

Garden State CLE Presents:



Back to the Future:
Motor Vehicles Searches
following
State v. Witt

Lesson Plan

Part I - Development in the Automobile **Exception - Federal Law**

a.) The Beginning - Carroll v. United States, **267 US 132 (1925)**

On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

b.) Traditional justifications for automobile exception

(1) The inherent mobility of the vehicle, [Carroll v. United States, 267 U.S. 132, 153 \(1925\)](#).

(2) The pervasive regulation of motor vehicles creates a lesser expectation of privacy in an automobile compared to a home, [California v. Carney, 471 U.S. 386, 391–93 \(1985\)](#).

(3) Exigent circumstances created by the inherent mobility of motor vehicles is a consideration. The recognition that a Fourth Amendment intrusion occasioned by a prompt search based on probable cause is not necessarily greater than a prolonged detention of the vehicle and its occupants while the police secure a warrant, [Chambers v. Maroney, 399 US 42, 51-52 \(1970\)](#).

c.) Keep it simple - Pennsylvania v. LaBron, 518 US 938 (1996)

The Supreme Court of Pennsylvania held the rule permitting warrantless searches of automobiles is limited to cases where ‘unforeseen circumstances involving the search of an automobile [are] coupled with the presence of probable cause. This was incorrect. Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's “ready mobility,” an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation. If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.

Maryland v. Dyson, 527 US 465 (1999)

Under federal law, probable cause to search a vehicle alone satisfies the automobile exception to the Fourth Amendment's warrant requirement. The federal automobile exception does not require a separate finding of exigency in addition to a finding of probable cause.

Part II - Development in the Automobile Exception - New Jersey Law

a.) The Beginning - State v. Alston, 88 NJ 211 (1981)

Finally, defendants' argument and the Appellate Division's holding misconstrue the level of “exigent circumstances” that need be shown in order for the probable cause determination of the police to suffice as authorization for the search.

According to *Chambers*, the exigent circumstances that justify the invocation of the automobile exception are the unforeseeability and spontaneity of the circumstances giving rise to probable cause, and the inherent mobility of the automobile stopped on the highway.

**b.) The Split - State v. Cooke, 163 NJ 657
(2000)**

In New Jersey, it is well-settled that the automobile exception permits police to stop and search a moving or readily movable vehicle when there is probable cause to believe the vehicle contains criminally related objects. The rationale for this exception is grounded in the exigent circumstances created by the inherent mobility of vehicles and the somewhat lessened expectation of privacy in one's vehicle.

In essence, “[t]he justification to conduct a warrantless automobile search ... turns on the circumstances that make it impracticable to obtain a warrant when the police have probable cause to search the car.”

This Court has repeatedly looked to exigent circumstances to justify warrantless automobile searches. automobile would be valid provided the police had probable cause to act. For example, under the rationale advanced by the State, a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs. Such a broad ruling has no basis in our case law.

We conclude by stating the obvious: the term “exigent circumstances” is, by design, inexact. It is incapable of precise definition because, by its nature, the term takes on form and shape depending on the facts of any given case. We reiterate that exigency in the constitutional context amounts to “circumstances that make it impracticable to obtain a warrant when the police have probable cause to search the car. It is that impracticability and the existence of probable cause to believe that the vehicle contains evidence of a crime, together with a lessened expectation of privacy in an automobile, that tips the balance in favor of condoning the warrantless search. Although the balance is a delicate one, we must attempt to maintain it to protect the rights and interests of all members of the community.

**c.) All exigency - all the time! - State v. Irelan,
375 NJ Super. 100, 119-120 (App. Div. 2005)**

We are satisfied that the exigent circumstances prong has also been established. The troopers had no advance information about defendant; they encountered him by chance while on patrol. Indeed, it was not until after the stop and the subsequent roadside investigation that they acquired probable cause that the vehicle contained items of evidence they had the right to seize. Therefore, the events that gave rise to probable cause were unforeseen, spontaneous, and developed swiftly.. Considering the early-morning hour, the requirement that the troopers promptly transport defendant to the stationhouse to administer a Breathalyzer test, and the pressing need for assistance because of the accident on the Expressway, it was “impracticable for the police to procure a search warrant and immediate action was necessary.

Third parties had access to defendant's vehicle. Defendant's passenger was fully aware of the situation and was at liberty. Both the passenger and defendant possessed cellular phones and could have informed others. The roadside sobriety tests and arrest were conducted in plain view of the many vehicles that passed by. It would have been unduly burdensome and unreasonably restrictive to require the police to post a guard with the vehicle until a search warrant could be obtained.. That impoundment of the vehicle was anticipated at the time of the search does not affect our conclusion because, as we have stated, if there is probable cause to search a vehicle at the scene of the stop, the police are not required to delay the search pending impoundment and issuance of a search warrant.

**d.) Lack of Exigency - State v. Dunlap, 185 NJ
543 (2006)**

In addition, we reject the State's argument that it would have been unduly burdensome and unreasonably restrictive to require the police to post a guard and repair to the courthouse for a warrant. There were at least ten officers present on the evening in question and even assuming that some were needed for other duties in connection with defendant's arrest and the on-going investigation, the State did not establish that an insufficient number would have been left to guard the car. To say that the late hour made access to a judge difficult or impracticable, is to ignore the procedures in place for emergent duty judges in every vicinage and the existence, since 1984, of the telephonic warrant procedure. *R. 3:5-3(b)*. Indeed, it is not without significance that the investigators here had time to call the prosecutor's office at about 10:00 pm and obtain verbal authorization for the consensual recording of defendant's conversation with Tiaa.

One final note. Nothing in this opinion should be viewed as a retrenchment from the well-established principles governing the automobile exception to the warrant requirement. The standards remain the same: probable cause and exigent circumstances, each of which to be determined on a case-by-case basis. Here, the unique facts, particularly the presence of ten officers, fully justified the Appellate Division's conclusion that exigency was absent. Different facts, such as a roadside stop effectuated by only one or two officers, would likely have changed the calculus. Police safety and the preservation of evidence remain the preeminent determinants of exigency.

e.) Confusion - State v. Johnson, 193 NJ 528
(2008)

In this case, the State relies on the exigent-circumstances exception to the warrant requirement to justify the search of the duffel bag in the Holloway home. Although “exigent circumstances” cannot be precisely defined or reduced to a neat formula, some factors to be considered in determining whether law enforcement officials faced such circumstances are the urgency of the situation, the time it will take to secure a warrant, the seriousness of the crime under investigation, and the threat that evidence will be destroyed or lost or that the physical well-being of people will be endangered unless immediate action is taken

At the very least, exigent circumstances will be present when inaction due to the time needed to obtain a warrant will create a substantial likelihood that the police or members of the public will be exposed to physical danger or that evidence will be destroyed or removed from the scene.

When the circumstances are sufficiently exigent that appearing before a judge to obtain a written warrant is either impossible or impracticable, but not so exigent that there is insufficient time to stabilize the situation and call for a warrant, police officers must obtain a telephonic warrant rather than conduct a warrantless search or seizure.

Footnote 7

The State has argued that the exigent circumstances needed for a telephonic warrant are no different from the exigent circumstances justifying a bypass of the warrant requirement. We disagree, because if the State were correct the police would never have reason to apply for a telephonic warrant. Simply stated, for purposes of a telephonic warrant, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain a written warrant. For purposes of a warrantless search, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain any form of warrant.

**f.) "Like Tom Petty, we won't back down." -
State v. Pena-Flores, 198 NJ 6 (2009)**

Exigency must be determined on a case-by-case basis. . No one factor is dispositive; courts must consider the totality of the circumstances. How the facts of the case bear on the issues of officer safety and the preservation of evidence is the fundamental inquiry.. There is no magic formula—it is merely the compendium of facts that make it impracticable to secure a warrant. In each case it is the circumstances facing the officers that tell the tale.

Legitimate considerations are as varied as the possible scenarios surrounding an automobile stop. They include, for example, the time of day; the location of the stop; the nature of the neighborhood; the unfolding of the events establishing probable cause; the ratio of officers to suspects; the existence of confederates who know the location of the car and could remove it or its contents; whether the arrest was observed by passersby who could tamper with the car or its contents; whether it would be safe to leave the car unguarded and, if not, whether the delay that would be caused by obtaining a warrant would place the officers or the evidence at risk. As we have previously noted, “[f]or purposes of a warrantless search, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain *any form* of warrant.

For example, there is a suggestion in our case law that a search pursuant to a telephonic warrant should be treated, analytically, as a warrantless search. *State v. Valencia*, 93 N.J. 126, 137, 459 A.2d 1149 (1983). As a result, it may be that resort to such warrants has been inhibited. It makes sense that if a telephonic warrant is treated as the equivalent of no warrant at all, police would generally see no benefit in the procedure. Moreover, our Court Rules have underscored the problem by requiring an applicant for a telephonic warrant to prove to the judge “that exigent circumstances exist sufficient to excuse the failure to obtain a written warrant.” *R. 3:5–3(b)*. By that requirement, which replicates the justification necessary to uphold a warrantless search, the telephonic or electronic warrant maintains its place in the hierarchy as a second-class citizen.

The foregoing observations seem to us to be intuitively correct. In furtherance of them, we will amend *R. 3:5–3(b)* to clarify the parity between the various methods for obtaining a warrant and to underscore that an officer may resort to electronic or telephonic means without the need to prove exigency.

Telephonic Search Warrant Rule

Rule 3:5-3(b) A Superior Court judge may issue a search warrant upon sworn oral testimony of an applicant who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate longhand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the applicant must identify himself or herself, specify the purpose of the request and disclose the basis of his or her information. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a search warrant. A warrant may issue if the judge is satisfied that exigent circumstances exist sufficient to excuse the failure to obtain a written warrant, and that sufficient grounds for granting the application have been shown. Upon approval, the judge shall memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed a search warrant for the purpose of R. 3:5. The judge shall direct the applicant to print the judge's name on the warrant. The judge shall also contemporaneously record factual determinations as to exigent circumstances.

Part III - Back to the Future

a.) State v. Witt, NJ (2015)

Experience and common sense persuade us that the exigent-circumstances test in *Pena-Flores* does not provide greater liberty or security to New Jersey's citizens and has placed on law enforcement unrealistic and impracticable burdens. First, the multi-factor exigency formula is too complex and difficult for a reasonable police officer to apply to fast-moving and evolving events that require prompt action. Thus, we cannot expect predictable and uniform police or judicial decision-making. Second, the securing of telephonic warrants results in unacceptably prolonged roadway stops. During the warrant-application process, the occupants of a vehicle and police officers are stranded on the side of busy highways for an extended period, increasing the risk of serious injury and even death by passing traffic. If the car is impounded, then the occupants' detention will be extended for an even longer period as a warrant is procured. Third, one of the unintended consequences of *Pena-Flores* is the exponential increase in police-induced consent automobile searches. The resort to consent searches suggests that law enforcement does not consider time-consuming telephonic warrants or the amorphous exigent-circumstances standard to be a feasible answer to roadway automobile searches. The heavy reliance on consent searches is of great concern given the historical abuses associated with such searches and the potential for future abuses.

Adherence to *stare decisis* serves a number of salutary purposes, including promoting certainty and stability in our law. However, *stare decisis* is not a command to continue on a misguided course or to hold tight to a failed policy. We do not overturn precedent lightly, and certainly not without good cause or a special justification. Because we believe that good cause and special justification are present here, we return to the standard that governed automobile searches in *Alston*—a standard that is more in line with the jurisprudence of most other jurisdictions, yet still protective of the right of citizens to be free from unreasonable searches.

b.) "Witt's resolved & unresolved issues"

1.) Probable cause – The New Jersey version of the automobile exception is still not precisely the same as its federal counterpart. Under the Fourth Amendment, a motor vehicle search may be undertaken by the police solely on a finding of probable cause. Nothing more is required. By contrast, the probable cause determination by New Jersey police must be the result of unforeseen and spontaneous circumstances, a slightly more demanding test. The unforeseen/spontaneity requirement will force the police to apply for a search warrant in those instances where they have developed probable cause to believe the contraband or criminal evidence is located within a motor vehicle well in advance of the vehicle stop.

2.) Consent searches – Following the publication of State v. Pena-Flores, New Jersey police agencies began utilizing consent searches, even when the investigating officers possessed ample probable cause to search the stopped vehicle. The use of consent searches was motivated by the impracticality of the telephonic warrant procedure created in *Pena-Flores*. Given the Court’s holding in *Witt*, in the future, the number of automobile searches undertaken by way of consent should diminish to the point of being negligible. By contrast, the total number of motor vehicle searches should increase dramatically, with a concomitant increase in the police recovery of illegal drugs, weapons, contraband and criminal evidence.

3.) Remote searches – The opinion bans the use of remote searches under the automobile exception. Searches of vehicles must take place at the scene of the stop. This new procedure overrules established New Jersey case law. [See State v. Martin, 87 NJ 561 (1981). See also Chambers v. Maroney, 399 US 42 (1970) for the federal standard.] This restriction may prove to be inconvenient or even harmful to police. The former procedure allowing for the search of a vehicle at a remote location was intended to provide a measure of safety for the police and permit them to conduct the vehicle search with the aid of adequate lighting and forensic tools.

4.) Telephonic search warrants – The Court’s decision in *Witt* does not discuss the future of telephonic search warrants. As a result, the Court’s stated desire to create parity between telephonic and convention search warrants remains unclear. The Court’s stated intention in *Pena-Flores* to amend the Rules of Court to this effect in 2009 has yet to occur. Moreover, the Court’s stated intention to remove the exigency requirement for the issuance of telephonic search warrants remains as part of the law.

5.) Judicial restraint - Courts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation. [See *Randolph Town Center v. Morris County*, 186 NJ 78 (2006). When courts disregard this precept, disaster can result, as occurred in *Dred Scott v. Sandford*, 60 US 393 (1857).] In *Witt*, the Court could have decided the case on the issue related NJSA 39:3-60 and the officer's purported mistake of law. However, this outcome would have meant no decision on the constitutional issue. Accordingly, the Court eliminated the mistake of law issue from the case on procedural grounds.

6.) Mistake of Law – The Court ruled in Witt that the Appellate division’s decision on the mistake of law issue was not properly before the panel and thus vacated its holding on that issue. However, the decision to nullify the Appellate Division’s ruling creates a split in authority. Under current New Jersey precedent, a mistake of law cannot justify a motor vehicle stop. (See State v. Puzio, 379 N.J.Super. 378, 878 A.2d 857 (App. Div. 2005). However, while the Witt case was pending oral argument before the New Jersey Supreme Court, the United States Supreme Court ruled that a reasonable mistake of law can justify a motor vehicle stop under the Fourth Amendment. The resolution of this issue must await another case and another day. In the interim, New Jersey law on this issue is unclear.

7.) Prospective application – The prospective application of the holding in *Witt* preserves a huge body of case law, allows pending motions to suppress to be decided on well-settled precedent and eliminates issues related to pipeline retro-activity. Accordingly, all of the prior case law (i.e. *Pena-Flores, et al.*) decided before September 24, 2015, the date of the *Witt* decision, is still perfectly valid and useful for advocacy related to searches under the automobile exception.
