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Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3359-21T4

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Salem County.
v.	:	Sat Below:
DELSHON J. TAYLOR, JR.	:	Hon. Linda L. Lawhun, P.J.Cr.
Defendant-Appellant.	:	

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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PRELIMINARY STATEMENT

Following the specific instructions from this Court on remand, the trial judge correctly applied the factors in State v. Williams, 192 N.J. 1 (2007), to determine that defendant's intentional flight after being detained by police was a sufficient attenuating circumstance from defendant's initial detention. As a result, the judge correctly denied the motion to suppress the handgun loaded with hollow-point bullets that defendant threw to the ground while fleeing from police.

The judge also considered the relevant factors for Graves Act waiver and, assiduously respecting the obligation of judicial restraint and deference, held that the prosecutor's office did not commit a patent and gross abuse of discretion in not seeking a Graves Act waiver in defendant's case. Defendant's suggestion that the court should instead have applied "ordinary abuse of discretion" review is in contradiction to a continuing line of precedent from this Court applying the "patent and gross abuse of discretion" standard and should be rejected.

Judge Lawhun conscientiously applied the correct legal standards in both instances and her findings must be affirmed.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On July 18, 2018, Salem County Indictment No. 18-07-0257-I charged defendant, Delshon J. Taylor, with (Count One) second-degree unlawful possession of a handgun, in violation of N.J.S.A. 2C:39-5b(1); (Count Two) second-degree possession of a handgun for an unlawful purpose, in violation of N.J.S.A. 2C: 39-4a(1); (Count Three) fourth-degree obstructing the administration of law or other government function, in violation of N.J.S.A. 2C:29-1a; (Count Four) fourth-degree tampering with physical evidence, in violation of N.J.S.A. 2C:28-6(1); and (Count Five) fourth-degree possession of hollow point bullets, in violation of N.J.S.A. 2C:39-3f(1). (Da1 to 2).[1]

Suppression motion.

On October 12, 2018, the Honorable Linda L. Lawhun, P.J.Cr., held a hearing on defendant's motion to suppress physical evidence seized during his

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[1] 1T refers to October 12, 2018 transcript of suppression hearing.
2T refers to November 2, 2018 transcript of suppression-motion decision.
3T refers to February 8, 2019 transcript of motion for reconsideration.
4T refers to October 10, 2019 transcript of decision on remand.
5T refers to April 26, 2021 transcript of plea.
6T refers to July 16, 2021 transcript of sentencing adjournment.
7T refers to July 23, 2021 transcript of hearing on Graves Act waiver.
8T refers to June 24, 2022 transcript of sentencing.
PSR refers to presentence report.
Da refers to defendant's appendix.
Dca refers to defendant's confidential appendix.

flight from police detention on November 15, 2017. (1T).[2] On November 2, 2018, Judge Lawhun denied defendant's suppression motion in an oral opinion, as well as issued a written opinion to that effect. (2T3-24 to 13-24: Da8 to 14).

On February 8, 2019, Judge Lawhun heard defendant's motion for reconsideration of her denial of the suppression motion. (3T). The judge granted defendant's motion for reconsideration and granted the suppression motion. (3T28-20 to 29-17; Da15 to 22). On February 11, 2019, and February 21, 2019, respectively, the judge entered an order and written opinion memorializing her decision. (Da15; Da16 to 22).

On March 13, 2019, the State moved for leave to appeal, which this Court granted on April 4, 2019. (Da23). On August, 28, 2019, this Court summarily remanded the matter to the trial court with instructions to apply the factors in State v. Williams, 192 N.J. 1 (2007), to defendant's case (Da24 to 32). On October 10, 2019, Judge Lawhun held a remand hearing, after which she denied defendant's suppression motion. (4T; 4T18-15 to 23-21; Da33).

Plea.

On April 26, 2021, defendant pleaded guilty to Count One of the

[2] Police recovered a black Bryco Jennings T380 semi-automatic handgun loaded with six hollow nose bullets. (PSR4; Da1 to 2; Da13).

indictment before Judge Lawhun. (5T7-9 to 11; 5T8-15 to 25; Da103; PSR1). Defendant also agreed to pay restitution in the amount of $561.97, (5T3-20 to 4-11), as well as to forfeiture of the handgun seized by police. (5T16-9 to 16; Da103). In exchange for defendant's guilty plea, the State agreed to recommend that defendant be sentenced to five years in State prison with three and one-half years' parole ineligibility, and to dismiss the remaining counts of the indictment. (5T7-11 to 16; Da20; PSR1; PSR5). The State also agreed that defendant's sentence would run concurrently with the sentence to be imposed on a separate charge for which defendant had just been arraigned, namely, fourth-degree resisting arrest under Indictment No. 21-03-00208-I. (5T7-17 to 20; PSR1; PSR5; Da41). After ascertaining that defendant knowingly and voluntarily was entering his plea (5T8-3 to 14-11) and that the plea was grounded in a sufficient factual basis (5T14-9 to 25), Judge Lawhun accepted defendant's guilty plea. (5T15-4 to 6).

Graves Act waiver.

At the conclusion of the court's October 10, 2019, oral ruling denying defendant's suppression motion, defense counsel mentioned his "hopes that there might be some sort of resolution related to a Graves Act waiver" and indicated his intention to discuss the issue with the assistant prosecutor. (4T24-1 to 25). On July 16, 2021, defendant's sentencing date, the court

confirmed that defense counsel had requested such a waiver, but that the prosecutor's office had not agreed to seek one. (6T7-13 to 8-14). Since a different assistant prosecutor appeared on July 16, the judge postponed defendant's sentencing to allow defense counsel to speak with the assistant prosecutor who originally had handled defendant's case (Michael Mestern). (6T8-15 to 9-21). On July 23, 2021, defendant's next court appearance, Judge Lawhun again postponed the case to allow the original assistant prosecutor (Michael Mestern) to file a written response to defendant's motion to override the State's February 12, 2020 decision not to seek a Graves Act waiver. (7T4-15 to 9-4; Da34 to 36; Da43 to 48). On August 10, 2021, the prosecutor's office filed a response, asking that defendant's motion be denied. (Da49 to 61). Both parties subsequently filed supplemental written submissions in support of their positions (August 19, 2021, defense letter (Da66 to 81); March 3, 2022, State's letter (Da82 to 85)). On June 15, 2022, the prosecutor's office filed a letter addressing the judge's concern comparing defendant's case to a number of other cases in the county in which the State had agreed to Graves Act waivers. (8T3-15 to 19; Da95 to 102).

On June 24, 2022, Judge Lawhun (in her capacity as the judge designated by the Assignment Judge to hear Graves Act waiver applications (7T8-6 to 24)) heard oral argument on defendant's motion. (8T3-11 to 24-14).

The judge then issued a ruling upholding the State's decision not to file a waiver. (8T24-15 to 43-23).

Sentencing.

On June 24, 2022, Judge Lawhun sentenced defendant in accordance with the plea agreement: five years in State prison with a three-and-one-half-year period of parole ineligibility. (8T43-23 to 44-3; Da103). The court also sentenced defendant to a concurrent eighteen-month term on the charge emanating from a separate indictment (Indictment No. 21-3-208, resisting arrest). (8T44-13 to 15; PSR9). The court dismissed the remaining counts of the indictment. (Da103).

The trial judge denied defendant's application for a stay pending appeal. (8T45-15 to 46-1). On July 6, 2022, defendant filed a Notice of Appeal. (Da107 to 111).

COUNTER-STATEMENT OF FACTS

When defendant pleaded guilty, he admitted that on November 15, 2017, in Penns Grove, he knowingly possessed a handgun without having a permit to carry this weapon. (5T14-9 to 15-16).

The following facts regarding the police stop and apprehension of defendant were adduced at the suppression hearing.

On November 15, 2017, Sergeant Carmen Hernandez of the Penns Grove Police Department was working the night shift in the borough. (1T3-20 to 25; 1T6-12 to 16). Hernandez was in uniform and driving a marked police car. (1T6-17 to 7-2). Penns Grove patrolmen Travis Paul and Joe Johnson also were working the night shift. (1T7-1 to 5).

At about 9:26 pm, Sergeant Hernandez received a radio report of "shots fired" near South Broad Street from Officer Paul, who indicated he was patrolling the Penns Grove Gardens apartment complex. (1T7-6 to 14; 1T8-7 to 9; 1T21-23 to 22-1; 1T33-2 to 4; 1T19-14 to 22). Officer Paul identified the shots he heard as gunshots based on his experience as a police officer who had dealt with prior incidents involving gunshots. (1T44-24 to 45-1). A few minutes later, the Salem County dispatch center issued a 911 call to all police agencies sharing the same channel (Penns Grove, Pennsville and Carney's Point), regarding shots fired in the area of South Broad Street. (1T57-20 to

59-10). Patrolman Paul, upon making the radio call and alerting other officers to canvass the area, headed from inside the apartment complex to South Broad Street, the area from which he had heard the shots. (1T33-18 to 34-1).

Patrolman Paul heard Sergeant Hernandez radio that she was on South Broad Street and was "out with three individuals." (1T35-1 to 4). Paul immediately broke off from his separate assistance of Patrolman Johnson regarding two other individuals on South Smith Street, and drove to South Broad Street to assist Hernandez. (1T34-6 to 35-7). Between three and five minutes elapsed from when Officer Paul heard the gun shots to his arrival at Sergeant Hernandez's location. (1T35-8 to 22).

Sergeant Hernandez had driven down South Broad Street to the location given in the radio report. (1T8-13 to 21). Between one and five minutes had elapsed between Hernandez hearing the radio report and arriving at the scene. (1T9-14 to 17; 1T22-11 to 21). Penns Grove is less than a square mile in size. (1T4-21 to 5-4). The location of Sergeant Hernandez's encounter with the three individuals was only two blocks away from the Penns Grove Gardens apartment complex where Patrolman Paul had heard the gunshots. (1T54-8 to 12).

When Hernandez arrived, she saw three males, two standing near the sidewalk of the area to which she was called, and a third walking toward them.

(1T8-22 to 9-4). At first, the sergeant drove past the males, then, noticing that they were the only persons in the area identified in the radio report, turned back, parked across the street from the males and walked up to them. (1T9-5 to 23).

Hernandez approached the three males stating "don't leave yet," and indicated that they were being detained because police had received a report of shots fired in the area and these individuals were the only persons at that location. (1T10-14 to 18; 1T11-19 to 23; 1T24-23 to 25-2). It was dark outside. (1T25-10 to 11). Since she was the lone police officer on the scene, her purpose in interacting with them was to "keep them with [her] attention so that they would stay there long enough for . . . [her] backup to arrive." (1T17-21 to 18-2). Sergeant Hernandez and the three males knew each other from prior contact, "several times" with defendant in particular, and she believed that, based on that mutual familiarity, they "would have the confidence to kind of stay there with [her]." (1T27-7 to 11; 1T27-15 to 16). "Two of the men remained at the scene without much complaint." (Da11). "Defendant on the other hand did not want to remain at the scene, moved around a lot, and said repeatedly that he was going to go home." (Da11). The males indicated that they had heard the shots, which sounded like they came from Penns Village, a few blocks away. (1T10-20 to 22).

As Hernandez initially approached the three males, a vehicle had pulled up as well. (1T8-24 to 9-4; 1T10-1 to 13). Hernandez noticed one of the men (Zaire Robinson) go to the driver's side and one (Corey Mills) to the passenger side, and radioed for backup. (1T10-3 to 13; 1T12-18 to 20; 1T26-15 to 17). The sergeant observed that Zaire Robinson kept reaching into the vehicle, and, given her experience, became suspicious as to whether "anything had been passed on" between Robinson and the vehicle's occupants. (1T10-3 to 13; 1T18-12 to 17). Upon Hernandez's arrival, Robinson was trying to walk away. (1T12-9 to 13). The vehicle drove off and the sergeant advised a sheriff's officer, who had arrived as backup, to stop the vehicle because she was uncertain as to what had transpired. (1T11-11 to 12-6; 1T35-25 to 36-6). Hernandez noticed that defendant, who had been at the passenger side of the vehicle with Corey Mills, was walking away from the car with "kind of like his fingers or something" by his pocket. (1T26-10 to 20). The item in defendant's hand was a cigarette. (1T28-13 to 21). Defendant stated that he wanted to go home, but Hernandez told him he was not allowed to leave. (1T28-24 to 29-6).

Hernandez directed her attention to Zaire Robinson. (1T12-9 to 20). Hernandez began to pat Robinson down and again advised the three men that they were being detained, and patted down, due to the report of gunshots fired. (1T13-22 to 14-1; 1T29-21 to 30-4). Her specific reason for patting down

Robinson was three-fold: the report of shots fired, he was trying to walk away, and he had been reaching into the vehicle that left the scene. (1T18-8 to 20).

Carney's Point Patrolman Timothy Haslett, then Patrolman Paul, separately arrived at the scene as the unknown vehicle was pulling away, exited their patrol cars and stood next to the two other males. (1T12-1 to 13-17; 1T35-23 to 36-6; 1T60-8 to 14; 1T63-2 to 3). Patrolman Haslett approached one of the other individuals, whom he recognized from "previous dealings" as Corey Mills, Jr. (1T60-17 to 61-3; 1T61-24 to 62-3). Haslett asked Mills if he had heard anything and where he was coming from. (1T62-3 to 5). Mills told Haslett that he did not know "this guy next to [him]" (meaning defendant) and defendant had "just walked up on" Mills and Robinson. (1T62-7 to 10). Haslett told Mills that he was going to pat him down for weapons, and asked whether Mills had "anything on [him] that [Haslett] should be concerned with," to which Mills responded "no." (1T63-3 to 6).

Patrolman Paul noticed defendant attempting to walk away from the other officers as Sergeant Hernandez was ordering people to stop moving and to remove their hands from their pockets. (1T36-6 to 10; 1T37-18 to 19; 1T63-11 to 14). Paul began to speak with defendant, who, in addition to walking away from the officers, was pacing back and forth, which made Paul

nervous knowing that shots had been fired and that this trio were the only individuals in the reported area. (1T36-20 to 37-25; 1T63-7 to 8). Upon the officer's approach, defendant started saying "I didn't do anything" and "I don't have anything on me," which raised Paul's concerns for his safety and, as a result, he told defendant that he would have to pat him down. (1T38-1 to 7). Defendant continued pacing, at which the patrolman told him to calm down and once or twice more repeated that he would have to pat defendant down for the officers' safety. (1T38-8 to 14). Paul told defendant to go toward the police vehicle and put his hands up. (1T52-13 to 18). Defendant momentarily seemed as if he would comply, then suddenly fled the scene running, ignoring Patrolman Paul, who had exclaimed "don't run." (1T38-14 to 15; 1T14-1 to 21).

Patrolmen Paul and Haslett gave chase on foot. (1T14-4 to 8; 1T63-14 to 21). During the pursuit, the officers observed defendant reach for his waistband, pull out a handgun and throw it to the ground, causing sparks, while defendant continued to run. (1T38-21 to 24; 1T39-6 to 8; 1T63-19 to 23). Patrolman Paul ran right past the gun, looked directly at it and screamed "gun, gun, gun." (1T39-3 to 10; 1T64-1 to 4). At this point, Patrolman Haslett reached out in an attempt to grab defendant, lost his footing and fell to the pavement while Patrolman Paul continued the chase. (1T38-24 to 39-12;

1T63-24 to 64-1). Shortly thereafter, Paul apprehended defendant, with the entire episode from the time he had heard "shots fired" to his apprehending defendant taking about ten minutes. (1T39-13 to 19; 1T64-7 to 8; 1T66-10 to 16). Patrolman Haslett, who had retrieved the gun that defendant threw away during the pursuit, assisted Paul in handcuffing defendant. (1T64-4 to 6; 1T65-8 to 11; 1T67-21 to 68-4).

Sergeant Hernandez, Patrolman Paul and Patrolman Haslett all were equipped with body-worn cameras that day, which they activated at the scene. The videos of their encounters with defendant and the other individuals were played at the suppression hearing, and marked into evidence as Exhibits S-1, S-2, and S-3. (1T16-14 to 17-19; 1T42-5 to 15; 1T65-17 to 66-8).

Defendant presented no witnesses at the suppression hearing. (1T69-1 to 3).

LEGAL ARGUMENT

POINT I

DEFENDANT'S SUPPRESSION MOTION WAS CORRECTLY DENIED AS DEFENDANT'S FLIGHT FROM POLICE WAS AN INTERVENING CIRCUMSTANCE THAT ATTENUATED THE SEIZURE OF THE HANDGUN FROM DEFENDANT'S INITIAL DETENTION.

Defendant challenges Judge Lawhun's decision on remand from this Court that application of the factors in State v. Williams, 192 N.J. 1 (2007), compelled denial of defendant's suppression motion. To the contrary, the court's ruling was correct.

Appellate review of a trial court's decision on a suppression motion is circumscribed. This Court defers to the court's factual and credibility findings if they are supported by sufficient credible evidence in the record. State v. Dunbar, 229 N.J. 521, 538 (2017). Deference is afforded "because the 'findings of the trial judge . . . are substantially influenced by [her] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" State v. Reece, 222 N.J. 154, 166 (2015) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). This deference includes the trial court's findings based on video recorded or documentary evidence. See State v. S.S., 229 N.J. 360, 374-81 (2017) (reaffirming the deferential and limited scope of

appellate review of factual findings based on video evidence); see also State v. Tillery, 238 N.J. 293, 314 (2019); State v. McNeil-Thomas, 238 N.J. 256, 271-72 (2019); State v. Elders, 192 N.J. 224, 244-45 (2007). Judge Lawhun found the testimony of all three officers credible and consistent with the body-worn camera footage. (Da11). This Court is bound to accept a trial court's findings unless they "are clearly mistaken." State v. Hubbard, 222 N.J. 249, 262 (2015). "A disagreement with how the motion judge weighed the evidence in a close case is not a sufficient basis for an appellate court to substitute its own factual findings to decide the matter." Elders, 192 N.J. at 245.

After initially denying defendant's motion to suppress, Judge Lawhun decided to the contrary in a written opinion in support of her decision to grant defendant's motion for reconsideration. The judge stated that, upon further review of the testimony, she "cannot disagree" with defense counsel's argument that, in the original denial, the court had relied on observations and circumstances that occurred after defendant was detained to support the conclusion that the detention was lawful. (Da18). Consequently, she also could not disagree with the argument that at the moment Sergeant Hernandez ordered defendant to wait, she had no basis to justify defendant's detention. (Da18). Since Sgt. Hernandez "clearly had instructed them not to leave" immediately upon approaching the individuals, the judge found Hernandez "did not have a

reasonable and particularized suspicion that any of these men had just engaged in or was about to engage in criminal activity." (Da16 to 22; Da28). The judge also addressed and rejected the argument that State v. Crawley, 187 N.J. 440 (2006) required denial of the suppression motion notwithstanding her finding that the investigatory stop was unlawful. (Da20 to 22).

This Court, upon interlocutory review, remanded the matter for the judge to consider whether attenuation applied. The Court framed the issue in this fashion:

> We presume the investigatory stop in this case was unconstitutional. See Williams, 192 N.J. at 10. Our reason for ordering a remand is that the judge's decision on whether to deny the motion to suppress notwithstanding the unlawful stop was guided entirely by Crawley, when Williams applies more directly to the facts of this case. * * *
> While fully explaining her reasons for concluding that Sgt. Hernandez lacked a basis for conducting "an investigatory stop," the judge did not reject her initial determination that the officer would have had a basis to make a field inquiry . . . Under the circumstances, we conclude that a remand for further consideration is appropriate, thereby allowing the motion judge to apply the three factors cited in Williams to the facts of this case.
>
> (Da30; Da32).

This Court's interlocutory ruling illustrates the distinction between Crawley and Williams: the former addressed whether a defendant commits the crime of obstruction if he flees an unconstitutional stop; the latter addresses

whether a defendant who flees an unconstitutional stop and is arrested for obstruction is entitled to suppression of the evidence of criminality seized incident to his lawful arrest. (Da30 to 31).

In determining the admissibility of the evidence, courts consider "whether the evidence was 'the product of the 'exploitation' of [the unconstitutional police action] or of a 'means sufficiently distinguishable' from the constitutional violation such that the 'taint' of the violation was 'purged.'" In Interest of J.A., 233 N.J. 432, 447 (2018) (quoting State v. Shaw, 213 N.J. 398, 414 (2012)). To answer that question, Brown v. Illinois identified three factors for consideration: "(1) 'the temporal proximity' between the illegal conduct and the challenged evidence; (2) 'the presence of intervening circumstances'; and (3) 'particularly, the purpose and flagrancy of the official misconduct.'" 422 U.S. 590, 593-94 (1975); J.A., 233 N.J. at 447 (quoting Shaw, 213 N.J. at 415). "[E]luding the police and resisting arrest in response to an unconstitutional stop or pat down constitute intervening acts and ... evidence seized incident to those intervening criminal acts will not be subject to suppression." Williams, 192 N.J. at 16.

In Williams, the Supreme Court considered the legitimacy of a stop and frisk. The Court determined that it "need not decide whether the officers acted without reasonable and articulable suspicion in attempting to conduct the pat down because we would not suppress the later discovery of the handgun even

if the investigatory stop did not meet acceptable constitutional standards. We reach that result because defendant was obliged to submit to the investigatory stop, regardless of its constitutionality." Id. at 10. The Court's determination was based on holding that "[o]bstructing the police constituted a break in the chain from the investigatory stop, which we will presume was unconstitutional. The taint from that initial stop was significantly attenuated by defendant's criminal flight that caused the handgun's later seizure, and accordingly the application of the exclusionary rule is unwarranted in this case." Ibid. Significantly, the Supreme Court has explicitly disapproved this Court's statement that "'a citizen's non-violent flight from an [unconstitutional] search and seizure cannot be validly criminalized' under N.J.S.A. 2C:29–1." Williams, 192 N.J. at 12; Crawley, 187 N.J. at 460 n. 7 (quoting State v. Williams, 381 N.J. Super. 572, 577 (App. Div. 2005), rev'd by 192 N.J. 1 (2007)). "For compelling public safety reasons," the law requires "that a defendant submit to an illegal detention and that he take his challenge to court." State v. Herrera, 211 N.J. 308, 334-35 (2012).

Defendant, as he did before the court below (4T5-17 to 25; 4T8-23 to 9-15), makes much of the fact that the judge did not find that he pushed or otherwise affirmatively impeded the police after his stop. (E.g., Db24). But Williams did not create a per se rule requiring that a defendant's obstruction or

impeding of a police officer involve the administration of force. Similarly, the majority opinion in Crawley was not premised on defendant's use of force against the police. See Williams, 192 N.J. at 18 (Wallace, J., concurring) (Justice Wallace explains that he dissented in Crawley (no pushing of police) and concurred in Williams (pushing of police) based on this distinction). Flight alone can be sufficient. Here, after a number of minutes of interaction, defendant fled from the scene, disobeying police commands for him not to, prompting the police to give chase. And defendant's flight caused one of the pursuing officers to lose his footing and fall to the pavement while attempting to catch him. (1T63-19 to 64-6; 1T38-24 to 25; 4T39-11 to 12; Da11; Da13). "The point to all of those cases is that the law should deter and give no incentive to suspects who would endanger the police and themselves by not submitting to official authority." Williams, 192 N.J. at 17. "Had defendant merely stood his ground and resorted to the court for his constitutional remedy, then the unlawful stop would have led to the suppression of the handgun." Ibid.

Defendant portrays the police conduct as an arbitrary detention on the street that took his flight "outside of the purview of the obstruction statute." (Db25). But such a broad interpretation would effectively negate application of the attenuation doctrine whenever unconstitutional conduct preceded it.

The police here did not detain defendant without any basis. There was a clearly articulated basis: a contemporaneous report of gunshots fired and defendant being in the immediate vicinity thereof. While the trial court ultimately found that the detention did not pass constitutional muster, it did not negate the officers' good faith, or lack of flagrancy, in responding and taking further investigative steps.

Applying the Brown/Williams criteria to this case, defendant did not immediately flee upon being detained by Sergeant Hernandez, but did so a few minutes later, when police presence had increased and the officers were attempting to pat the three men down out of a growing concern the men's actions posed for their safety. This three-minute interval served to dissipate any connection between the stop and defendant's flight and abandonment of the gun. In any event, temporal proximity is the "least determinative" factor. State v. Worlock, 117 N.J. 596, 622–23 (1990)

The second factor, intervening circumstances, favors the State. After Hernandez first asked the men to remain, two additional officers in marked patrol cars arrived. Defendant constantly moved around and was told not to leave. Hernandez and Haslett began patting down Robinson and Mills, respectively. Officer Paul subsequently ordered defendant to submit to a pat down. Instead, defendant took off running. In Williams, the Supreme Court

found "significant[] attenuat[ion]" when, in response to being instructed to place his hands on his head for a pat down, the defendant pushed one of the officers and fled, and was apprehended 100 feet away with a handgun. 192 N.J. at 14-18. Here, as in Williams, "[d]efendant's resistance to the pat down and flight from the police ... was an intervening act—the crime of obstruction—that completely purged the taint from the unconstitutional investigatory stop." Id. at 18.

"With regard to the third factor, it bears repeating that even though the officers may have acted mistakenly, they did so in good faith. Accordingly, their actions could hardly be described as flagrant misconduct." Williams, 192 N.J. at 16. Here the "shots fired" event was personally (aurally) witnessed and broadcast by a police officer. Contrast with, State v. Williams, 410 N.J. Super. 549, 556 (App. Div. 2009), certif. denied, 201 N.J. 440 (2010) (noting that the State did not present any evidence regarding the source of the information upon which the report was based, so that "the record does not indicate whether the information came from a police officer, a confidential informant, or merely a rumor in the neighborhood").

"A police officer who reasonably relies on information from headquarters in responding to an emergency or public safety threat may be said to be acting in good faith under the [obstruction] statute." Williams, 192 N.J.

at 13. Sergeant Hernandez was reasonably relying on information from another fellow police officer and police dispatch regarding a public safety threat, that is, a report of gunshots. As this Court noted, the trial judge found that there was a sufficient basis for the police to at least conduct a field inquiry. (Da32). Therefore, the police conduct here cannot be described as flagrant. A lone police officer responding in good faith to a police report of dangerous criminal conduct (shots fired), came upon three individuals at night in the area where gun shots were heard. Even in these circumstances, the record confirms that Hernandez did not immediately approach Robinson, Miller and defendant upon seeing them, but, rather, drove past to first assess the situation and only subsequently turned back to confront them. Her conduct, even if deemed not constitutionally valid, was certainly in good faith. Contrast with State v. Caronna, 469 N.J. Super. 462, 497 (App. Div. 2021) ("there was no evidence that the police were in any danger" and thus police conduct was "not objectively reasonable").[3]

[3] While defendant attempts to draw relevance from an earlier, separate stop by Patrolman Johnson (to which Officer Paul drove to assist, but was not involved in either the stop or pat down (1T46-10 to 49-7)) (Db22; Db27), that stop simply had no bearing on the circumstances of defendant's subsequent detention by Sergeant Hernandez or his deliberate flight from the scene.

A close case, where the officer simply falls short of the "constitutionally mandated level of suspicion to justify the stop," Williams, 192 N.J. at 12, does not equate to bad faith. Rather, our courts hold that "[a] suspect is required to cooperate with the investigating officer even when the legal underpinning of the police-citizen encounter is questionable." Reece, 222 N.J. at 172. When Hernandez ordered defendant to stop, and subsequently, when Paul ordered him to submit to a pat down, the officers were performing an official function. Defendant was obligated to comply. Instead, he opted to run, throw a loaded handgun onto the sidewalk, and avoid apprehension by continuing to run. These intervening criminal acts purged any conceivable taint. See Worlock, 117 N.J. at 623 (presence of intervening criminal events is the most important factor in the attenuation analysis). "'[D]efendant's headlong flight' resulted in the very type of potentially dangerous situation that the statutory scheme requiring citizens to comply with police orders was intended to prevent." State v. Dunbar, 434 N.J. Super. 522, 528 (App. Div. 2014) (citing Crawley, 187 N.J. at 451). Irrespective of the constitutionality (or lack thereof) of the stop, the gun was lawfully recovered after defendant discarded it in the course of committing obstruction.

Critically, Judge Lawhun rejected any notion that the police were acting in bad faith or engaging in flagrant misconduct by reaffirming her prior finding

that Sergeant Hernandez had a legitimate basis to approach the three males: "The court did find and continues to find that the officers would have been entirely within their authority to conduct a field inquiry based on the fact that they had received a call of shots being fired somewhere in the vicinity of where all these activities took place." (4T18-15 to 20).[4] Defendant's sudden flight from the police, who, responding to a fresh report of "shots fired," had yet to take the rudimentary step of a pat down to ensure their safety, was a basic superseding event for the purposes of the attenuation doctrine. It severed the link between any preceding unconstitutional conduct and the later recovery of the gun when defendant threw it to the ground during the chase. Although the temporal proximity of the events was close, the abrupt flight of defendant—armed with a handgun with hollow point bullets that could have harmed the officers—was a significant intervening circumstance that satisfied the attenuation doctrine. Additionally, the entire encounter took place late at night on an otherwise empty street. See State v. Tucker, 136 N.J. 158, 168 (1994) ("greater latitude to subject a citizen to an investigatory stop" during

[4] Judge Lawhun also expressed concern as to how a lone police officer confronted by three individuals while promptly responding to a "shots fired" call, could possibly keep her eye on all three in order to safely conduct the field inquiry, but decided "that's not a question any of us in this room can answer today." (4T19-3 to 9).

"late-evening to early-morning hours"); State v. Todd, 355 N.J. Super. 132, 138 (App. Div. 2002) (considering that defendant was only person on the street in the early morning hours among the totality of circumstances justifying stop within few blocks of crime scene). And, of course, "[m]erely because innocent connotations can be ascribed to a person's actions does not mean that an officer cannot base a finding of reasonable suspicion on those actions if 'a reasonable person would find the actions are consistent with guilt.'" Id. at 136 (quoting State v. Arthur, 149 N.J. 1, 11 (1997)).

The State also notes that, in her initial decision denying the suppression motion, Judge Lawhun, though citing Crawley, already found the requisite attenuation concerning recovery of the weapon. See (Da14) ("[Defendant] discarded the weapon while in the course of committing [the offense of obstructing the administration of law], not during the course of the investigative detention. Therefore the weapon was lawfully recovered."); (Da18) ("I concluded that the weapon was found incident to that [obstruction] offense, not the initial detention. Thus, discovery of the weapon was sufficiently attenuated from the initial detention that it would be admissible evidence even if the detention were found to be unlawful.") (emphasis supplied). Yet, in granting the motion to suppress upon reconsideration of defendant's motion, the trial court shifted exclusively to Crawley obstruction-

offense-conviction analysis. (Da21 to 22). This Court granted leave to appeal and subsequently realigned the judge's analysis to focus on the Williams context – attenuation as applied to the admissibility of evidence. Judge Lawhun subsequently applied the correct legal standard to again hold that the recovery of the handgun discarded by defendant was sufficiently attenuated from defendant's illegal detention and therefore validly used in evidence. (4T18-15 to 23-21).

Furthermore, defendant's act of throwing the weapon away, while not in and of itself legal abandonment based on the Supreme Court's ruling in Tucker, nevertheless was an affirmative act of factual abandonment that added to the attenuation between the initial stop and recovery of this evidence. There is a meaningful, common-sense distinction between the scenario in which a defendant flees, is apprehended and a gun is found secured on his person and one in which a defendant, while fleeing, openly brandishes the firearm in full view of the pursuing officers and anyone else who might pass by, regardless of defendant's purpose. In the latter case, defendant's active, visible possession of the gun, even if only to discard it, created a higher risk of danger.

Sergeant Hernandez was responding to a "shots fired" call, and defendant, Miller and Robinson were the only persons in the area where the shots originated. Hernandez, a 20-year veteran of the department, testified

that based on her experience something may have been passed to the driver. (1T 9-3 to 13; 10-1 to 4; 18-14 to 20). While the trial judge suggested that "perhaps the better course of action would have been for [the sergeant] to stay in her car and keep the men in sight" (3T27-14 to 16), police officers are obligated "to act on the spur of the moment without the benefit of quiet contemplation," and reviewing courts must "avoid unrealistic second-guessing of police officers' decisions." State v. Chapman, 332 N.J. Super. 452, 462 (App. Div. 2000). The nature of the crime and the urgency of the situation - with a vehicle pulling up and two men approaching - did not allow for the luxury of a delayed procedure. As a police officer, Sergeant Hernandez had a duty to investigate behavior that, based on her experience and facts known to her, was suspicious. State v. Stovall, 170 N.J. 346, 363 (2002). When evaluating whether a police officer had a reasonable suspicion of criminal activity, a court must "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 expertise." Arthur, 149 N.J. at 10–11. The seriousness of the criminal activity under investigation is also a relevant factor among the totality. State v. Alexander, 191 N.J. Super. 573, 576-77 (App. Div. 1983). In the fluid situation of a possible armed assailant in the area, time was of the essence.

For all the foregoing circumstances, Judge Lawhun correctly denied defendant's motion to suppress the loaded handgun he threw away during the chase.

POINT II

THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD OF REVIEW IN DENYING DEFENDANT'S MOTION TO OVERRIDE THE PROSECUTOR'S DECISION NOT TO SEEK A GRAVES ACT WAIVER TO ONE YEAR.

Defendant was sentenced to a Graves Act parole disqualifier of forty-two months. Defendant argues that the trial court "applied the wrong standard of review" in denying his motion to override the prosecutor's Graves Act waiver denial in order to lower the parole ineligibility term to one year. (Db37). Defendant asserts that the proper standard is "an ordinary abuse of discretion" and requests a remand for reconsideration of his motion utilizing the "correct" standard of review. (Db37). Defendant's claim is contradicted by long-standing legal precedent.

This Court consistently has applied the "patent and gross abuse of discretion" standard to evaluate Graves Act waiver cases. State v. Cengiz, 241 N.J. Super. 482, 512 (App. Div. 1990) (Shebell, J., concurring) (A defendant "may move before the assignment judge or designated judge of the vicinage for a Leonardis-type hearing as to whether the prosecutor's rejection or refusal is grossly arbitrary or capricious or a patent abuse of discretion");
State v. Alvarez, 246 N.J. Super. 137, 148 (App. Div. 1991) (a defendant

"must make a showing of arbitrariness constituting an unconstitutional discrimination or denial of equal protection constituting a 'manifest injustice,'"); State v. Watson, 346 N.J. Super. 521, 535 (App. Div. 2002) ("If the prosecutor does not so move or consent, the defendant may seek application by arguing to the Assignment Judge that the prosecutor's refusal is a patent and gross abuse of discretion. More specifically, the defendant must show that in refusing to move or consent to make such an application to the trial court, the decision was arbitrary and amounted to unconstitutional discrimination or denial of equal protection"), certif. denied, 176 N.J. 278 (2003) (citations omitted); State v. Benjamin, 442 N.J. Super. 258, 264-65 (App. Div. 2015) ("We have previously held that, if the prosecutor does not consent to a defendant's request to be sentenced pursuant to the escape valve provision of N.J.S.A. 2C:43–6.2, 'the defendant may [appeal the denial of the waiver] by arguing to the Assignment Judge that the prosecutor's refusal is a patent and gross abuse of discretion.'"), aff'd as modified, 228 N.J. 358, 364 (2017) (a defendant may "appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor"); State v. Andrews, 464 N.J. Super. 111, 120 (App. Div. 2020) ("In accordance with Alvarez, defendants may "appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion

by the prosecutor"); State v. Rodriguez, 466 N.J. Super. 71, 87 (App. Div. 2021) (vacating Graves Act waiver because "defendant failed to establish that the prosecutor's rejection of his request for a Graves Act waiver constituted a patent and gross abuse of discretion"); id. at 105 ("we emphasize the comparative analysis methodology serves as a 'judicial backstop' to guard against prosecutorial arbitrariness, vindictiveness, or discrimination"). Our Supreme Court has "defined the 'patent and gross abuse of discretion' standard" as requiring a party to "show that the prosecutor's decision failed to consider all relevant factors, was based on irrelevant or inappropriate factors, or constituted a 'clear error in judgment.'" State v. Nwobu, 139 N.J. 236, 247 (1995) (quoting State v. Bender, 80 N.J. 84 (1979)). Defendant's assertions to the contrary notwithstanding, there is no valid reason to abandon the Court's decades-long practice now.[5]

The assistant prosecutor provided written and oral submissions thoroughly explaining why he did not apply for a Graves Act waiver in this

[5] The State disputes defendant's argument that Judge Lawhun's conclusion that she "could not find" a patent and gross abuse of discretion was the equivalent of finding that the prosecutor had abused his discretion to some degree. (Db43). The judge merely made a finding that defendant had not met the applicable legal standard. The judge made no affirmative finding of the existence of any level of abuse of discretion and it is pure speculation to suggest or infer otherwise.

case in contrast to the other cases in which his office had sought such a waiver. Among his reasons: a large majority of the other cases were constructive possession cases, while defendant actually possessed the gun; the large majority also did not involve hollow point bullets like defendant's case; the other cases did not involve a defendant who incurred additional charges like defendant in this case, and; many of the other cases presented issues of proof. (8T4-14 to 5-9; Da35 to 36; Da 49 to 61; Da82 to 85; Da95 to 102). Based on these distinctions, the trial court found that the prosecutor's decision did not constitute a patent and gross abuse of discretion. (8T43-19 to 22). Indeed, as the trial court correctly recognized, "a patent and gross abuse of discretion is not automatically established by finding one or two cases where similarly situated defendants were granted a waiver." (8T41-14 to 17) (quoting Rodriguez, 466 N.J. Super. at 111).

Among several other factors considered, the prosecutor acted within his discretion in considering the strength of this case (in which defendant actually possessed the gun and was seen tossing it during a foot pursuit with police) relative to other cases in which the Prosecutor's Office has agreed to a waiver. Rodriguez, 466 N.J. Super. at 112 ("The Attorney General Directive expressly allows a prosecutor to consider "the likelihood of obtaining a conviction at trial" in deciding whether to grant a Graves Act waiver.") (quoting Attorney

General Directive to Ensure Uniform Enforcement of the "Graves Act", at 12 (Oct. 23, 2008, as corrected Nov. 25, 2008) ("Directive")); see also id. at 103 ("likelihood of obtaining a conviction" is a pertinent factor under the Directive in distinguishing other cases from the present one). Moreover, "under the patent and gross abuse of discretion standard, a reviewing court should not substitute its judgment for the prosecutor's assessment of the relative strengths and weaknesses of the State's trial proofs." Id. at 113. Thus, Judge Lawhun properly deferred to the prosecutor's assessment of the relative strengths and weaknesses of the State's trial proof. (8T41-22 to 25).

Defendant claims that the prosecutor violated the Directive in that he did not rely on any of the Directive's exceptions to the presumption of tendering an initial plea offer that included only a one-year waiver applied. (Db38 to 39). To the contrary, while the prosecutor's initial letter of February 12, 2020 did not specifically cite the particular exception, it is apparent from the prosecutor's analysis that he considered both the seriousness of the offense as weighed against the lack of criminal history of the offender. Specifically, the prosecutor considered that defendant "does not have any adult criminal convictions." (Da35). However, the prosecutor considered the troubling aspects of the offense: officers were responding to a report of shots fired; defendant was noncompliant with police; defendant ran during a pat down;

defendant threw the handgun he was concealing onto a public street; an officer was injured, and; the gun was loaded with five hollow point bullets in the magazine, and one in the chamber. (Da35 to 36). The prosecutor's analysis demonstrates consideration of the third exception in the Directive: "the aggravating factors applicable to the offense conduct and offender outweigh any applicable mitigating circumstances." Andrews, 464 N.J. Super. at 121 (citing Directive at 13).

Moreover, when later requested by the judge, the assistant prosecutor did address the third exception in the Directive, that, in his judgment, the aggravating factors applicable to the offense conduct and offender outweighed any applicable mitigating circumstances. (Da42 to 61). That the prosecutor's reasoning in this respect was not originally submitted, but, rather, came in a subsequent submission, does not negate the fact that an exception to the Directive was addressed and relied upon in the course of the designated judge's consideration of defendant's motion to override the prosecutor's decision. (Da49 to 61). See State v. Hoffman, 399 N.J. Super. 207, 215 (App. Div. 2008) (finding "the prosecutor's comments during oral argument" demonstrated consideration of relevant factors in denying PTI admission); see also id. at 218 (Sabatino, J.A.D., concurring) (prosecutor's remarks at oral argument "… cure[d] the shortcomings of her ... follow-up letter").

Defendant's claim that the August 10, 2021 letter was just a "post-hoc justification" (Db50) is contradicted by the fact that the prosecutor addressed the same concerns about the offense raised in his initial letter. As the prosecutor stated:

> At the very least, the Defendant was in possession of a handgun, loaded with illegal ammunition, in a public area walking distance from where shots had been fired moments earlier. He did not comply with the officer's requests. Further, the Defendant attempted to distance himself from the handgun by deliberately throwing it as he was running from the police. If the officers had not recovered the loaded handgun it would have been left out in the open for anyone to come upon and which would pose a danger to the community.
>
> (Da55).

And while Judge Lawhun disagreed with the assistant prosecutor's assessment, she appropriately recognized that the mere fact of disagreement did not justify action which would violate the bedrock principle of deference to the executive branch. Specifically, the judge held that if she imposed a one-year parole disqualifier, she "would be substituting [her] judgment for that of the Prosecutor's Office." (8T43-18 to 21). "It's simply their analysis of the facts and how important those things are versus mine." (8T43-21 to 22). In so doing, the judge scrupulously adhered to the law. See Andrews, 464 N.J. Super. at 123. ("[Judicial review] may not be used as an artifice to allow a trial court to 'substitute its own discretion for that of the prosecutor.'" (citing

Nwobu, 139 N.J. at 253)); State v. Miller, 321 N.J. Super. 550, 555 (Law. Div. 1999) (no showing of prosecutorial arbitrariness arose simply from sentencing judge finding more mitigating than aggravating factors).[6]

Defendant, citing State v. K.S., 220 N.J. 190 (2015), also faults the assistant prosecutor for mentioning defendant's three juvenile contacts with the criminal justice system and one adult contact because these charges were all dismissed. (Db51). To the contrary, the holding in K.S. was directed to consideration of PTI applications. Id. at 199 ("For the prior dismissed charges to be considered properly by a prosecutor in connection with [a PTI] application, the reason for consideration must be supported by undisputed facts of record or facts found at a hearing."). Indeed, the Court specifically rejected the declaration in State v. Brooks, 175 N.J. 215 (2002), analogizing the prosecutor's function in reviewing PTI applications to that of a sentencing

[6] While defendant refers to the two paths of waiver applications under N.J.S.A. 2C:43-6.2 (Db40 to 42), see State v. Ginty, 243 N.J. Super. 39, 42 (App. Div. 1990), each path still requires the consent of the prosecutor. See Miller, 321 N.J. Super. at 527 ("The prosecutor must approve the application to the assignment judge for relief from the mandatory period of incarceration in both circumstances"). Moreover, in defendant's case, Judge Lawhun not only was the sentencing judge, but also the judge who the Assignment Judge expressly designated to hear Graves Act waiver applications, and did so in defendant's case. (7T5-2 to 5-6; 7T8-6 to 25; 8T33-1 to 4). For these reasons, the separate prongs of the waiver statute carry no legal distinction for defendant's assertions regarding Graves Act waiver.

court with regard to arrests that did not result in convictions. K.S., 220 N.J. at 199 (quoting Brooks, 175 N.J. at 229). Necessarily, where the prosecutor is considering factors applicable to a sentencing decision, prior dismissed charges may still be relevant, for example, to infer the defendant was not deterred by prior arrests. See State v. Rice, 425 N.J. Super. 375, 382 (App. Div. 2012) ("[a]dult arrests that do not result in convictions may be 'relevant to the character of the sentence ... imposed.'") (alteration in original); State v. Thomas, 188 N.J. 137, 154 (2006) (consideration of certain sentencing factors in the assessment of a defendant may include "the mere fact of a prior conviction, or even in the absence of a criminal conviction").

In any event, the prosecutor's brief reference to such juvenile "contacts" did not characterize them as delinquency adjudications, instead focusing on what followed, a pair of municipal court convictions. (Da56). More importantly, the prosecutor readily and repeatedly admitted that the factor of defendant's history of breaking the law was not strong and resulted only in two adult convictions (simple assault and refusal to assist a police officer). See (Da35) ("The State recognizes your client does not have any adult criminal convictions."); (Da55) ("The State concedes that defendant does not have a lengthy criminal record"). In the Prosecutor's Office's view, two other aggravating factors -- the risk that defendant will commit another offense and

the need to deter defendant -- were predominant. (Da55 to 56).

Given the totality of circumstances and considerations expressly set forth by the assistant prosecutor to explain why his office would not agree to a Graves Act waiver to a one-year parole ineligibility term, (Da34 to 36; Da49 to 61; Da82 to 85), the trial judge, despite having a different view, correctly refused to substitute her judgment for that of the prosecutor. No remand is therefore required.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's conviction and sentence.

Respectfully submitted,

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