SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1878-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ORESTE HERRERA, a/k/a ORESTE HERRERA, JR., CORY LOTT, CORY LOTTO, COREY LOTTO, CARLOS RIVERA, CARLOS RIVE, ORESTA HERRERA, and CARLOS ORESTA HERRERA,

Defendant-Appellant.

Submitted May16, 2022 – Decided June 8, 2022

Before Judges Sabatino and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Warren County, Indictment No. 19-08-0262.

Joseph E. Krakora, Public Defender, attorney for appellant (Alison Gifford, Assistant Deputy Public Defender, of counsel and on the brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Lila B. Leonard, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Oreste Herrera pled guilty to second-degree possession with intent to distribute controlled dangerous substances (CDS) and was sentenced to a custodial term of nine years with fifty-one months of parole ineligibility. He now appeals: (1) the trial court's denial of his three motions to suppress CDS found in his vehicle, and (2) the length of his sentence. We affirm the trial court's denial of defendant's suppression motions and affirm his sentence.

I.

Based upon an affidavit of Detective Brett Marino of the Phillipsburg Police Department, Special Operations Division,[1] the State obtained from a judge a Controlled Data Warrant ("CDW") to surveil defendant's movements in a blue Lincoln he was seen driving and reportedly out of which he was selling heroin. We summarize here the trial court's rendition of the events described in the first suppression motion decision.

[1] Detective Marino was also a Narcotics Task Force Officer with the Warren County Prosecutor's Office. He was responsible for the investigation into defendant's illegal activities.

In January 2019, Detective Brett Marino[2] received information from a cooperating witness ("CW") that a man named "RayRay" was distributing heroin in Phillipsburg. The CW told police that sometimes RayRay drove an SUV, and other times he drove a blue Lincoln sedan. From January to May 2019, the police worked with at least one CW[3] to arrange and carry out numerous controlled buys, each of which defendant was involved in some way.

During the week of January 7, 2019—the same week police received the CW's first tip—Detective Marino engaged a "previously approved" CW to conduct a controlled buy of heroin from RayRay. The CW called RayRay on the phone to arrange the buy, but RayRay told the CW to call a different number. When the CW called that number, another man answered and instructed the CW to park near a certain restaurant in Palmer, Pennsylvania on a certain date. The CW went to that location on that date and was met by an

[2] Detective Marino testified at the second suppression motion hearing that he participated in over 300 narcotic investigations since 2012 and, as the court explained, has had "extensive training, particularly as it related to narcotic investigation and search and seizure tactics by police."

[3] It is unclear from the record whether the CW who gave the tips to police is the same CW who performed the controlled buys, and whether the same CW performed each of the controlled buys.

individual[4] who supplied the CW with narcotics. The CW was under surveillance during the buy, and provided a taped statement afterwards. The State acknowledges that the individual who sold the CW narcotics was not defendant, and that defendant was not seen at this buy.

On January 14, just one week after the first controlled buy, the CW who had given police the initial tip told Detective Marino that RayRay may also be distributing heroin in the area of Irwin Street and Shultz Avenue. Detective Marino began to suspect that defendant was RayRay because he had arrested defendant for distribution of heroin in the past.[5] Additionally, the CW identified defendant as the man who was selling the CW narcotics when Detective Marino showed the CW one photo of defendant.

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[4] Detective Marino wrote in his CDW affidavit that the CW described this individual as a "tall, black male with a black beanie and a black vest," however the court did not note this in its opinion.

[5] Although not noted in the trial court's opinion, Detective Marino wrote in his affidavit that he believed RayRay might be defendant because, in addition to having arrested him before on heroin-related offenses, defendant lived on Schultz Avenue and "often distributed in those areas when the last incident took place."

Defendant argued in his first motion to suppress that Detective Marino's theory that RayRay was defendant was baseless. Defendant noted that the CW told law enforcement that RayRay is tall, whereas defendant is 5'6".

Detective Marino, in conjunction with Pennsylvania police officers and the Warren County Narcotics Task Force, prepared for another controlled buy from defendant with a previously approved CW that same week. This time, defendant advised the CW to meet in West Easton, Pennsylvania. Under surveillance from law enforcement, the CW entered the blue Lincoln, and exited a short time after with suspected narcotics, which were turned over to the Pennsylvania police.

During the week of February 18, the same authorities from the second controlled buy coordinated with the CW to arrange and conduct a third controlled buy. Prior to the third buy, defendant instructed the CW to meet him in the parking lot of a cellphone store, which was where the first controlled buy had occurred. The blue Lincoln was parked near the store. While in the parking lot, defendant called the CW to instruct the CW to enter the blue Lincoln, take the heroin, and leave the money. Under surveillance by law enforcement, the CW followed these instructions, and soon after exited the blue Lincoln with suspected heroin. The CW gave a taped statement afterwards. The State contends that a short time after the buy, Pennsylvania authorities witnessed defendant get into the blue Lincoln and leave from the parking lot.

On March 18, Detective Marino was surveilling defendant driving the blue Lincoln and observed him drive to 122 Glen Avenue in Phillipsburg. Shortly after defendant parked his vehicle, a young male approached the vehicle, reached inside, and walked away.

During the week of March 18, Detective Marino coordinated with the same authorities to conduct another controlled buy. The CW was instructed by defendant to meet in the area around Irwin Street in Phillipsburg. The affidavit described that the CW remained in the CW's vehicle, the defendant handed the CW narcotics, and then walked away. Detective Marino witnessed this interaction, and noted that the man who gave the CW narcotics matched defendant's description.

On March 28, defendant was seen driving the blue Lincoln in Pohatcong Township in a Walmart parking lot. Detective Marino then saw defendant getting gas nearby, but after that Detective Marino was unable to surveil him clandestinely, and so did not witness anything further.

On April 2, defendant was seen driving to the area of 122 Glen Avenue. Defendant pulled to the side of the road, a young man approached the vehicle and reached in, and then walked away into a house. This was the same location as the transaction that took place on March 18.

Based on this information, and mindful that he had arrested defendant for selling heroin in the past, and that defendant had fourteen arrests in New Jersey and five convictions for narcotic and weapons offenses, Detective Marino suspected that defendant was using the blue Lincoln to sell and distribute heroin.

This led Detective Marino to apply for a CDW for the blue Lincoln on April 11, 2019. The vehicle was registered to defendant's girlfriend, with whom he has children. In the affidavit in support of the CDW, Detective Marino detailed the information summarized above. On April 11, Judge Angela Borkowski found that there was probable cause that contraband or evidence of a crime was in the vehicle, justifying the issuance of the CDW. The CDW gave police ten days to install a GPS device on the blue Lincoln, and, once it was installed, thirty days to surveil the vehicle.

The police installed the GPS on April 21. The police were able to track the Lincoln's location by logging into a computer program.

On May 17, Detective Marino observed on the tracking software that the Lincoln was in Jersey City. He dispatched a surveillance team, who tracked the vehicle to a McDonald's parking lot in Greenwich Township in Jersey City. Defendant was having dinner with his family in the McDonald's. The blue

Lincoln was parked next to a black Ford Explorer SUV. After defendant and his family left the restaurant, State Police Trooper Raymond Krov[6] saw defendant move a black duffel bag from the Lincoln to the Ford.

Defendant's family drove away in the Lincoln and defendant drove away in the Ford.[7] Soon thereafter, the police pulled over defendant as he was approaching the Easton-Phillipsburg toll bridge. Police ordered him out of the car. Defendant was immediately placed under arrest, and the Ford was towed to the Phillipsburg police station, where defendant was also brought and held.

While at the police station, a canine unit conducted a sweep around the outside of the car, which indicated a positive result for narcotics. Then Detective Marino promptly applied for a telephonic search warrant to search the car. Within hours, Judge Margaret Goodzeit issued the warrant,[8] and a subsequent search of the vehicle revealed 749 wax folds of heroin.

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[6] Trooper Krov worked for the Warren County Narcotics Task Force when the incident occurred.

[7] Police learned later that this vehicle was a rental car, which had been rented by defendant's girlfriend.

[8] Defendant does not appeal the denial of defendant's third motion to suppress the CDS, in which he argued that the telephonic search warrant was not supported by probable cause.

Police had also pulled over defendant's family in the blue Lincoln, but defendant's girlfriend, who was driving the vehicle, did not consent to a search of the car. The Lincoln was also towed to the Phillipsburg police department because of "tinted windows and a view obstruction violation." During the telephonic hearing in which police obtained a search warrant for the Ford, the police sought and obtained a separate search warrant to search the Lincoln. A search of that vehicle revealed no narcotics.

On August 5, 2019, defendant was charged in Indictment No. 19-08-00262 with third-degree possession of a CDS, N.J.S.A. 2C:35-10(a)(l) (count one), and second-degree possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2) (count two).[9]

Defendant filed three successive motions to suppress the heroin confiscated as a result of the stop, seizure, and subsequent search of his vehicle. First, defendant argued that the CDW was improperly issued because the facts on which police relied to assert probable cause were allegedly insufficient. Second, defendant argued that the stop of his vehicle was unconstitutional because police did not have reasonable suspicion that

[9] Defendant was charged with eight other counts in a separate indictment not at issue in this appeal.

defendant was engaged in criminal activity. Third, defendant argued that the search warrant for defendant's vehicle issued after the vehicle was impounded and the canine sniff had occurred was not supported by probable cause. Judge H. Matthew Curry denied all three of these motions.

In December 2020, defendant entered into a plea agreement, preserving his right under Rule 3:5-7(d) to appeal the suppression rulings. He pled guilty to count two of this indictment, second-degree possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2). Defendant also pled guilty to four third-degree offenses from the other indictment.[10] Pursuant to the plea agreement, the State did not seek a discretionary extended term but recommended an aggregate ten-year sentence with fifty-one months of parole ineligibility.

[10] The four counts include two counts of third-degree distribution of CDS, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3); one count of third-degree possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(3); and one count of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(2). Defendant was sentenced to concurrent five-year custodial terms on each count, to run concurrently with his nine-year custodial term for the drug offenses that are the subject of this appeal.

Consistent with the plea agreement, defendant was sentenced on January 29, 2021 to a custodial term of nine years with fifty-one months of parole ineligibility.

Defendant raises the following points in his brief:

> POINT I
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S SUPPRESSION MOTON BECAUSE THERE WAS NO REASONABLE SUSPICION TO CONDUCT THE MOTOR VEHICLE STOP. ALTERNATIVELY, EVEN IF THE STOP WAS VALID, SUPPRESSION IS STILL WARRANTED BECAUSE THERE WAS NO PROBABLE CAUSE TO SEIZE DEFENDANT AND HIS VEHICLE.
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> A. BECAUSE THERE WAS NO REASONABLE SUSPICION THAT DEFENDANT WAS ENGAGED IN OR ABOUT TO ENGAGE IN CRIMINAL ACTIVITY, THE MOTOR VEHICLE STOP WAS UNCONSTITUTIONAL. ACCORDINGLY, THE EVIDENCE MUST BE SUPPRESSED.
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> B. EVEN IF THERE WAS A REASONABLE SUSPICION TO CONDUCT AN INVESTIGATORY STOP, SUPPRESSION IS STILL WARRANTED BECAUSE THERE WAS NO PROBABLE CAUSE TO CONDUCT A WARRANTLESS SEIZURE OF DEFENDANT AND HIS VEHICLE.
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> POINT II
>
> IF THE TRIAL COURT'S ORDER DENYING SUPPRESSION IS NOT REVERSED, THE MATTER

MUST BE REMANDED FOR A RESENTENCING BECAUSE THE COURT FAILED TO EXPLAN ITS REASONS FOR IMPOSING AN EXCESSIVE SENTENCE AND ERRONESOULY REJECTED TWO MITGATING FACTORS.

For the reasons stated in Part II and III of this opinion, these arguments are not persuasive.[11]

II.

Defendant argues that (1) police did not have reasonable suspicion to conduct the motor vehicle stop, and (2) police did not have probable cause to arrest[12] defendant and to seize and impound his vehicle. Therefore, he argues, the CDS confiscated as a result of these unconstitutional seizures must be suppressed.

In evaluating a trial judge's ruling on a suppression motion, we afford considerable deference to the judge's role as a factfinder. Our review of the

[11] We discuss the suppression rulings out of chronological sequence to correspond with the sequence of defendant's substantive arguments.

[12] Although defendant asserts that his arrest was unconstitutional because there was not probable cause to arrest him, the subjects of this appeal, listed in the case information statement and in the point headings of his brief, are the trial court's three denials of his motions to suppress the CDS found in his vehicle, not on his person. Therefore, the issue of defendant's arrest is not properly raised in this appeal and we will not discuss the merits of that argument.

judge's factual findings is "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999). We must defer to those factual findings "so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015) (internal citations omitted); see also State v. Nelson, 237 N.J. 540, 551 (2019) (same). As part of that deference, we particularly must respect the trial judge's assessments of credibility, given the judge's ability to have made "observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Locurto, 157 N.J. at 474 (same).

By contrast, the trial court's interpretation of the law and the legal "consequences that flow from established facts" are reviewed de novo. State v. Gamble, 218 N.J. 412, 425 (2014).

A.

The first issue presented is whether police had reasonable suspicion to stop defendant's vehicle, which was the subject of defendant's second motion to suppress. On appeal, defendant argues that reasonable suspicion did not exist because (1) the CW tips police had received in January 2019—including one claiming defendant buys heroin for distribution in Jersey City—were unreliable in the first place and stale as of May 2019 and (2) defendant's

moving of a bag from one vehicle to another "bore no indicia of criminality." Defendant argues it was improper for law enforcement to rely on the controlled buys and the CDW to conduct the motor vehicle stop, because the buys, like the CW's tips, were also stale, and each buy had inherent problems which weighed significantly against defendant's culpability. Defendant also notes that the substances brought back from the buys by the CW were not field tested, and the actual substance was not included in the police's affidavit for the CDW.[13]

A motor vehicle stop is lawful when based on reasonable and articulable suspicion that a traffic or a criminal offense has been or is being committed. Delaware v. Prouse, 440 U.S. 648, 663 (1979); State v. Carty, 170 N.J. 632,

[13] Defendant made almost identical arguments in his suppression motions that he now makes on appeal. In arguing that the warrantless stop of his vehicle was unconstitutional because police lacked reasonable suspicion to conduct the motor vehicle stop, defendant argued that police had only "an unreliable hunch" that he was in possession of CDS at that time. Defendant argued the moving of the bag from one vehicle to another provided "no reasonable inference that the contents of the bag were narcotics or any other form of contraband." Additionally, defendant argued that the other information on which police relied to stop the vehicle—including the tip that defendant bought CDS in Jersey City—did not constitute reasonable suspicion because the source of that information was "suspect," and the tip was never corroborated because defendant was never observed engaging in a drug transaction in Jersey City.

639-40 (2002). The State has the burden to prove by a preponderance of the evidence that such suspicion was present. State v. Amelio, 197 N.J. 207, 211 (2008).

To determine whether reasonable suspicion existed, a court must consider the totality of the circumstances, viewing the "whole picture" rather than taking each fact in isolation. Nelson, 237 N.J. at 554-55. This analysis may also consider police officers' "background and training," including their ability to "make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" Id. at 555 (quoting United States v. Arvizu, 534 U.S. 266, 273 (2002)). Additionally, "police may rely on behavior that is consistent with innocence as well as guilt in finding reasonable and articulable suspicion to conduct an investigatory stop." State v. Pineiro, 181 N.J. 13, 25 (2004).

On March 3, 2020, in his second suppression ruling, Judge Curry held that the police did have reasonable suspicion to stop defendant's vehicle. The judge explained:

> Detective Marino outlined a multiple-month investigation which he conducted in coordination with . . . law enforcement officers from the Warren County Drug Task Force as well as Pennsylvania law enforcement agencies. The investigation included

> four (4) controlled CDS purchases involving Defendant and the Lincoln MKS, the issuance of a CDW, and numerous surveillance events. As counsel indicated, a prior motion to suppress was filed, and this Court upheld the constitutionality of the issuance of the CDW.
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> . . . .
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> Detective Marino testified his knowledge and awareness that Defendant made purchases of CDS in Jersey City, and would subsequently return with the CDS to Warren County to distribute locally as well as in Pennsylvania.
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> . . . .
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> Upon becoming aware that the tracked vehicle was located in Jersey City, Detective Marino implemented the surveillance unit's assistance in tracking the Defendant upon his return to Warren County. Trooper Krov testified credibly that he recognized Defendant and indicated that he observed the small bag being indicative of carrying CDS taken from one vehicle and placed in the other. In following the vehicle upon its departure, Detective Marino further indicated the vehicle was heading towards Pennsylvania, a known distribution point for the CDS.

The trial court found that Detective Marino was credible and had pointed to "specific and articulable facts" to stop the vehicle, including: (1) the prior controlled buys involving defendant and the Lincoln, (2) knowledge of the location of the Lincoln in Jersey City, and (3) knowledge of the locations of

the CDS distribution. These, "taken together with all of the rational inferences drawn from [them], based upon the totality of circumstances" show that Detective Marino was justified in conducting the motor vehicle stop because law enforcement believed defendant was committing a criminal violation. Similarly, as noted in the block quote above, the court also found Trooper Krov testified "credibly."

At the motion hearing and now on appeal, defendant argues that because the CDW and the information included therein are inapplicable to consider in the reasonable suspicion analysis, the moving of the black bag from one vehicle to another is not enough to constitute reasonable suspicion. See, e.g., State v. Kuhn, 213 N.J. Super. 275, 276, 282 (App. Div. 1986) (finding no reasonable suspicion where officer testified that the arrangement of three individuals in and around a vehicle "fit[] the profile of a drug transaction," because "[the arrangement] could have been attributed . . . to coincidence . . ." and the officer had no other evidence of criminal activity, including even a furtive gesture). Although the trial court agreed with defendant's contention that the movements and location of a vehicle alone are not "indicia of criminality," the court explained that that argument fails in this case because in

making it, "[d]efendant dismisses the entirety of the investigation and all of the controlled purchases of CDS . . . ."

We agree with the trial court there was reasonable suspicion to stop defendant's vehicle. To begin, the CDW, which was issued not even a month before the stop, was based on probable cause that defendant was involved in distribution of CDS. Therefore, a least three weeks before the stop, police had probable cause that contraband or evidence of a crime was in the blue Lincoln. Probable cause, which can provide grounds for a seizure (i.e., the CDW)—requires the State to meet a higher burden of proof than the one the State must meet to perform a stop of the vehicle, which is reasonable suspicion. State v. O'Neal, 190 N.J. 601, 611-12 (2007). Therefore, if probable cause existed at the time of the stop, reasonable suspicion existed as well.

The probable cause to obtain the CDW was established because (1) New Jersey and Pennsylvania law enforcement authorities had been investigating defendant for four months; (2) police were aware of defendant's prior criminal history, which included CDS distribution; and (3) multiple controlled buys of CDS had occurred in which defendant was involved in some way. All of this was enough to constitute probable cause, let alone reasonable suspicion, for

the police to properly receive a CDW to track the location of the vehicle associated with defendant's illegal activities.

Defendant argues on appeal that the information underlying the CDW could not have been used as grounds for reasonable suspicion because three weeks had passed between the date the CDW was issued and the date the stop was effectuated, making the controlled buys and the CW's tips "stale." This argument fails.

The CW tips describing that defendant sold drugs out of a blue Lincoln, distributed in certain areas in New Jersey and Pennsylvania, and bought drugs for distribution in Jersey City were received by police in January 2019. Multiple controlled buys involving defendant, as well as surveillance of defendant participating in other drug transactions, occurred throughout January, February, March, and April 2019.[14] The CDW was issued and the GPS tracking device was affixed to defendant's vehicle in April 2019. Defendant's vehicle was surveilled, and his movements tracked in April and May. Defendant's vehicle was finally stopped and seized on May 17.

[14] The State notes in its brief that another controlled buy in which the blue Lincoln was used occurred in Pennsylvania on May 7. Defendant claims he was not provided with this information in discovery.

This timeline does not show staleness; instead, it shows a thorough ongoing investigation. Law enforcement steadily built up its case and amassed evidence against defendant in a measured way. An effort by police to not rush and potentially violate defendant's rights by making a premature arrest, search, or other seizure does not bespeak staleness. See State v. Sager, 169 N.J. Super. 38, 44-46 (App. Div. 1979) (finding warrant was not stale when executed despite being issued two months earlier, because other investigatory information was collected in the interim period). Instead, it exemplifies prudence and a sensitivity to personal rights. Therefore, the facts underlying the CDW were properly used by police as reasonable suspicion to stop defendant's vehicle.

In addition to that pre-existing probable cause (and thereby, inherently, reasonable suspicion), defendant's actions in the interim period between the GPS being placed on his vehicle and defendant being stopped by police also contribute to a finding of reasonable suspicion. The surveillance of defendant's vehicle during this period showed that his movements were consistent with law enforcement's understanding of his illegal activities—that defendant obtained CDS in Jersey City and then returned to Warren County to distribute CDS locally. Further, on the day of the stop, defendant was in

Jersey City and was seen placing a bag in his vehicle that police testified, in their experience, can be used for transporting drugs. It was reasonable for police to suspect defendant was driving south to distribute CDS that were in the black bag. See Pineiro, 181 N.J. at 25 (finding police had reasonable suspicion to stop defendant after police observed defendant, who they knew dealt drugs, give someone a pack of cigarettes, which police knew was a method of containing drugs, and neither of the men were smoking).

Under the totality of the circumstances, police had reasonable suspicion that defendant was engaged in criminal activity. Defendant isolated each fact instead of looking at them in the totality; the black bag was not unrelated to the controlled buys and the CW's tips. See Nelson, 237 N.J. at 554-55 (explaining that in a reasonable suspicion analysis, a court must consider the "whole picture" and "not engage in a 'divide-and-conquer' analysis by looking at each fact in isolation").

We briefly address defendant's other arguments for sake of completeness. Defendant additionally argues that the trial court was wrong to consider the controlled buys as indicia of reasonable suspicion because, not only were they stale at the time of the stop, but also, they were (1)

"problematic" and not inculpatory of defendant, and (2) unreliable because the drugs bought in the buys were not field tested.

Defendant argues the buys were "problematic" because Detective Marino did not see defendant during each of the controlled buys; instead, during only one of the buys he saw a man who resembled defendant. Defendant argues this makes the buys less reliable. Further, defendant argues the affidavit did not contain any information about the CW who provided the tips to the police or the "previously approved" CW who arranged and engaged in the controlled buys with defendant. Without knowing more about the CWs, defendant argues it is impossible to establish their reliability and truthfulness, as well as the veracity of the CW's tips and the veracity of the CW's reported interactions with defendant, respectively.

To review whether the controlled buys where "deeply problematic," and thus unreliable for purposes of relying on them for reasonable suspicion, we review the first suppression ruling, in which the trial court upheld the constitutionality of the CDW, and in turn, upheld the issuing-court's consideration of the controlled buys for purposes of granting the CDW.

After reviewing the affidavit submitted in support of the CDW and the issuing-court's decision, the trial court upheld the constitutionality of the CDW

and denied defendant's first motion to suppress the CDS. The trial court reasoned:

> Considering the totality of the circumstances including the multiple sources of corroboration including controlled purchases, surveillance, description of the vehicles, the Defendant's extensive criminal history involving narcotics distribution, and Detective Marino's extensive training and experience in narcotics investigation, the Court finds there was sufficient probable cause to support the issuance of the Communications Data Warrant.

The trial court did not make any findings about "problems" with the buys or the tips that would create unreliability.

In accordance with the trial court, we do not find that any of the factors listed above made the buys "problematic," and therefore unworthy of being relied upon for purposes of reasonable suspicion. The trial court noted that a CW is "previously approved" when the CW has been used in previous investigations and is proven to be reliable. See State v. Sullivan, 169 N.J. 204, 213 (2001) ("An informant's veracity may be shown by demonstrating that the informant proved to be reliable in previous police investigations."). Therefore, even though Detective Marino only saw a man who resembled defendant during one of the buys, the CW's reports from the buys can be generally

trusted. Additionally, the buys all had many things in common, including the blue Lincoln and nearby locations.

The CW's tips were mostly corroborated as well, which increased the reliability of the CW. See, e.g., State v. Smith, 155 N.J. 83, 95 (1998) ("Because the information contained in an informant's tip is hearsay and must be invested with trustworthiness to be considered as probative evidence, corroboration is an essential part of the determination of probable cause. Independent corroboration is necessary to ratify the informant's veracity and validate the truthfulness of the tip.").

In some ways, this case is similar to State v. Birkenmeier, 185 N.J. 552 (2006). There, the Supreme Court reversed the Appellate Division, which had reversed the trial court, which originally found that reasonable suspicion existed to support the stop of defendant's vehicle based on a confidential informant who provided

> particularized information concerning defendant: defendant's name; defendant's address; defendant's physical description; the make, model and license tag number of defendant's car; the fact that defendant would be leaving his home at 4:30 p.m. to make a marijuana delivery; and the fact that defendant would be carrying the drugs in a laundry tote bag.
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> [Id. at 561.]

All of this information in Birkenmeier was corroborated by police. Ibid. The corroboration of the predictive element of the tip, that that defendant would be carrying the drugs in a laundry tote bag at a certain time in a specific location, is particularly important to ensure the knowledge and truthfulness of the informant. Illinois v. Gates, 462 U.S. 213, 244-46 (1983).

In defendant's case, the CW likewise provided specific and predictive information to police that did happen. For example, the CW told police that defendant bought drugs in Jersey City, the vehicle defendant was using to distribute drugs, and in which areas defendant distributed drugs. The CW was correct about the vehicle and the areas; surveillance of defendant's vehicle showed defendant's recurring route between Jersey City and south Jersey and Pennsylvania.

This case is also like Birkenmeier because the CW's tip made a seemingly innocent action—defendant's moving of a black bag from one vehicle to another—into something likely criminal. That is directly analogous to the confidential informant's tip in Birkenmeier that at 4:30 p.m. the defendant would leave his house to make a marijuana delivery, while carrying the drugs in a laundry tote bag. 185 N.J. at 561-62. Without more, walking

out of the house with a laundry bag is an innocent action. But with the confidential informant's tip, it became criminal. Ibid.

Although more information about the CWs could help a judge in deciding to issue a warrant, the evidence about the CWs, in addition to all of the other information in the affidavit, was more than enough to constitute probable cause for the purpose of granting the CDW, and in turn, more than enough to constitute reasonable suspicion for the stop of defendant's vehicle. See also Gates, 462 U.S. at 235-37 (recognizing that affidavits are often written by nonlawyers "in the midst and haste of a criminal investigation . . . . where [t]echnical requirements of elaborate specificity . . . have no proper place . . .").

Lastly, based on the affidavit, defendant contends that the substances "bought" in the controlled buys were not field tested. Defendant is correct that the affidavit did not contain specifically whether the CDS obtained were heroin. However, this did not affect the totality-of-circumstances analysis in a debilitating way. The field-testing results would only be cumulative evidence.

In sum, the pre-existing probable cause underlying the CDW, which carried over to the day of the stop, was more than enough to constitute reasonable suspicion to authorize police to stop defendant's vehicle.

Defendant's activities in the interim period between the issuance of the CDW and the vehicle stop also created reasonable suspicion. Therefore, we agree with the trial court that police had reasonable suspicion to stop defendant's vehicle and we affirm the denial of defendant's second suppression motion.

B.

In the alternative, defendant argues that even if police did have reasonable suspicion to stop his vehicle, police did not have probable cause to seize the vehicle. For many of the reasons explained above, we disagree.

The stop of an automobile is proper if, among other things, there is reasonable suspicion that criminal activity has been or is being committed. Amelio, 197 N.J. at 211. A warrantless search of the automobile is proper if the conditions and circumstances of the automobile exception to the warrant requirement exist. State v. Witt, 223 N.J. 409, 422 (2015). These "circumstances" include probable cause that the vehicle contains contraband or evidence of an offense and that the stop was spontaneous and unforeseeable. Id. at 446-48; State v. Rodriguez, 459 N.J. Super. 13, 15 (App. Div. 2019). If the stop meets these criteria, law enforcement has the authority to search the vehicle at the scene without a warrant. Ibid. If police has probable cause that the vehicle contains evidence of a crime, but the stop was not spontaneous or

foreseeable, the police department can tow and impound the car, secure a search warrant, and then search the vehicle.[15] Id. at 448-49.

The main issue in this portion of the appeal is whether there was probable cause for the vehicle to be towed to the police department, where it was later canine-sniffed and searched after a search warrant was issued.

Defendant argues that because the stop allegedly was not spontaneous or unforeseeable, law enforcement did not have a permissible basis to tow the car, making the CDS found in the subsequent search of the vehicle fruits of the poisonous tree. That argument fails, however, because defendant conflates the discrete rules for search and seizure of an automobile. Defendant contends defendant's vehicle was improperly seized, because, even if there was probable cause the vehicle contained contraband or evidence of a crime, the stop was not unforeseeable and spontaneous, as required by Witt. That is not what is required by Witt, however. The requirements of foreseeability and spontaneity only apply to on-the-scene searches of automobiles, where there is probable

[15] There are reasons other than the lack of spontaneity and unforeseeability for police to choose to tow the vehicle and obtain a search warrant to search it later, as opposed to performing an on-the-scene search. See Rodriguez, 459 N.J. Super. at 24 (listing these reasons, such as "heavy traffic, poor lighting, weather conditions, [and] security concerns").

cause the vehicle contains contraband or evidence of a crime. Witt, 223 N.J. at 449. To tow and impound the vehicle at that point, only probable cause is needed. Ibid. Therefore, the conditions of the automobile exception do not have to be met in this case because the vehicle was only seized at the scene, not searched.

Defendant essentially argues in the alternative that if only probable cause was required to tow the vehicle, police did not have such probable cause because police only relied on the CW's tip that defendant buys CDS in Jersey City, the observation of the bag transfer, and the controlled buys. Defendant argues also that nothing occurred during the investigatory stop that would have given rise to probable cause, such as the existence of contraband in plain view. Defendant's innocuous portrayal of the events that occurred disregards the events that preceded and followed the issuance of the CDW.

We agree with the trial court's finding that there was probable cause that contraband or evidence of a crime were located in defendant's vehicle, which authorized law enforcement to seize and then tow the vehicle. Law

enforcement followed the proper procedure by towing the car, applying for a search warrant, and then searching the vehicle at the police department.[16]

Probable cause exists where, given the totality of the circumstances, there is a "fair probability that contraband or evidence of a crime will be found in a particular place." State v. Moore, 181 N.J. 40, 46 (2004) (quoting Gates, 462 U.S. at 238). The central component of probable cause "is a well-grounded suspicion that a crime has been or is being committed." State v. Nishina, 175 N.J. 502, 515 (2003) (quoting Sullivan, 169 N.J. at 211). This standard for probable cause is identical under both the Fourth Amendment of the Federal Constitution and Article I, Paragraph 7 of the New Jersey Constitution. State v. Novembrino, 105 N.J. 95, 122 (1987) (quoting Gates, 462 U.S. at 238). Probable cause may be based in part on information obtained by informants, so long as a substantial basis is presented for crediting that information. State v. Jones, 179 N.J. 377, 389 (2004).

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[16] Defendant asserts in his brief that because the search warrant-issuing judge relied heavily on the canine sniff to find that there was probable cause to grant the search warrant, there could not have been probable cause to seize the vehicle without the canine sniff. We disagree for the reasons we have already explained. The canine sniff could have constituted another indicia of probable cause for police to seize the vehicle, but the other information was sufficient.

On December 5, 2019, Judge Curry denied defendant's first motion to suppress the CDW, finding the CDW was based on probable cause and was "therefore constitutional." Although defendant argued that the controlled buyd which formed the basis for probable cause were flawed or did not directly inculpate defendant, the trial court disagreed. In a detailed written opinion, the trial judge explained why, among other reasons, probable cause existed for law enforcement to seize defendant's vehicle:

> In this case, three controlled purchases and two suspected drug transactions corroborate information previously provided by a confidential witness. The CW's information provided specific details as to the location of the sales, and the individual selling, and the type of CDS. That statement is corroborated by three controlled purchases all involving the defendant, his vehicle, or his phone number. The controlled purchases were conducted in a manner to ensure maximum corroboration, with officers searching the cooperating witness prior to and following the purchases. The cooperating witness wore a recording device. Suspected CDS was retrieved each time. The cooperating witness provided audio statements immediately after each purchase. Two other suspected drug transactions and the defendant's criminal record provide additional corroboration.
>
> [(Emphasis added).]

For these reasons explained at length above, we agree that the above facts constitute probable cause and the vehicle was properly seized and in law enforcement's possession.

III.

Lastly, we turn to defendant's sentencing arguments. Defendant was sentenced to a custodial term of nine years with a discretionary fifty-one-month parole disqualifier. Defendant argues that his sentence was improperly imposed because: (1) the court allegedly did not explain why it found aggravating factors three, six, and nine; (2) the court allegedly did not explain why it was imposing a sentence at the top of the offense's range; and (3) the court erred in rejecting mitigating factors eight and nine. We reject these arguments and affirm defendant's sentence.

As our Supreme Court has reaffirmed, "when [trial judges] exercise discretion in accordance with the principles set forth in the Code [of Criminal Justice] and defined by [the Court] . . . , they need fear no second-guessing." State v. Bieniek, 200 N.J. 601, 607-08 (2010) (quoting State v. Ghertler, 114 N.J. 383, 384-85 (1989)). Once the trial court has balanced the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and -1(b), it "may impose a term within the permissible range for the offense." Id. at 608; see

also State v. Case, 220 N.J. 49, 54 (2014) (remanding for resentencing because the trial court relied on "unfounded assumptions rather than evidence in the record" in finding a "critical" aggravating factor); State v. Fuentes, 217 N.J. 57 (2014) (remanding for resentencing because the trial court "did not adequately explain its findings" for the aggravating factors).

In its oral opinion after hearing argument from both parties at the sentencing hearing, the court first discussed defendant's extensive prior criminal history. The offense to which defendant pled, as well as the other offenses to which defendant pled from the other indictment, represent his seventeenth through twenty-first indictable convictions in New Jersey. Defendant has been convicted of

> conspiracy, distribution of CDS on or near school property; possession of a weapon for an unlawful purpose; aggravated assault; absconding; false motor vehicle insurance cards; two counts of receiving stolen property; contempt; possession of CDS; unlawful possession of a weapon and resisting arrest.

Defendant also has numerous prior convictions in Pennsylvania.

Immediately after this discussion, the trial court found aggravating factors three, N.J.S.A. 2C:44-1(a)(3), risk that defendant will commit another offense; aggravating factor six, N.J.S.A. 2C:44-1(a)(6), extent of defendant's

prior criminal history and the seriousness of the offenses which he has been convicted; and aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), the need to deter defendant and others from violating the law were met.

Then the court found that mitigating factor four applied, that defendant's substance abuse issues constitute some grounds tending to excuse or justify his conduct. N.J.S.A. 2C:44-1(b)(4). However, the court determined that defendant's illegal activities were motivated by monetary gain as opposed to by issues with substance abuse, which gave the factor less weight. The court did not find mitigating factor eight, that defendant's conduct was the result of circumstances unlikely to recur, despite defendant's argument to the contrary. N.J.S.A. 2C:44-1(b)(8). Although defendant argued that he attended all of the treatment programs available to him while he has been incarcerated and that he attends A.A. meetings regularly, the court found that defendant has "made a career of dealing drugs" and so the court cannot be confident the circumstances of the crime are unlikely to recur.

The court also did not find mitigating factor nine, that the character and attitude of defendant indicates that he's unlikely to commit another offense, despite defendant's urging. N.J.S.A. 2C:44-1(b)(9). The court acknowledged that defendant has been a "model prisoner," is a "nice person," and "wants to

get out and be with his family." Nevertheless, the court was still unsure, albeit hopeful, that the custodial sentence will provide defendant with the rehabilitation he needs.

The court found the aggravating factors outweighed the mitigating factors, and then announced defendant's sentence.

Defendant is facially correct that the judge did not explicitly explain why aggravating factors three, six, and nine applied; why he was imposing a sentence near the top of the offense's sentencing range; or why he imposed the highest probationary disqualifier. In Fuentes, the Supreme Court reiterated the well-established principle that a sentencing court's "clear and detailed statement of reasons is . . . a crucial component of the process conducted by the sentencing court, and a prerequisite to effective appellate review." 217 N.J. at 74. Despite these claimed deficiencies, this court is able to effectively review the trial judge's decision.

With regard to defendant's first argument, the fact that the discussion of the aggravating factors came right after the discussion of defendant's extensive criminal history is sufficient to explain that this history was the cause of the judge's finding of those aggravating factors. The judge did not abuse his discretion in finding the three aggravating factors.

As to the whether the court did not explain why it imposed a sentence at the top of the range, the court actually imposed one year less than the State recommended pursuant to the plea agreement. The fact that the judge did not specifically say he was starting at the top of the range was not so troublesome, because that was what was recommended by the State, of which defendant had sufficient notice. Additionally, it is evident that even though nine years is close to the top of the range for the offense, the court evidently found the mitigating factors had some weight, because defendant was given a shorter term than what was recommended. The judge called defendant a "nice person," a "model prisoner," and recognized that he wants to be back with his family.[17]

[17] Defendant also argues that the judge did not explain why he imposed the fifty-one-month parole disqualifier, which was recommended by the State in the plea agreement. Although the judge did not address this in his oral opinion, he cited State v. Brimage in defendant's judgment of conviction as support for his decision. 153 N.J. 1 (1998). Brimage held that prosecutors must follow certain guidelines when offering plea agreements in certain serious offenses. Id. at 23. Therefore, although giving an explicit explanation for this decision would have been more prudent, the judge imposed the parole ineligibility term that the State recommended, consistent with the principles announced in Brimage. Ibid. Therefore we find the judge did not abuse his discretion in imposing the fifty-one-month parole disqualifier.

Despite its observations that defendant is a "nice person," the court did not abuse its discretion in not finding mitigating factors eight and nine. First, the court provided a sufficient explanation why it was rejecting those factors. Mitigating factor eight applies if defendant's conduct was the result of circumstances unlikely to recur. N.J.S.A. 2C:44-1(b)(8). Even though defendant is seemingly turning his life around while in custody, the court found that defendant had "made a career of dealing drugs." With defendant having over twenty-one indictable convictions in New Jersey alone, we find the court did not abuse its discretion in lacking confidence that the circumstances of the crime are unlikely to recur.

The court also did not find mitigating factor nine—that the character and attitude of defendant indicate that he's unlikely to commit another offense. N.J.S.A. 2C:44-1(b)(9). For reasons similar to those described above, we find the court did not abuse its discretion in not finding mitigating factor nine.

The judge thoughtfully respected the plea agreement, balanced the aggravating and mitigating factors, and considered defendant's extensive criminal history in determining defendant's sentence. We affirm defendant's sentence.

IV.

Any other arguments by defendant we have not addressed lack sufficient merit to warrant discussion. R. 2:11-3(e)(2). Affirmed.

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

CLERK OF THE APPELLATE DIVISION