that strictly respected the authorization it provided. Bivins, 435 N.J. Super. at 524. The court correctly determined the stop of defendant a mile away from the Beachwood home prior to the execution of the warrant at the premises exceeded the scope of the authorizing language of the search warrant.

The language in the warrant's preamble upon which the State relies also did not authorize the stop. The preamble explains only that the State believed there was probable cause to search "any and all persons arriving at, departing from and located therein at the time of the execution of the warrant." However,

even if that language is given effect as authorization for a search, it does not support the stop of the Honda prior to execution of the warrant to search the premises.

Again, the officers purposely delayed executing the search warrant at the premises until they stopped defendant at a remote location. In accordance with the officers' plan and purpose, defendant was not departing the premises "at the time of the execution of the warrant." McCrae testified the officers did not execute the search warrant at the premises until defendant had been stopped twice, the CDS was discovered by Quinn, the Honda was impounded, and it was only the stop of defendant's vehicle that "triggered the execution" of the search warrant at the premises. Further, there is no evidence defendant was aware of the police surveillance of the Beachwood home that could otherwise characterize defendant's departure as flight from an impending execution of the warrant. Bivins, 226 N.J. at 16. Most simply, the State failed to establish defendant fell within the language of the preamble because its evidence showed defendant was not departing the premises at the time of the execution of the warrant and that was in accordance with the officers' plan and purpose.

We observe that caselaw approving the seizure and search of individuals pursuant to an "all persons-present" warrant is similarly tethered to the time of

a warrant's execution. See Bivins, 226 N.J. at 16 (explaining an "all persons[-]present" search warrant "authorized [police] to search individuals present at the residence, and that could encompass persons fleeing from the execution of the warrant"); State v. Carlino, 373 N.J. Super. 377, 394-96 (App. Div. 2004) (finding an "all persons present" search warrant permitted the seizure and search of an individual who arrived at the location of the search warrant during the execution of the warrant); L.Q., 236 N.J. Super. at 472 (holding "a warrant to search premises used for the continuing retail sale of CDS may authorize the search of all persons already present or arriving if the search is conducted at a time when sales ordinarily take place" and provided there are additional factors that suggest the person "is likely to be a party to the unlawful activity").

We further reject the State's argument that under Michigan v. Summers, 452 U.S. 692, 699 (1981), the warrant to search the Beachwood home provided an articulable basis to stop defendant's vehicle almost a mile from the premises to be searched. In Summers, the Court found a warrant to search a home permitted the detention of the home's occupant for the duration of the search when he was encountered on the home's front steps as police were about to search the home. Id. at 693-94. The Court found the detention was justified because "[t]he connection of an occupant to that home gives the police officer

an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." Id. at 703-04.

The Court has limited the scope of this "categorical" authority to detain an occupant incident to a search warrant's execution, to the "immediate vicinity" of the premises to be searched. Bailey, 568 U.S. at 199. Even in the case of an "all persons present" warrant, our Supreme Court has limited the authority to detain occupants incident to the execution of a warrant to the "unfolding scene of the warrant's execution." Bivins, 226 N.J. at 17. As noted, defendant was beyond either the "immediate vicinity," Bailey, 568 U.S. at 201, or the "unfolding scene of the warrant's execution," Bivins, 226 N.J. at 17, because the motor vehicle stop, and indeed the recovery of cocaine from the vehicle, occurred prior to the execution of the warrant at the Beachwood home.

We are not persuaded by the State's argument that concerns about officer safety in some manner broadened the scope of the search warrant they requested and were granted. If there were concerns about officer safety supporting the stop of the Honda at a location remote from the premises otherwise covered by the warrant, they should have been presented to the court with a request for a different, additional, or broader warrant than the ones issued. Of course, the officers plan of stopping defendant after he departed from the premises and prior

to execution of the search warrant for the premises would not suffer from similar infirmities if defendant, perhaps as the officers' anticipated, left the premises in the BMW. That is not because the search warrant for the premises authorized the stop of the vehicle at a remote location prior to execution of the warrant; it would have been because the officers had also obtained a search warrant for the BMW. See Watts, 223 N.J. at 516-18 (upholding a pre-execution, offsite detention and search of a defendant because he was seized under a separate search warrant authorizing "a search of [the] defendant's person").

For these same reasons, we reject the State's argument that a stop of the white Honda was within the scope of the search warrant as "certain property" which had "been used" or was "intended for use" in connection with drug trafficking. The argument is not supported by the evidence. The State did not present evidence the Honda was ever on the premises or had been used during the controlled purchases from defendant that occurred weeks prior to the search. We therefore conclude the court properly rejected the State's argument that the search warrant for the Beachwood home authorized the motor vehicle stops of defendant in the Honda.

III.

Because the motor vehicle stop was not supported by the search warrants, the State bore the burden of proving the stop was lawful under an exception to the warrant requirement. Bailey, 568 U.S. at 202 ("If officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion . . . or an arrest based on probable cause."). The court found the stop of defendant's vehicle was supported by "reasonable and articulable suspicions" justifying an investigatory stop.

More particularly, the court found the police possessed information supporting a reasonable suspicion defendant "was engaged in . . . additional . . . criminal activity" and premised its conclusion on the "history of distribution," as well as "the information relative to . . . defendant using a vehicle" during the two "controlled buys" that occurred during the weeks prior to the motor vehicle stop. The court noted the search warrant affidavits reported defendant used a different vehicle – the BMW – during the controlled buys, but, as noted, the court did "not find that to have any [c]onstitutional significance."

Defendant argues the court erred in determining the initial stop could be upheld as a valid investigatory stop. He claims McCrae did not know he was the driver of the white Honda until the second stop occurred because McCrae did not see him enter the vehicle, and therefore information regarding the controlled buys could not support the initial stop. Defendant also claims there was no evidence establishing reasonable suspicion he was engaged in criminal activity at the time of the initial stop. He argues the court "conflat[ed] the authority to arrest with the authority to search" because the police lacked authority to conduct a motor vehicle stop "to discuss controlled purchases [that occurred] weeks earlier."

The record does not support a finding the officers pulled over defendant's vehicle to conduct an investigatory stop. As McCrae explained, defendant did not commit any motor vehicle offenses and the officers stopped defendant solely to detain him at a location remote from the Beachwood home prior to execution of the search warrant at those premises. Nonetheless, we consider whether there was information known to McCrae at the time that would justify an investigatory stop because in considering the constitutionality of a search or seizure,"[a]lthough an officer may testify to his or her subjective intent, the crucial inquiry is whether the officer's conduct was objectively reasonable."

O'Neal, 190 N.J. at 614; see State v. Cryan, 320 N.J. Super. 325, 331 (App. Div. 1999) ("Putting to one side" the fact none of the justifications offered by the State to support a motor vehicle stop as an investigatory stop "came to the officer," and nonetheless considering whether the circumstances "objectively viewed would justify" an investigatory stop).

"An 'investigatory stop' permits law enforcement officers to detain an individual temporarily for questioning." State v. Maryland, 167 N.J. 471, 486 (2001). "An officer may stop a motor vehicle only upon 'articulable and reasonable suspicion' that a criminal or motor vehicle violation has occurred." Atwood, 232 N.J. at 444 (quoting Delaware v. Prouse, 440 U.S. 648, 663 (1979)). The "reasonable-suspicion standard" requires "some minimal level of objective justification for making the stop." State v. Nishina, 175 N.J. 502, 511 (2003) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)). An investigatory stop "may not be based on arbitrary police practices, the officer's subjective good faith, or a mere hunch." State v. Shaw, 237 N.J. 588, 612 (2019) (quoting State v. Coles, 218 N.J. 322, 343 (2014)). Where the lawfulness of an investigatory stop is challenged, the State bears the burden of showing "the stop was 'based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal

activity.'" State v. Alessi, 240 N.J. 501, 518 (2020) (quoting State v. Mann, 203 N.J. 328, 338 (2010)).

In evaluating whether reasonable suspicion exists, we must consider "the totality of the circumstances." Ibid. In doing so, we "must assess whether 'the facts available to the officer at the moment of the seizure . . . warrant[ed] a [person] of reasonable caution in the belief that the action taken was appropriate.'" Mann, 203 N.J. at 338 (quoting State v. Pineiro, 181 N.J. 13, 21 (2004)). "Police officers should consider whether a defendant's actions are more consistent with innocence than guilt; however, simply because a defendant's actions might have some speculative innocent explanation does not mean that they cannot support articulable suspicions if a reasonable person would find the actions are consistent with guilt." State v. Arthur, 149 N.J. 1, 11 (1997).

We first reject defendant's claim McCrae did not have adequate information to support a reasonable suspicion defendant was driving the Honda. An officer may lawfully conduct an investigatory stop in reliance on observations made by fellow officers. United States v. Hensley, 469 U.S. 221, 230-33 (1985). "It is understood 'that effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act

swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.'" Crawley, 187 N.J. at 457 (quoting United States v. Robinson, 536 F.2d 1298, 1299 (9th Cir. 1976)).

The evidence shows Quinn observed defendant exit the Beachwood home, enter the white Honda, and depart from the residence. He relayed that information to the other officers, and McCrae followed the Honda based on Quinn's report. McCrae therefore possessed sufficient information supporting a reasonable suspicion defendant was driving the Honda when he directed Petrecca to effectuate the motor vehicle stop.

Nonetheless, based on the evidence presented, we are not convinced the evidence established circumstances supporting a reasonable and articulable suspicion defendant was engaged in criminal activity when the initial motor vehicle stop occurred. As found by the motion court, the only information known to McRae at the time of the stop related to the two controlled buys, which the court characterized as defendant's "history of distribution," and the "information relative to . . . defendant using a vehicle."

We first note the State does not argue, and the court did not find, the stop was justified based on an inferred investigatory purpose to ask defendant questions regarding the completed, uncharged, controlled buys which occurred

in the weeks prior.[3] See Alessi 240 N.J. at 523-24 (considering whether an investigatory stop for questioning was justified by a reasonable suspicion the defendant was involved in a completed crime that had occurred a month prior). Instead, the court found the two controlled buys provided reasonable suspicion for the officers to believe defendant was engaged in additional criminal activity at the time of the motor vehicle stop such that the stop was supported by a reasonable and articulable suspicion.

In a case involving a motor vehicle stop, our Supreme Court in State v. Birkenmeier held that reliable information may provide the requisite reasonable suspicion to conduct an investigatory stop of a defendant suspected of using a vehicle to traffic drugs. 185 N.J. 552, 561-62 (2006). In Birkenmeier, the police received a tip from a reliable confidential informant providing the "defendant's name; [the] defendant's address; [the] defendant's physical description; the make, model and license tag number of [the] defendant's car," and that the "defendant would be leaving his home at 4:30 p.m. to make a marijuana delivery; and . . . would be carrying the drugs in a laundry tote bag." Id. at 561. The

[3] Because the court did not find the stop was supported by an investigatory purpose to ask defendant questions regarding the completed, uncharged controlled buys, and because there is no evidence that was the case, it is unnecessary to address defendant's argument that such circumstances, if proven, could not properly justify the initial motor vehicle stop.

Court also noted the motor vehicle stop at issue occurred after the police observed the defendant leaving the home at 4:30 p.m., the identified time, with a laundry tote bag, the identified receptacle, and entering the vehicle identified by the informant. Ibid. The Court found those "collective circumstances," supported a reasonable and articulable suspicion the defendant was engaged in criminal activity at the time of the challenged motor vehicle stop following the defendant's departure from the home. Id. at 561-562.

Here, unlike in Birkenmeier, McCrae had information concerning the two controlled buys that occurred during the weeks prior to the motor vehicle stop, but there is no evidence he or any of the other officers had information supporting a reasonable suspicion defendant left the Beachwood home in the Honda to transport CDS, to make a drug transaction, or to engage in any other criminal activity. Quinn did not testify he observed defendant carry anything giving rise to a reasonable suspicion of criminal activity when he entered the Honda, and, neither Quinn nor McCrae offered any evidence defendant had previously used the Honda for any criminal purpose. Additionally, there is no evidence supporting a reasonable and articulable suspicion defendant was engaged in criminal activity every time he drove a vehicle simply because on two prior occasions, occurring weeks before, he had done so.

In Pineiro the Court found an officer's observation of a defendant known to have "been involved with illicit drugs," exchanging a pack of cigarettes in a high crime area, provided sufficient reasonable suspicion to conduct an investigatory stop because in the officer's experience "drugs sometimes are transported in cigarette packs." 181 N.J. at 25-27. Similarly, in Arthur the Court found an officer's rational inference a drug transaction had occurred justified an investigatory stop, because it was informed by his experience and knowledge drugs are often transported in paper bags, and the officer had personally observed an individual briefly enter and then exit the defendant's vehicle with a paper bag, in a high drug activity area, followed by the defendant's immediate departure from the area. 149 N.J. at 10-12.

McCrae and Quinn offered no testimony regarding any circumstances supporting an inference defendant was engaged in criminal activity at the time of the initial motor vehicle stop. And simply entering a vehicle, even when in direct response to police presence, "is not enough to justify" an investigatory stop. State v. Costa, 327 N.J. Super. 22, 32 (App. Div. 1999).

As noted, McCrae did not testify he had a reasonable and articulable suspicion defendant was engaged in criminal activity at the time of the stop. However, even after consideration of all the extant circumstances that might

objectively support a reasonable and articulable suspicion, we are convinced the court erred in finding the prior controlled buys and defendant's decision to take a drive in a vehicle that had no known association with any criminal activity established a reasonable and articulable suspicion defendant was engaged in criminal activity when the stop was effectuated. The decision to stop the vehicle was based solely on the officers' tactics and strategy related to the planned execution of the search warrant on the premises, and, perhaps at best by a hunch that fortuitously proved correct. Neither supports a motor vehicle stop consistent with applicable constitutional principles. Shaw, 237 N.J. at 612.

IV.

Our determination the initial stop was not supported by either the search warrant for the premises or a reasonable and articulable suspicion of criminal activity does not end the inquiry. The court found that even if the initial stop was constitutionally infirm, the second stop was nonetheless sufficiently attenuated from any unconstitutional taint such that the evidence seized from the Honda should not be subject to the exclusionary rule. See Williams I, 192 N.J. at 15 (explaining "the exclusionary rule will not apply when the connection between the unconstitutional police action and the evidence becomes so

attenuated as to dissipate the taint from the unlawful conduct" (quoting State v. Badessa, 185 N.J. 303, 311 (2005))).

The exclusionary rule bars the State from entering into evidence the "fruit of the poisonous tree"; that is, evidence obtained as a result of an unconstitutional search or seizure. Wong Sun v. United States, 371 U.S. 471, 485-88 (1963); State v. Shaw, 213 N.J. 398, 412-13 (2012). However, "[t]he exclusionary rule will not apply when the connection between the unconstitutional police action and the secured evidence becomes 'so attenuated as to dissipate the taint' from the unlawful conduct." Shaw, 213 N.J. at 414 (quoting Badessa, 185 N.J. at 311).

"The State bears the burden of proving attenuation." In Interest of J.A., 233 N.J. 432, 457 (2018). When determining whether evidence is sufficiently attenuated from an unconstitutional stop to dissipate the taint from unlawful police conduct, a court must consider "(1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct." Williams I, 192 N.J. at 15 (quoting State v. Johnson, 118 N.J. 639, 653 (1990)).

The Court has "found that resisting arrest and eluding the police after an unconstitutional stop can constitute intervening acts justifying admission of

later-obtained evidence." Alessi, 240 N.J. at 525; see also Williams I, 192 N.J. at 16 ("[E]luding the police . . . in response to an unconstitutional stop . . . constitute[s an] intervening act[] and . . . evidence seized incident to [that] intervening criminal act[] will not be subject to suppression."); Seymour, 289 N.J. Super. at 88 (finding evidence obtained after a motorist eluded police admissible despite an unlawful attempt to stop the motorist in the first instance).

The motion court recognized the standard established in Williams I, quoting from the opinion in its decision. The court also cited to Seymour, 289 N.J. Super. at 86, and Crawley, 187 N.J. at 460, for the proposition that a defendant may not elude arrest even if in response to an unlawful direction to stop by the police.

Although referencing the applicable standard for attenuation, the court did not address and make findings as to each of the pertinent factors in reaching its conclusion the second stop and the resultant search of the Honda was sufficiently attenuated from the unlawful initial stop to permit admission of the evidence seized from the Honda. The court found only McCrae had probable cause to arrest defendant for eluding, and the court apparently found attenuation on that basis alone.

To the extent we may correctly construe the court's probable cause determination as an implicit finding of "the presence of intervening circumstances," Williams I, 192 N.J. at 15, the mere finding defendant disobeyed an unlawful police command to stop does not require or permit a determination that evidence later seized as a result of an arrest for eluding is attenuated from an initial unlawful stop. State v. Williams (Williams II), 410 N.J. Super. 549, 560 (2009). Thus, the singular finding made by the court – that McCrae had probable cause to arrest defendant for eluding – does not support its determination the evidence recovered from defendant's vehicle after the second stop for eluding was attenuated from the initial unlawful stop of defendant's vehicle.

In Williams II, officers had been dispatched to a housing complex to deter a potential retaliatory shooting after a homicide had been committed in the area days earlier. Id. at 552. An officer observed the defendant, who was riding a bicycle, start pedaling away when he recognized the officers. Id. at 553. The officers ordered the defendant to stop, but he kept riding away. Ibid. The police chased defendant, and as they caught him, he dropped a box that contained cocaine to the ground. Ibid.

We held the stop was unlawful because the officers lacked reasonable and articulable suspicion for an investigatory stop. Id. at 558. We then considered whether the drug evidence was sufficiently attenuated from the unlawful stop and concluded the State had failed to establish "significant attenuation," and that failure warranted reversal of the order denying his motion to suppress. Id. at 564. We explained that under the second Williams I factor, although the defendant was arrested for obstruction, "there were no significant 'intervening circumstances' between the unlawful police command . . . and [the] defendant's discard of the box." Id. at 563 (quoting Williams I, 192 N.J. at 15). We found Williams I and other cases cited in that decision distinguishable because they involved intervening criminal conduct that created a risk of physical injury to police or the general public in addition to breaking "the chain of causation" between the officer's initial unlawful conduct and the later seizure of evidence. Ibid. We emphasized the "defendant did not force the officers to engage in a lengthy and dangerous pursuit to apprehend him or engage in any act of physical aggression against" the arresting officers. Ibid.

Here, although the motion court seemingly found intervening circumstances, it did not engage in any analysis or make any findings as to the significance of those intervening circumstances. As we explained in Williams

II, "our Supreme Court in Williams [I] did not say that any conduct that could be found to constitute obstruction automatically constitutes 'an intervening act . . . that completely purge[s] the taint from the unconstitutional investigatory stop.'" Id. at 560 (second alteration in original) (quoting Williams I, 192 N.J. at 18). Proper determination of "'whether evidence is sufficiently attenuated from the taint of a constitutional violation' must be made on a case-by-case basis in light of the three-factor test" in Williams I. Ibid.

Because the motion court did not address two of the three factors essential to an attenuation determination, and it appears the court erroneously concluded defendant's arrest for eluding automatically constituted a "significant 'intervening circumstance[]" under the Williams I standard, id. at 563 (quoting Williams I, 192 N.J. at 15), we vacate the order denying defendant's suppression motion and remand for the court to reconsider its determination the State satisfied its burden of establishing "significant attenuation[,]" id. at 564.

On remand, the court shall address and balance the applicable factors: "(1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct." Williams I, 192 N.J. at 15 (quoting Johnson, 118 N.J. at 653). The court may in its discretion allow the parties to present any

additional testimony, evidence, and argument necessary for a proper disposition of the attenuation issue. Neither our decision to remand nor anything in this opinion shall be construed to express an opinion on the merits of the issue, which should be decided anew by the court based on the record and any additional argument and evidence presented on remand.

Defendant's conviction and sentence shall remain undisturbed pending the result of the remand proceedings. If the court determines the evidence seized from the Honda is not sufficiently attenuated from the taint of the unlawful initial stop of the vehicle, it shall grant defendant's suppression motion, allow defendant to withdraw his guilty plea if he chooses to do so, and conduct such further proceedings as are appropriate.

Vacated and remanded. We do not retain jurisdiction.