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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1139-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANGEL R. HERNANDEZ-  
NUNEZ, a/k/a ANGEL  
HERNANDEZ-NUNEZ,  
ANGEL R. HERNANDEZ,  
and ANGEL R. NUNEZ,

Defendant-Appellant.

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Argued January 11, 2023 – Decided February 14, 2023

Before Judges Accurso, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law  
Division, Bergen County, Indictment No. 17-06-0747.

Kevin S. Finckenauer, Assistant Deputy Public  
Defender argued the cause for appellant (Joseph E.  
Krakora, Public Defender, attorney; Kevin S.  
Finckenauer, of counsel and on the brief).

Edward F. Ray, Assistant Prosecutor, argued the cause  
for respondent (Mark Musella, Bergen County

Prosecutor, attorney; William P. Miller, Assistant Prosecutor, of counsel and on the briefs; John J. Scaliti, Legal Assistant, on the briefs).

Appellant filed a pro se supplemental brief.

## PER CURIAM

Following the denial of his motion to suppress physical evidence seized after the stop of a motor vehicle in which he was a passenger, defendant Angel R. Hernandez-Nunez was found guilty of first-degree possession with intent to distribute controlled dangerous substances (CDS), N.J.S.A. 2C:35-5(a)(1) and 2C:35-5b(1) (count one); third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1) (count two); and third-degree possession of CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-7(a) (count three).

After merger, the court sentenced defendant to an aggregate fifteen-year custodial term with a five-year period of parole ineligibility. Defendant challenges both his convictions and sentence and raises the following issues:

### POINT I

BECAUSE THE MOTOR VEHICLE STOP WAS BASED ONLY ON A MEAGER TIP THAT FAILED TO CREDIBLY SUGGEST CRIMINAL ACTIVITY AND INNOCUOUS OBSERVATIONS THAT LIKEWISE FAILED TO PRESENT CRIMINAL ACTIVITY, OFFICERS LACKED REASONABLE,

ARTICULABLE SUSPICION TO STOP THE CAR,  
AND [DEFENDANT'S] MOTION TO SUPPRESS  
SHOULD HAVE BEEN GRANTED.

A. The State Failed To Establish The [Confidential Informant (CI)]'s Reliability Or Why the CI Believed He Overheard a Drug Trafficking Conversation, and Police Did Not Corroborate Significant Details of the Tip Suggesting Criminal Activity.

B. No Facts External To the Tip Sufficiently Supported a Finding of Reasonable, Articulable Suspicion.

## POINT II

THE ERRONEOUS ADMISSION OF NUMEROUS PRIOR, CONSISTENT STATEMENTS FROM THE TRANSCRIPT OF [JUAN] PACHE-CEDENO'S INITIAL STATEMENT TO POLICE IMPROPERLY INCRIMINATED [DEFENDANT] AND BOLSTERED THE STATE'S KEY WITNESS, PACHE-CEDENO, DENYING HIM A FAIR TRIAL.

## POINT III

THE PROSECUTOR'S SUMMATION WAS REplete WITH COMMENTS IMPROPERLY BOLSTERING THE CREDIBILITY AND TESTIMONY OF HIS WITNESSES THROUGH FACTS NOT IN EVIDENCE AND EXPRESSIONS OF PERSONAL OPINION, AS WELL AS COMMENTS GROUPING HIMSELF WITH THE JURY AND DENIGRATING [DEFENDANT].

POINT IV

THE CUMULATIVE IMPACT OF THE ERRORS DESCRIBED IN POINTS II AND III DENIED [DEFENDANT] DUE PROCESS AND A FAIR TRIAL.

POINT V

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO MERGE COUNT THREE WITH COUNT ONE AND IMPOSED A MANIFESTLY EXCESSIVE SENTENCE BY APPLYING INAPPLICABLE AGGRAVATING FACTORS AND REJECTING APPLICABLE MITIGATING FACTORS.

A. The Trial Court Failed To Merge Count Three Into Count One.

B. The Trial Court Erred In Evaluating the Aggravating And Mitigating Factors, Requiring a Resentencing.

Defendant also raises the following issues in his pro se brief:

[POINT I]

DEFENDANT WAS DENIED HIS RIGHT TO CROSS-EXAMINATION OF THE STATE'S WITNESS FOR THE JURY TO DETERMINE HIS CREDIBILITY.

[POINT II]

THIS CASE SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL DUE TO THE

DELIBERATE MISCONDUCT OF THE  
PROSECUTOR IN THIS CASE.

[POINT III]

DEFENDANT'S SENTENCE OF FIFTEEN YEARS  
WITH A FIVE[-]YEAR PAROLE DISQUALIFIER IS  
EXCESSIVE AND HE SHOULD BE RESENTENCED  
TO A TERM OF TEN YEARS WITH A THREE[-]  
AND[-]A[-] HALF YEAR PAROLE DISQUALIFER.

We agree with defendant's arguments in Point I. The challenged motor vehicle stop was not supported by a reasonable and articulable suspicion of criminal activity. We therefore reverse the denial of defendant's suppression motion, vacate his convictions and sentence, and remand for further proceedings consistent with this opinion. In light of our decision, we do not address defendant's remaining counseled and pro se arguments related to alleged evidentiary errors committed by the court, improper comments made by the prosecutor, or challenges to his sentence.

I.

On December 1, 2016, a confidential informant (CI) contacted Detective Davis Valdivia of the Bergen County Prosecutor's Office and stated he overheard a conversation between three men at a restaurant in Hackensack regarding a CDS purchase. According to Detective Valdivia, the CI informed him: (1) one of the men mentioned "something cost [33] and . . . it would be

here in [45] minutes to an hour"; (2) two of the men "appeared to be Dominican" and the third one "appeared to be Mexican"; and (3) the men arrived at the restaurant in a white BMW and a red Acura.

Detective Valdivia and his partner immediately "set up surveillance" around the restaurant's parking lot. Without witnessing who entered either car, the detectives observed a white BMW and a red Acura exit the lot. The detectives followed the cars to 130 Overlook Avenue in Hackensack, a high-rise condominium, where they observed a black minivan with New York livery plates park next to the cars and a man, later identified as defendant, exit the Acura, and enter the backseat passenger side of the minivan. Detective Valdivia described defendant as either "holding something" or "carrying something inside his jacket," but conceded he could not be sure, and defendant could have simply been hunched over due to the cold.

As all three vehicles drove out of the parking lot, Detective Valdivia instructed officers from the Hackensack Police Department to pull over the minivan because he believed "a drug transaction occurred or was about to occur." The police pulled over the vehicle and spoke to the driver, later identified as Elvin Quiroz, and a man seated behind the driver, later identified as Pache-Cedeno. Detective Valdivia approached the passenger side of the

vehicle where he questioned defendant. While questioning him, Detective Valdivia overheard a Hackensack police officer ask Pache-Cedeno, "What do you have under your jacket?" The officer patted down Pache-Cedeno's midsection, tapped a solid object, "opened [his] jacket and removed what appear[ed] to be a kilo of cocaine."<sup>1</sup> The officers removed all three men from the minivan and arrested them. While doing so, Detective Valdivia observed a second kilogram of cocaine under the floor mat near Pache-Cedeno's feet. Quiroz consented to a search of the vehicle, but no additional contraband was found.

As noted, defendant moved to suppress the physical evidence seized in the course of the stop. Detective Valdivia was the sole witness at the suppression hearing and testified he believed the minivan was utilized for criminal activity based on his observation "of the passenger and the way he was holding something," his experience and training, and because "livery cabs . . . are notoriously used to transport drugs and money so it's harder . . . to identify individuals." He also recounted having previously arrested individuals for drug

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<sup>1</sup> Defendant has not argued the officer's tapping on Pache-Cedeno's chest and opening his jacket constituted an unconstitutional search. We therefore do not address the constitutional import of those actions as it is unnecessary for resolution of the issues before us.

activity on Overlook Avenue but described the high-rise condominium as "safe and secure."

Detective Valdivia also explained the CI had previously "produced for our office and for federal agencies." He did not, however, provide any additional background information about the CI's reliability, such as the length of his relationship, the CI's direct experience with drug investigations, the substance or nature of what the CI had "produced" in the past, the specific federal agencies the CI previously assisted, or whether any convictions had followed from the CI's involvement.

The court denied defendant's motion in an oral decision and entered a corresponding order. Based on the totality of the circumstances, the court found the officers formed "a reasonable and articulable suspicion of criminal activity" to justify the motor vehicle stop. The court determined the CI's tip was reliable because the detective sufficiently established the CI's veracity and basis of knowledge. The court noted the CI had provided reliable information previously and personally overheard the conversation at the restaurant. The court also credited Detective Valdivia's experience with drug crimes and expertise that livery cabs are used by individuals engaging in such activity.



As noted, the jury convicted defendant of all three charges and after merging count two into count one, the court sentenced him to a fifteen-year custodial term with a five-year period of parole ineligibility and a concurrent four-year term with a three-year period of parole ineligibility with respect to count three. This appeal followed.

## II.

In his first point, defendant contends the court erred in denying his suppression motion as the State failed to satisfy its burden "to prove . . . police had reasonable suspicion to stop the car." Specifically, defendant argues the State did not "establish the CI's reliability or why the CI believed he overheard a drug trafficking conversation, and police did not corroborate significant details of the tip suggesting criminal activity." Defendant also avers there were no facts outside of the CI's tip to adequately support a finding of reasonable, articulable suspicion. We agree.

The "standard of review on a motion to suppress is deferential." State v. Nyema, 249 N.J. 509, 526 (2022). "[A]n appellate court reviewing a motion to suppress 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) (alteration in original)

(quoting State v. Elders, 192 N.J. 224, 243 (2007)). We "defer[] to those findings in recognition of the trial court's 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Nyema, 249 N.J. at 526 (quoting Elders, 192 N.J. at 244). We review "[a] trial court's legal conclusions . . . and its view of 'the consequences that flow from established facts,' . . . de novo." Id. at 526-27 (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

"Warrantless seizures and searches are presumptively invalid as contrary to the United States and the New Jersey Constitutions." State v. Pineiro, 181 N.J. 13, 19 (2004). If a search or seizure is conducted without a warrant, the State must demonstrate the search or seizure falls within an exception to the warrant requirement. Ibid. The burden is on the State to prove the absence of a constitutional violation by a preponderance of the evidence. State v. Wilson, 178 N.J. 7, 13 (2003).

One such exception is an investigatory stop, which must be "'justified at its inception' by a reasonable and articulable suspicion of criminal activity." State v. Rosario, 229 N.J. 263, 276 (2017) (quoting State v. Dickey, 152 N.J. 468, 476 (1998)). A suspicion of criminal activity is reasonable only if it is based on "some objective manifestation that the person [detained] is, or is about

to be engaged in criminal activity." Pineiro, 181 N.J. at 22 (quoting United States v. Cortez, 449 U.S. 411, 417-18 (1981)). In making this determination, a court must consider the "totality of the circumstances." Ibid.

"An informant's tip is a factor to be considered when evaluating whether an investigatory stop is justified." State v. Golotta, 178 N.J. 205, 213 (2003). The reliability of a CI's tip is also to be analyzed under "the totality of the circumstances." State v. Zutic, 155 N.J. 103, 110 (1998). "An informant's 'veracity' and 'basis of knowledge' are two highly relevant factors under the totality of the circumstances." Ibid. (quoting State v. Smith, 155 N.J. 83, 93 (1998)). "A deficiency in one of those factors 'may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.'" Id. at 110-11 (quoting Illinois v. Gates, 462 U.S. 213, 233 (1983)).

An informant's veracity may be established by "past instances of reliability." Smith, 155 N.J. at 93. The Court has cautioned, however, "[a] few past instances of reliability do not conclusively establish an informant's reliability." Id. at 93-94. "Similarly, a statement that the police believe the informant is reliable because [they] 'did a job for [an officer] in the past,' without

additional information, will not firmly establish veracity." State v. Keyes, 184 N.J. 541, 555 (2005) (quoting Smith, 155 N.J. at 96-97).

For example, in State v. Williams, 364 N.J. Super. 23, 32-33 (App. Div. 2003), we concluded the State failed to satisfy the veracity prong where an officer testified the CI provided information on up to ten cases, her information had been relayed to other agencies and led to arrests, and pertained to CDS investigations, but the officer failed to "specif[y] the nature of the information provided by the informant, the 'agencies' to which it was transmitted, the names of the targets of their investigations . . . or whether any had been convicted of crimes following arrests resulting from those investigations." We also noted the officer "did not give any further details with respect to his knowledge of the informant." Id. at 33.

Further, the basis of an informant's knowledge may be established when "the tip itself relates expressly or clearly how the informant knows of the criminal activity." State v. Sullivan, 169 N.J. 204, 213 (2001) (quoting Smith, 155 N.J. at 94). "In the absence of such explicit disclosure, 'the nature and details revealed in the tip may imply that the informant's knowledge of the alleged criminal activity is derived from a trustworthy source.'" Ibid. (quoting Smith, 155 N.J. at 94). Where police lack such detailed information,

"independent corroboration is necessary to ratify the informant's veracity and validate the truthfulness of the tip." Smith, 155 N.J. at 95.

Additionally, when conducting a totality of the circumstances analysis, our Supreme Court has instructed courts to "ascribe sufficient weight to the officer's knowledge and experience and to the rational inferences that could be drawn from the facts objectively and reasonably viewed in light of the officer's experience." State v. Arthur, 149 N.J. 1, 10 (1997). In Arthur, an officer personally observed the defendant park his vehicle "in an area known for high levels of narcotics activity," a second individual enter the vehicle and exit shortly thereafter with a paper bag, and the defendant immediately depart from the area. Id. at 10. The Court concluded the officer's rational inference a drug transaction had occurred justified the investigatory stop because it was informed by his observations, experience, and knowledge drugs are often transported in paper bags. Id. at 10-12.

Similarly, in Pineiro, an officer observed the defendant and a second individual exchange a pack of cigarettes on the corner of a "high drug, high crime area." 181 N.J. at 18. The officer knew the individual used drugs through previous arrests, recognized defendant from his experience "'clearing the corners' in that same area," and had received intelligence reports the defendant

sold drugs. Ibid. The Court concluded, in light of the officer's observations and "knowledge that drugs were sometimes carried in cigarette packs," the totality of the circumstances established a reasonable and articulable suspicion of criminal activity.<sup>2</sup> Id. at 25.

Contrariwise, in Rosario, 229 N.J. at 267-68, the Court held "reasonable and articulable suspicion did not ripen prior to the officer's . . . exchanges with [the] defendant," where the officer received an anonymous tip the defendant sold heroin out of her vehicle and where he later observed the defendant "scuffling around" while lawfully parked outside her home in a residential development. The Court concluded the anonymous tip was entitled to "little weight" and there was no corroborated criminal activity to justify the investigatory stop. Id. at 276.

Applying those precedents, we conclude the totality of the circumstances did not support "a reasonable and articulable suspicion of criminal activity," as the CI's tip was entitled to limited weight and nothing about the remaining circumstances, independently or cumulatively, corroborated criminal activity.

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<sup>2</sup> Although the Pineiro Court determined the circumstances raised "a reasonable and articulable suspicion that criminal activity was occurring" to justify an investigatory stop, it concluded those same circumstances did not support probable cause to seize the cigarette pack and effectuate an arrest. 181 N.J. at 29.

Ibid. With respect to the tip, the State failed to establish either the informant's veracity or basis of knowledge under Zutic or "some other indicia of reliability." 155 N.J. at 110-11. Detective Valdivia's bare assertion the CI had provided reliable information in the past was insufficient to establish the CI's veracity. See Keyes, 184 N.J. at 555; Smith, 155 N.J. at 96-97; Williams, 364 N.J. Super. at 32-33.

Additionally, according to Detective Valdivia, the CI shared a single statement he overheard – "something cost [33] and . . . it would be here in [45] minutes to an hour" – the men's nationalities, and the cars they arrived in. That information, even accepting it all as true, simply does not provide a sufficient basis to conclude the men, whom the informant did not know, were discussing a drug transaction.

Further, Detective Valdivia's observations were insufficient to "validate the truthfulness of the tip," Smith, 155 N.J. at 95, or justify the stop. As found by the motion judge, Detective Valdivia merely observed defendant enter a minivan with New York livery plates outside a building, which he described as "safe and secure," as opposed to a high-crime area. The detective was not familiar with defendant prior to the stop, nor did he witness what could reasonably be interpreted as a drug transaction. All Detective Valdivia could

say was he believed defendant was "holding something." He did not actually see anything that could reasonably be described as narcotics and could not even be sure if defendant was simply hunched over to protect himself from the cold.

In light of the tip's unreliability and Detective Valdivia's observations of solely commonplace behaviors, we are satisfied the stop was not "'justified at its inception' by a reasonable and articulable suspicion of criminal activity." Rosario, 229 N.J. at 276. Accordingly, the physical evidence seized from the stop, as well as the statements obtained thereafter, must be suppressed. Id. at 277 (citing State v. Herrera, 211 N.J. 308, 330 (2012) ("The exclusionary rule generally bars the State from introducing evidence of the 'fruits' of an illegal search or seizure.")). As the cocaine, admitted as physical evidence, and the related testimony from Detective Valdivia and Pache-Cedeno, were material parts of the State's case, we are satisfied admission of that evidence was "clearly capable of producing an unjust result." R. 2:10-2.

The court's order denying defendant's suppression motion is reversed, defendant's convictions and sentence are vacated, and the matter is remanded for further proceedings consistent with this opinion. 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