SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2335-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARKIES L. WELLS,

Defendant-Appellant.

Argued October 18, 2022 – Decided December 23, 2022

Before Judges Sumners, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 18-01-0110.

Gilbert G. Miller, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Gilbert G. Miller, on the briefs).

Melinda A. Harrigan, Assistant Prosecutor, argued the cause for respondent (Raymond S. Santiago, Monmouth County Prosecutor, attorney; Melinda A. Harrigan and Lisa Sarnoff Gochman, of counsel and on the briefs).

PER CURIAM

Defendant, Markies Wells, appeals his convictions arising from a motor vehicle stop for impermissibly tinted windows. He contends the Law Division judge erred in denying his motion to suppress controlled dangerous substances (CDS) that were first felt during a roadside frisk for weapons and later seized during a strip search at the police station. After carefully reviewing the record, we conclude the detaining officers unduly prolonged the motor vehicle stop because they did not have reasonable articulable suspicion to believe a crime was being committed when they asked defendant for consent to search his vehicle. That request thus violated the rule established in State v. Carty, 170 N.J. 632 (2002). Because the frisk occurred after the Carty violation, the CDS found on defendant's person is a fruit of the unlawfully prolonged investigative detention. We therefore reverse the denial of the suppression motion.

I.

Officer Brian Taylor of the Neptune Police Department was the only witness to testify at the two-day suppression hearing. On March 22, 2017, around 5:30 p.m., Officer Taylor was on patrol in an unmarked vehicle. He was accompanied by two other officers assigned to the Street Crimes Unit, Officers DePalma and Rosenthal. All three officers were wearing "[p]lain clothes, with

a police vest over the top, with police clearly marked in yellow on the front and back." The officers pulled into the parking lot of a motel on Highway 33 as part of their routine patrol. Officer Taylor described the motel and parking lot as "a documented high crime area, and [a place] where narcotic distribution arrests have been made in the past."

Officer Taylor observed a black Mercedes Benz with dark tinted windows back into a parking space. When Officer Taylor drove closer to the Mercedes, "it quickly exited that parking space and moved to a parking space toward the front of the motel." The driver, defendant, exited the Mercedes and went inside the motel. Officer Taylor was concerned that defendant had recognized the officers' unmarked vehicle as a police vehicle, so Taylor drove across the street to give the appearance the officers had left the parking lot. Officer Taylor could see the front office of the motel from the spot where he parked the police vehicle.

After a few minutes, defendant exited the motel and drove the Mercedes towards the rear of the motel property. Officer Taylor drove to the front office of the motel and instructed Officers DePalma and Rosenthal to go inside to "see what, if anything, [defendant] did in there, or if he spoke to anyone." From this vantage point, Officer Taylor could not see the rear parking area or the Mercedes.

While waiting for Officers DePalma and Rosenthal to return, Officer Taylor observed a tan sedan enter the parking lot and drive towards the rear of the motel. The tan vehicle was occupied by a female driver and a male passenger.

Officers DePalma and Rosenthal spoke to a motel staff member and notified Officer Taylor that defendant had not rented a room. The officers drove "back towards the rear portion of the lot to see if the tan vehicle met with the [b]lack Mercedes." As the officers traveled to the lot behind the building, the tan vehicle and the Mercedes passed them and exited the motel premises. Officer Taylor noticed the tan vehicle's front passenger's "eyes widen[ed]," and "his body kind of slouched into [the] seat." Officer Taylor was concerned "the passenger recognized [Taylor's] vehicle as a police vehicle, and [that he] tried to put his seatbelt [on] so [Taylor] wouldn't stop him for [a] traffic violation." Officer Taylor testified he believed that the occupants in the Mercedes and tan vehicle met prior to exiting the premises. However, he did not actually see any such rendezvous.

The Mercedes and tan vehicle proceeded to Highway 33. The officers followed. Officer Taylor contacted a police sergeant and asked him to locate

and stop the tan vehicle. The tan vehicle was never stopped. Officer Taylor initiated a motor vehicle stop of defendant's vehicle.

After defendant was pulled over, Officer DePalma approached the driver's side of the Mercedes while Officer Rosenthal approached the passenger side. Officer Taylor remained at the rear of the Mercedes. Officer DePalma asked defendant to produce his driving credentials. Defendant complied. Defendant began recording the encounter using his cellphone.[1] Officer Taylor testified that defendant was "aggressive," "antagonistic," "angry," and "loud" throughout the encounter.

Officer DePalma asked defendant to step out of the vehicle. Defendant argued that the officers had no authority to order him to step out into the cold. He nonetheless complied with the command. The officers told defendant they pulled him over "because of the tinted windows[,] [a]nd . . . his behavior while at the hotel."

The officers posed questions to defendant about his itinerary and why he was at the motel. Defendant repeatedly told the officers that he would not answer questions, explaining, "I have the right to remain silent." The officers continued to pose questions.

[1] The audio/video recording was played at the suppression hearing.

Eventually, Officer Taylor asked defendant if the officers could search his vehicle. Defendant initially refused but relented after Officer Taylor explained that the officers would bring out a drug detection canine and "if the [c]anine indicated on the odor of narcotics, then the vehicle would be seized[,] and [the officers] would apply for searching [the vehicle] . . . that way."[2] Defendant signed a consent-to-search form.

Officers DePalma and Rosenthal searched the Mercedes while Officer Taylor stood with defendant. No contraband was found during the search of the vehicle. Officer Taylor testified that while Officers DePalma and Rosenthal were searching the car, defendant was "[s]till aggressive, kind of antagonistic, [and] kept making racial slurs. [He] [j]ust kept almost baiting us . . . ."

At one point, defendant placed his left hand in his pants pocket. Officer Taylor instructed him to "refrain from putting [his hands] inside his pockets for the duration of the stop." Defendant responded that he was cold but complied. However, after a short time defendant again placed his hands in his pockets. That prompted Officer Taylor to conduct a pat down frisk. Officer Taylor testified as to the procedure for conducting a protective frisk:

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[2] The record does not indicate whether Officer Taylor or either of the other officers called for a canine to come to the scene of the stop.

> If there is a structure or a vehicle[,] I have the person place their hands on that structure or vehicle. I'll start by . . . their neck region. I come down shoulders, go down each arm. Then I will go down their chest down to their pelvic region. I'll reach around towards their groin, towards their rear. Then I go down each leg, down to their ankles.

When Officer Taylor got to defendant's groin region, defendant "pulled his body away." Officer Taylor ordered defendant to remain still. Officer Taylor continued with the pat down and felt something in defendant's groin area. Officer Taylor testified that as he patted down defendant's groin region, "there were items that didn't feel like body parts." He "felt almost like a plastic crinkly sound," which he "immediately recognized . . . as a drug package" based on prior training and experience. Officer Taylor then placed defendant under arrest.

Defendant refused to give Officer Taylor his hands and "locked his arms and wrists together, not allowing [the officers] to put handcuffs on him." A contemporaneous search incident to the arrest revealed $1,630 in defendant's back pocket. The officers did not attempt to remove the suspected CDS from defendant's groin area.

The officers called for a transport vehicle to take defendant to the police station. Concerned that Highway 33 was not a safe location to wait, the officers transported defendant in the unmarked police car to a safer portion of the

roadway. Officer Rosenthal sat with defendant in the back of the unmarked police vehicle because it did not have a cage and defendant kept trying to place his hands in his pockets. A police transport vehicle eventually arrived and took defendant to the police station.

Once at the station, Officer Taylor obtained authorization from Lieutenant William Kirchener to conduct a strip search.[3] Once defendant's pants were removed, two clear plastic bags fell to the ground—one containing cocaine and the other marijuana.

Defendant was charged by indictment with third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1); second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(b)(2); and third-degree possession of cocaine with intent to distribute while in a school zone, N.J.S.A. 2C:35-7(a). Defendant was also charged with the following non-indictable disorderly persons offenses: obstruction of the administration of the law or other governmental function, N.J.S.A. 2C:29-1(a); resisting arrest, N.J.S.A. 2C:29-2(a)(1); and possession of less than fifty grams of marijuana, N.J.S.A. 2C:35-10(a)(4).

[3] Officer Taylor filled out a form for the strip search and explained to the lieutenant that a strip search was needed to retrieve suspected contraband concealed in defendant's groin area.

Defendant filed pretrial motions to suppress physical evidence seized without a warrant and the statements he made to police. The motion judge convened a suppression hearing on June 26 and July 3, 2018. On August 28, 2018, the judge denied defendant's motions, rendering a forty-page written opinion.

In fall 2018, another judge convened a jury trial over the course of four days. The jury convicted defendant of all three charges in the indictment. After the jury returned its verdict, the trial judge, sitting as the trier of fact, found defendant guilty of the disorderly persons offenses and motor vehicle violations.

At sentencing, the trial judge merged the convictions for third-degree possession of cocaine and second-degree possession of cocaine with intent to distribute and imposed a seven-year prison term. The judge imposed a concurrent four-year prison term with a three-year period of parole ineligibility on the school zone conviction. As to the disorderly persons convictions, the judge imposed ninety-day jail terms to be served concurrently with the seven-year prison sentence.

Defendant raises the following contentions for our consideration:

> POINT I
>
> THE STOP OF DEFENDANT'S VEHICLE, HIS DETENTION AT THE SCENE OF THE STOP AND

THE PAT-DOWN SEARCH OF HIS GENITAL AREA AND BUTTOCKS VIOLATED HIS RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND ART. I, PAR. 7 OF THE STATE CONSTITUTION, AND THE DRUGS WHICH WERE ALLEGEDLY SEIZED DURING THE STRIP SEARCH WHICH FOLLOWED SHOULD HAVE BEEN SUPPRESSED AS "FRUIT OF THE POISONOUS TREE."

A. DEFENDANT'S STOP AND HIS DETENTION AT THE SCENE PRIOR TO THE PAT-DOWN SEARCH VIOLATED HIS RIGHT UNDER THE FEDERAL AND STATE CONSTITUTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES.

1. NO LEGITIMATE BASIS FOR THE AUTOMOBILE STOP.

2. UNJUSTIFIED DETENTION FOLLOWING THE STOP.

B. TAYLOR'S PAT-DOWN SEARCH OF DEFENDANT'S GROIN AREA WAS NOT SUPPORTED BY FACTS WHICH INDICATED A REASONABLE NEED FOR OFFICER SAFETY AND WAS THUS AN UNCONSTITUTIONAL SEARCH OF DEFENDANT'S PERSON.

POINT II

THE FRISK OF DEFENDANT'S GROIN AREA AND THE POLICE PROCEDURES SURROUNDING IT

FAILED TO RESPECT DECENCIES OF CIVILIZED CONDUCT AND SHOCKS THE CONSCIENCE AND OFFENDS CANONS OF FAIRNESS AND JUSTICE, THEREBY VIOLATING DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO SUBSTANTIVE DUE PROCESS.

POINT III

THE OFFICERS' REPEATED REFUSAL TO HONOR DEFENDANT'S REPEATED INVOCATION OF HIS RIGHT TO REMAIN SILENT AS THEY PERSISTED IN ASKING HIM QUESTIONS AT THE SCENE OF THE STOP VIOLATED HIS RIGHT TO REMAIN SILENT UNDER THE FIFTH AMENDMENT AND STATE LAW.

POINT IV

THE TRIAL COURT ERRONEOUSLY ADMITTED DEFENDANT'S PRIOR CONVICTION FOR THIRD-DEGREE UNLAWFUL POSSESSION OF A WEAPON.

II.

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) (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). "An appellate court should not disturb the trial court's findings merely because 'it might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case." State v. Nelson, 237 N.J. 540, 551 (quoting Elders, 192 N.J. at 244). "The governing principle, then, is that '[a] trial court's findings should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction.'" Id. at 551–52 (alteration in original) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)).

When the motion court hears testimony in addition to reviewing an audio/video recording of the encounter,[4] an appellate court's own review of the video recording must not be elevated over the factual findings of the trial court. See State v. S.S., 229 N.J. 360, 374–76 (2017).

Importantly, however, "[a] trial court's legal conclusions and its view of 'the consequences that flow from established facts,' are reviewed de novo."

[4] The video recording of the investigative detention was made by defendant using his smart phone. Although the officers were on patrol wearing gear that clearly indicated they were police officers, none of the officers were equipped with body-worn cameras.

Nyema, 249 N.J. at 526–27 (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

III.

We first address defendant's contention that his vehicle was stopped unlawfully. At the motion to suppress, the State did not contend the stop was initiated based on reasonable articulable suspicion to believe that criminal activity was afoot, see Terry v. Ohio, 392 U.S. 1 (1968). Nor did the motion judge find that the motor vehicle stop was predicated on reasonable suspicion of criminal activity. Rather, the court found the stop was lawfully initiated based on a tinted windows violation.[5]

[5] Specifically, the court found:

> In this case, the [o]fficers clearly observed that the defendant['s] . . . vehicle windows were tinted in violation of N.J.S.A. 39:3-75. This observation provided the [o]fficers with a reasonable and articulable suspicion that[] [defendant] committed a motor vehicle violation. As a result of their observation, they initiated a motor vehicle stop. The motor vehicle stop of defendant . . . was valid.

We note the Court in State v. Smith made clear that N.J.S.A. 39:3-75 is inapplicable and that the statute governing window tinting that would authorize a traffic stop is N.J.S.A. 39:3-74. 251 N.J. 244, 253 (2022).

In Smith, our Supreme Court provided guidance on when police may stop a vehicle based on darkly tinted windows. 251 N.J. at 244. The Court ruled that under N.J.S.A. 39:3-74, "reasonable and articulable suspicion of a tinted windows violation arises only when a vehicle's front windshield or front side windows are so darkly tinted that police cannot clearly see people or articles within the car." Id. at 253. This case might have provided an opportunity to address how to account for variables such as distance, observation time, viewing angle, and lighting conditions when determining whether police could "clearly see" occupants or articles inside a vehicle. However, we learned after oral argument that defendant submitted a letter brief to the motion court stating, "the State had probable cause[6] to stop [d]efendant's motor vehicle because his vehicle was equipped with windows in violation of N.J.S.A. 39:3-75. Defendant concedes this."

In State v. Robinson, our Supreme Court held,

> the failure to raise defendant's present claim during the motion to suppress denied the State the opportunity to confront the claim head-on; it denied the trial court the opportunity to evaluate the claim in an informed and deliberate manner; and it denied any reviewing court

[6] We note that reasonable and articulable suspicion of a motor vehicle violation, not the higher standard of probable cause, is sufficient to justify a stop. See State v. Alessi, 240 N.J. 501, 508 (2022); State v. Pitcher, 379 N.J. Super. 308, 314 (App. Div. 2005).

> the benefit of a robust record within which the claim could be considered. . . . Given this record, an appellate court should stay its hand and forego grappling with an untimely raised issue.
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> [200 N.J. at 21.]

See also State v. Witt, 223 N.J. 409, 418–19 (2015) ("For sound jurisprudential reasons, with few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'" (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 23 (1973))); State v. Carillo, 469 N.J. Super. 318, 337 (App. Div. 2021) ("'Parties must make known their position at the suppression hearing so that the trial court can rule on the issue before it.' When a defendant holds an issue for appeal, he or she deprives the State an opportunity to marshal evidence to meet it." (quoting Witt, 223 N.J. at 419)).

Here, defendant did not just fail to raise an issue before the trial court; he explicitly conceded the stop was lawfully initiated. In light of that unequivocal concession, we stay our hand, Robinson, 200 N.J. at 21, and decline to address defendant's contention on appeal there was no legitimate basis for the stop.

IV.

We turn next to defendant's contention the officers unlawfully prolonged the investigative detention so that it became a de facto arrest not supported by

probable cause. Specifically, defendant contends the officers violated his constitutional rights during the roadside encounter by: ordering him to exit the vehicle; broadening the scope of the tinted windows stop by asking questions about his activity in the motel and its rear parking lot; continuing to pose questions after he asserted his right to remain silent; asking for permission to conduct a consent search without reasonable articulable suspicion to believe the search would reveal contraband or other evidence of a crime; and conducting an unlawful frisk that included a pat down of the groin area.

Although there is no rigid time limitation on investigatory stops, "an investigatory detention may become too long if it involves a 'delay unnecessary to the legitimate investigation of the law enforcement officers.'" State v. Chisum, 236 N.J. 530, 546 (2019) (quoting United States v. Sharpe, 470 U.S. 675, 687 (1985)). Our Supreme Court has embraced a two-prong inquiry for determining the reasonableness of a detention. "First, the detention must have been reasonable at its inception. Second, the scope of the continued detention must be reasonably related to the justification for the initial interference. Thus, the detention must be reasonable both at its inception and throughout its entire execution." Id. at 546–47 (quoting State v. Coles, 218 N.J. 322, 344 (2014)).

"[T]here is [no] litmus-paper test for . . . determining when a seizure exceeds the bounds of an investigative stop." Id. at 547 (second alteration and omission in original) (quoting State v. Dickey, 152 N.J. 468, 476 (1998)). "Therefore, '[i]n assessing whether a detention is too long in duration to be justified as an investigative stop, [courts] . . . examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" Ibid. (quoting Dickey, 152 N.J. at 477).

We agree with the motion court that the officers were authorized to order defendant to step out of the vehicle. In State v. Smith, our Supreme Court embraced the United State Supreme Court's holding in Pennsylvania v. Mimms, 434 U.S. 106 (1977), ruling that police may routinely order the driver of a detained vehicle to step out. 134 N.J. 599, 611 (1994).[7]

[7] The motion court ruled that "Officer DePalma's request for Wells to exit his vehicle was permissible based on his combative behavior, yelling, questioning of the officers' authority and overall disruptive behavior. Therefore, the stop of defendant . . . and subsequent request for him to exit his vehicle were valid." We add that police do not require a particularized reason to order a driver to exit a lawfully detained vehicle. Smith, 134 N.J. at 611.

We also agree with the motion court that the officers were permitted to pose questions concerning defendant's activities at the motel and in the parking lot. As our Supreme Court explained in Dickey,

> the reasonableness of the detention is not limited to investigating the circumstances of the traffic stop. If, during the course of the stop or as a result of the reasonable inquiries initiated by the officer, the circumstances "give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those suspicions."
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> [152 N.J. at 479–80 (alteration in original) (quoting United States v. Johnson, 58 F.3d 356, 357–58 (8th Cir. 1995)).]

Although defendant's conduct at the motel did not rise to the level of reasonable and articulable suspicion to justify a criminal suspicion stop under Terry, we are satisfied the officers' observations and the information they learned from the motel clerk warranted a few questions during the traffic stop that had been initiated for a suspected tinted windows violation.[8]

V.

Defendant argues the officers violated his constitutional rights by continuing to pose questions concerning his reason for being at the motel after

[8] As we explained in section III, in view of defendant's explicit concession, for purposes of this opinion we assume the motor vehicle stop was lawfully initiated based on a suspected tinted windows violation.

he asserted his right to remain silent. The audio/video recording confirms that while defendant was shouting his own questions and comments at the officers, he repeatedly responded to the officers' questions by stating, "I have the right to remain silent."

In its landmark Miranda v. Arizona decision, the United States Supreme Court imposed safeguards to enable an individual to exercise meaningfully the right against self-incrimination when interrogated while in police custody. 384 U.S. 436, 477 (1966). Among those safeguards, when a person is in custody for purposes of the Miranda rule, police must immediately stop custodial interrogation and "scrupulously honor" the invocation of the right to remain silent. See State v. Hartley, 103 N.J. 252, 265 (1986). The United States Supreme Court in Miranda explained,

> [o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the [custodial] interrogation must cease. At this point he has shown that he [or she] intends to exercise his [or her] Fifth Amendment privilege; any statement taken after the person invokes his [or her] privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

[384 U.S. at 473–74.]

The prophylactic Miranda rules, including the requirement to "scrupulously honor" a request to stop further questioning, are triggered by custodial interrogation and are designed to "impose[] safeguards to . . . counteract the inherent psychological pressures that might compel a person subject to a custodial interrogation 'to speak where he would not otherwise do so freely.'" State v. Rivas, 251 N.J. 132, 153 (2022) (omission in original) (quoting State v. Wint, 236 N.J. 174, 193 (2018)).

The categorical rule that prohibits further police questioning after the assertion of the Fifth Amendment right to remain silent only applies during a custodial interrogation, not to questions posed during an investigative detention. In State v. Pierson, we held, "Miranda is not implicated when the detention and questioning is part of an investigatory procedure rather than a custodial interrogation." 223 N.J. Super. 62, 66 (App. Div. 1988). Such an "investigatory procedure" has been held to include detention and questioning during a traffic stop or a field investigation. See Berkemer v. McCarty, 468 U.S. 420, 437–38 (1984) (holding that because a vehicle stop is "presumptively temporary and brief" and "public, at least to some degree," it does not automatically trigger the Miranda requirements).

Defendant now asks us to create a new rule that would require police to stop asking questions during an investigative detention when a motorist asserts the right to remain silent. We decline to extend Miranda's categorical requirements to non-custodial questioning that occurs during a motor vehicle stop. We thus conclude the officers were not required to "scrupulously honor" defendant's assertion of the Fifth Amendment right to remain silent by immediately foregoing further questioning.

VI.

Although we reject defendant's contention that his Fifth Amendment rights were violated by the officers' repetitive questions during the investigative detention, we acknowledge that a detained motorist's assertion of the right to remain silent may have Fourth Amendment implications. Continued questioning in the face of the assertion of the right to remain silent is part of the totality of the circumstances we must consider in determining whether the investigative detention was unduly prolonged. In this instance, once defendant made clear he would not cooperate by answering police questions, it should have been apparent to the officers that further questioning would be unproductive, needlessly prolonging the encounter.

We need not determine whether the officers unduly prolonged the investigative detention by continuing to ask questions after defendant asserted his right to remain silent. We focus instead on another investigative technique the officers resorted to—asking defendant to consent to a search of his vehicle. That request has special significance under the New Jersey Constitution.

The circumstances under which police may make such a request are spelled out in Carty. 170 N.J. at 632. In that case, our Supreme Court created a new rule, holding that,

> consent searches following a lawful stop of a motor vehicle should not be deemed valid . . . unless there is reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity. In other words, . . . unless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional.
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> [Id. at 647.]

In State v. Shaw, the Court affirmed that "[t]his prophylactic rule protects the public from the unjustified extension of motor vehicle stops and from fishing expeditions unrelated to the reason for the initial stop." 237 N.J. 588, 619 (2019) (citing Carty, 170 N.J. at 647).

In addressing the lawfulness of the consent search, the motion judge focused principally on whether consent was given voluntarily. The judge devoted comparatively little attention to whether the officers had reasonable articulable suspicion to believe a search of the defendant's vehicle would reveal CDS or other evidence. With respect to the reasonable suspicion requirement, the motion court ruled,

> [d]uring a valid motor vehicle stop, the officer may request the defendant's consent to search his vehicle when he has a reasonable suspicion that the search will produce evidence of criminal activity.
>
> . . .
>
> In this case, Officer DePalma requested the defendant['s] . . . [c]onsent to [s]earch his vehicle based on the fact that he was in an area, specifically in the parking lot of the Red Roof Inn, known as a high-traffic area for illegal narcotics transactions. Additionally, the [o]fficers witnessed a tan vehicle approach [defendant's] vehicle in the back corner of the parking lot, consistent with a[n] illegal narcotics transaction. Further, when Officer DePalma approached the vehicle, [defendant] became extremely combative.[9]
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> [(internal citations omitted).]

[9] In deference to the motion court's factfinding, see S.S., 229 N.J. at 374–76, we accept the court's characterization that defendant was "extremely combative," even though our own review of the video recording suggests that "argumentative" might be a more neutral and objective description of defendant's verbal tirade.

We next review the relevant circumstances to determine whether the officers had reasonable and articulable suspicion to believe that criminal activity was afoot. Reasonable suspicion is defined as "a particularized and objective basis for suspecting a person stopped of criminal activity." State v. Pineiro, 181 N.J. 13, 22 (2004) (quoting State v. Stovall, 170 N.J. 346, 356 (2002)). There must be "some objective manifestation that the person [detained] is, or is about to be engaged in criminal activity." Ibid. (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981)). In State v. Goldsmith, our Supreme Court recently reaffirmed that "[a]lthough reasonable suspicion is a less demanding standard than probable cause, '[n]either "inarticulate hunches" nor an arresting officer's subjective good faith can justify infringement of a citizen's constitutionally guaranteed rights.'" 251 N.J. 384, 399 (2022) (quoting Stovall, 170 N.J. at 372).

When determining whether reasonable suspicion exists, a reviewing court must consider "the totality of the circumstances—the whole picture." State v. Nelson, 237 N.J. at 554 (quoting Stovall, 170 N.J. at 361). A reviewing court must not engage in a "divide-and-conquer" analysis by "looking at each fact in isolation." Id. at 555. The reasonable suspicion inquiry, moreover, must account for the officers' background and training that permits them "to draw on their own experience and specialized training to make inferences from and

deductions about the cumulative information available to them that 'might well elude an untrained person.'" Ibid. (quoting United States v. Arvizu, 534 U.S. 266, 273, (2002)).

Applying these general principles, although we defer to the factual findings made by the motion court, we conclude the officers did not have reasonable articulable suspicion to justify the consent search request. We acknowledge Officer Taylor's testimony that the motel was a high-crime location known for drug transactions is relevant to the totality of circumstances analysis. See Pineiro, 181 N.J. at 26 ("[T]he reputation or history of an area and an officer's experience with and knowledge of the suspected transfer of narcotics [are] relevant factors to determine the validity of a Terry stop."). In Goldsmith, our Supreme Court reaffirmed that presence in a high-crime area is a relevant factor but also emphasized that "[t]he State must do more than simply invoke the buzz words 'high-crime area' in a conclusory manner to justify investigatory stops." 251 N.J. at 404.

We deem it especially significant that the officers did not observe any interactions between defendant and the individuals in the tan vehicle. Indeed, Officer Taylor never observed the two vehicles parked together. Rather, he merely observed the two vehicles leave the parking lot in tandem. Cf. State v.

L.F., 316 N.J. Super. 174, 179 (App. Div. 1998) ("[A] person is privileged, upon noting a police presence, to decide that he or she wishes to have nothing to do with the police, without risking apprehension solely by reason of the conduct manifesting that choice." (quoting State v. Ruiz, 286 N.J. Super. 155, 162–63 (App. Div. 1995))).

We deem it significant the State did not argue to the motion court that the initial stop was based on reasonable suspicion of criminal activity based on the information known to the officers before the Mercedes was pulled over. Nor did the trial court make a finding that the stop was justified by reasonable articulable suspicion that criminal activity was afoot. Rather, as we have noted, the motion court found the stop was justified because of a tinted windows violation. See supra note 5. The gravamen of the State's argument is that reasonable suspicion ripened after the stop. We therefore turn our attention to whether defendant's post-stop conduct, when viewed in conjunction with the pre-stop information and through the lens of the officers' training and experience, presented a particularized and objective basis for suspecting that defendant was engaged criminal activity. See Pineiro, 181 N.J. at 22.

We conclude that nothing the officers learned after the stop bolstered the limited information known to them before the stop. Notably, the motion court

did not explain the nexus between defendant's "extremely combative" attitude and demeanor and the likelihood that contraband or other evidence was concealed in his car. We stress that defendant was not obliged to cooperate with the police investigation other than to produce his driving credentials. He was under no obligation to answer questions concerning his activities at the motel. Cf. State v. Richards, 351 N.J. Super. 289, 305 (App. Div. 2002) ("It is clear that the right to ignore police questioning has become a part of our constitutional fabric and would become unraveled if its exercise were used to justify a Terry stop.").

Nor can defendant's assertion of the right to remain silent be viewed as a suspicious circumstance, suggesting involvement in criminal activity. To draw any such inference would impermissibly burden the exercise of a constitutional right. Cf. State v. Camacho, 218 N.J. 533, 545–46 (2014) (recognizing that juries should not be permitted to draw adverse inference from a defendant's right to remain silent).

Furthermore, even accepting that defendant's demeanor was "extremely combative," see supra note 9, the clear inference to be drawn was that he was angry, not that he was engaged in criminal activity. The unfortunate but undeniable reality is that some citizens, especially persons of color, are

mistrustful of police and become frustrated when accused of criminal wrongdoing during an impromptu roadside encounter. Cf. State v. Tucker, 136 N.J. 158, 169 (1994) (noting "[t]hat some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true."). Indignation, we emphasize, is not an objectively reasonable suspicion factor.

Relatedly, we hold that defendant's decision to record the police encounter on his cellphone is not a suspicious circumstance and in no way suggests ongoing criminal activity. Some citizens deem it prudent to document encounters with law enforcement electronically because they want officers to know their conduct is being recorded so as to deter inappropriate police tactics and false testimony.

The State argues that defendant's combative demeanor was intended to distract the officers, deflecting their attention from his vehicle. We find that argument to be unpersuasive. We fail to see how "baiting" the officers, to use Officer Taylor's characterization, would deflect their attention or somehow assuage their suspicions.

We also take note of what the State did not argue in this matter. We confirmed at oral argument the State does not contend that defendant's behavior suggested he was intoxicated—a circumstance that might support an inference

that drugs or alcohol would be found in the vehicle. Nor did the State argue at the suppression hearing or in its appeal brief that defendant lied to police about his visit to the motel—a circumstance that might support an inference that defendant was concealing criminal behavior.

We add that nothing in the record suggests that the officers recognized defendant or his vehicle from prior encounters or observed narcotics transactions. Nor does the record indicate that the officers conducted a computerized criminal history check once they determined defendant's identity, which might have revealed his prior firearms conviction. Cf. State v. Valentine, 134 N.J. 536, 547 (1994) ("[A]n officer's knowledge of a suspect's prior criminal activity in combination with other factors may lead to a reasonable suspicion that the suspect is armed and dangerous.").

In sum, we conclude (1) the officers did not have an objectively reasonable basis to suspect criminal activity before they stopped defendant's vehicle for a tinted windows violation, and (2) nothing the officers learned after the stop was initiated caused reasonable suspicion to ripen before they asked for consent to search the vehicle. Accordingly, the request for consent improperly prolonged the stop in violation of Carty.

VII.

The frisk that revealed the presence of CDS leading to defendant's arrest was conducted while his vehicle was being searched. The circumstances that prompted the frisk would not have occurred but for the consent search. Thus, the discovery of suspected CDS in defendant's groin area was a "fruit" of the Carty violation. See In Interest of J.A., 233 N.J. 432, 446 (2018); Utah v. Strieff, 579 U.S. 232, 237 (2016). The State does not argue that defendant's combative behavior broke the chain of causation as to invoke the attenuation doctrine exception to the exclusionary rule.[10] See State v. Alessi, 240 N.J. at 525 (under the attenuation doctrine, intervening circumstances such as resisting arrest and eluding police after an unconstitutional stop can justify admission of later-obtained evidence). Accordingly, the CDS revealed during the roadside frisk and retrieved during the stationhouse strip search must be suppressed.

Because we conclude the request to conduct a consent search was unlawful, triggering the fruit-of-the-poisonous-tree doctrine, we need not reach defendant's additional arguments that the frisk and ensuing strip search were themselves conducted unlawfully. Furthermore, because defendant's jury trial

[10] "An issue not briefed on appeal is deemed waived." Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).

convictions for drug possession and possession with intent to distribute must be vacated, we need not address defendant's contention the trial court erred in admitting his prior conviction for unlawful possession of a weapon.

We reverse the denial of defendant's motion to suppress and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed.