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Garden State CLE presents:

New Jersey Arrest Search & Seizure Case Law Update

In service training review - May 2, 2017



Lesson Plan

Part I - Video Examples of 4th Amendment Issues



a. Miranda during a motor vehicle stop

In general, under the New Jersey Rules of Evidence 505, every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate.

However, despite this rule of law, providing a suspect with *Miranda* warnings is not required and generally unnecessary unless he is subjected to a custodial interrogation.

Custodial interrogation, means *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. A roadside investigative detention following a motor vehicle stop, is not custody for *Miranda* purposes. In addition, logically, it defeats the reason for the detention: for the officer to either confirm or dispel his reasonable suspicions.

In the first of the following two video clips, note how unnecessary *Miranda* warnings have the potential to hinder and prolong an investigative detention. Then, contrast this procedure with the second video and note how much critical evidence of guilt is lawfully obtained by the investigating officer by not providing unnecessary *Miranda* warnings.

Case Chronology - Tag-light MV Stop

Officer immediately has passenger exit vehicle - no apparent evidence of heightened concern for safety;

Officer immediately uses restraints on passenger - no apparent evidence of need for restraints;

Officer performs unannounced door opening - permissible under NJ law.

Initial frisk does not appear to be based upon any articulable suspicion of a weapon in possession;

Passenger *Mirandized*, despite no legal obligation during an investigative detention;

Odor of marijuana gave officer probable cause to search the vehicle and arrest both subjects;

Both occupants *Mirandized*, despite no legal obligation during an investigative detention;

Initial stop based upon defective tag light constitutes valid probable;

Officer gets admission of marijuana possession after unnecessary *Miranda* warnings;

Case Chronology - RV MV Stop

Officer establishes lawful basis for the MV stop [probable cause - reasonable suspicion - community caretaking];

Driver and vehicle are detained for investigative purposes;

Note officer gets an admission to the traffic offense;

Officer questions on a topic unrelated to the MV stop - permissible so long as it does not unreasonably prolong the detention;

Officer has driver exit the vehicle - this option is categorical for police;

Driver gives consent for a dog search (not a search under federal law - and requires reasonable suspicion under NJ law);

Dog alert provides probable cause to search the vehicle;

Officer gets admission as to possession for personal use - this also provides probable cause for the search but is unnecessary due to the dog alert;

Officer gets denial of distribution quantity in vehicle;

Officer safety search of vehicle during detention probably illegal in NJ - but no contraband located.

Driver detained so officer can monitor her and conduct search simultaneously;

Officer gets admission as to luggage ownership;

Driver placed under arrest.

b. Escalation following a field inquiry

It is not unusual for consensual encounters between the police and members of the public to escalate into potentially deadly situation.

A simple field inquiry may quick morph into an investigative detention and culminate in an arrest. During these interactions, police conduct must conform to the reasonableness requirements of the 4th Amendment at each stage in order to assure the admissibility of physical evidence and admissions made during the encounter.

The plain feel exception to the warrant requirement now mandates that the criminal nature of the object the officer feels be immediately apparent to the officer. This can be reported based upon the officer's training, experience and the characteristics of the object.

The following video will illustrate these principles:

Case Chronology - Field Inquiry

Initial encounter is a field inquiry - no suspicion required

odor of marijuana provides probable cause to search. Note, the probable cause was developed spontaneously.

order for passenger to exit vehicle in NJ must be based upon concern for officer safety, conducting a search or serving a summons upon the passenger.

pat-down must be based upon reasonable suspicion that suspect has a weapon. Officer concerned about furtive gesture touching waistband. Also, Note here that officers were outnumbered by the passengers.

officer secures 1st passenger with handcuffs prior to assisting his partner in the struggle.

under the plain feel doctrine, it was immediately apparent to the officer as to the nature of the contraband.

Non-deadly use of force (choke-hold) reasonable given the circumstances confronting the officers.

c. Orders to exit vehicle - Search following DWI arrest

The right of police officers in New Jersey to have a driver exit a vehicle during a motor vehicle stop is categorical. There is no requirement for any level of articulable suspicion. Simply put, it is the officer's call.

In the following example, note how the police have ample probable cause to believe the suspect is operating while under the influence of alcohol.

His refusal to exit the vehicle constitutes a violation of NJSA 2C:29-1.

In New Jersey, the subsequent search of the vehicle would be best based upon a search for evidence proving the intoxicated operation. The firearms found during the search would be admissible under the plain view doctrine in that the officers were lawfully in the viewing area and they had probable cause to associate this "*per se*" contraband with a violation of the law.

Case Chronology - Refusal to exit vehicle/Search

Refusal to exit vehicle provides probable cause to arrest for NJSA 2C:29-1. Also provides strong evidence of intoxication under NJSA 39:4-50(a).

Note paraphernalia recovered during a search of the person incident to arrest.

Search of vehicle justified based upon the probable cause to arrest for drunk driving. Weapons and contraband are recovered in plain view.

d. The law of arrest

In New Jersey, a law enforcement officer may arrest without a warrant for a traffic violation set forth in Chapter 3 or 4 of Title 39 that has been committed in the officer's presence. An arrest for DWI may be made even if the offense did not occur in the officer's presence. Presence means the officer perceived the violation in real time or the defendant admits the violation to the officer. [See NJSA 39:5-25]

A police officer may arrest without a warrant for a disorderly persons' offense committed "on view" or for an ordinance violation constituting a breach of the peace. [NJSA 40A:14-152.]

Seatbelt violation is a secondary offense and must be tied to an independent violation to justify an MV stop. [NJSA 39:3-76(n).]

Driver must exhibit credentials to a police officer in the performance of his duties upon request. [NJSA 39:3-29]

Purposeful refusal to show credentials constitutes an independently unlawful act, an element of NJSA 2C:29-1 [State v. Perlstein, 206 NJ Super. 246 (App. Div. 1985).]

During an MV stop, the moment the vehicle comes to a halt, both the vehicle itself and all its occupants are seized within the meaning of the 4th Amendment. [Brendlin v. California, 127 S. Ct. 2400 (2007).]

Video recording police officers does not violate New Jersey law. However, there is no express right in New Jersey to use video or telephone equipment while seized and detained during a motor vehicle stop. Such activities have the clear capacity to interfere with the officer's lawful functions during the traffic stop, such as identifying the passengers, preventing them from colluding with each other, denying them the opportunity to contact confederates, checking their identification against NCIC or ensuring officer and passenger safety.

Case Chronology - Seatbelt violation

Motor vehicle stop based upon no read-seat passenger seatbelt. Not a primary offense under New Jersey law.

Order to have driver exit vehicle is purely a matter of officer discretion

Note passenger video recording officer

Failure to present driving credentials constitutes a violation of NJSA 39:3-29. Police may arrest when this offense is committed in their presence. A purposeful refusal to present credentials also constitutes a violation of NJSA 2C:29-1.

Driver responsible for passenger seat belts for all children under 8 years old and passengers who are greater than 8 but less than 18 years old. NJSA 39:3-76.2f.

New residents of New Jersey have 60-days to obtain a driver's license. NJSA 39:3-17.1

Ticket or arrest quotas are illegal in New Jersey NJSA 40A:14-181.2

Officer is entitled to (and must) control suspects during detention for purposes of safety and investigative integrity and security.

Part II - Recently Published Search & Seizure Cases



a.) Plain Feel Exception

State v. Evans, ___ NJ Super. ___ (App. Div. 2017)

Defendant was arrested on an outstanding warrant for failure to pay a \$6.50 fine. In the search incident to arrest, the officer seized approximately \$2,000 from defendant's person, observed a bulge in the groin area of defendant's pants and manipulated the bulge. Defendant was taken to the police station where he was subjected to a strip search. The strip search resulted in the recovery of two rocks of crack cocaine totaling 0.56 ounces and nine bags of heroin containing approximately 0.018 grams each. A search warrant was obtained for the car defendant had been driving. Execution of that warrant resulted in the seizure of a gun and hollow nose bullets.

Legal Reasoning:

A threshold requirement for the application of the plain feel exception is that the character of the contraband be “immediately apparent.”

Although the trial judge made this finding, that conclusion is not supported by the record. Laboy never testified it was “immediately apparent” to him that the bulge concealed drugs. [The arresting police officer] stated he felt the bulge in defendant's groin area and manipulated it. He said the bulge “felt like a rocklike substance” and that when he felt the rocklike substance, he “believe[d]” it was “[c]rack cocaine.” When he viewed the substances retrieved, he “suspect[ed]” them to be “[c]rack cocaine and heroin.”

We recognize that the line between “immediately apparent” and “probable cause” is easily blurred. Given the significant intrusion of a strip search, the authority provided by [N.J.S.A. 2A:161A-1](#) should not turn on whether the officer utters the correct talismanic words. Rather than making a conclusory statement, the officer should articulate specific facts that support his assertion that the nature of the contraband was immediately apparent.

By way of example, both our court and the Supreme Court found the plain feel doctrine applicable when the officer conducting a lawful search “feels an object whose contour or mass makes its identity immediately apparent.” The size and shape of the contraband can be independently assessed by the court's inspection of the physical evidence and give credence to or cast doubt upon the officer's assertion that its identity was “immediately apparent” with a mere touch. The officer's knowledge that the arrestee has concealed drugs on his person in the past may also contribute to the officer's immediate realization that the bulge he touched was drugs.

b.) Plain View

State v. Gonzales, 227 NJ 77 (2016)

We now hold that the inadvertence requirement for a plain-view seizure is at odds with the objective-reasonableness standard that governs our state-law constitutional jurisprudence. Accordingly, like the United States Supreme Court and most other state courts, we now hold that an inadvertent discovery of contraband or evidence of a crime is no longer a predicate for a plain-view seizure. Provided that a police officer is lawfully in the viewing area and the nature of the evidence is immediately apparent (and other constitutional prerequisites are met), the evidence may be seized. This holding is a new rule of law and therefore must be applied prospectively. Nevertheless, we conclude that the discovery of the drugs in this case was sufficiently inadvertent to satisfy the then existing plain-view standard.

[Horton v. California, 496 U.S. 128 \(1990\)](#)

Analysis:

Under the plain-view doctrine, the constitutional limiting principle is that the officer must lawfully be in the area where he observed and seized the incriminating item or contraband, and it must be immediately apparent that the seized item is evidence of a crime. State v. Gonzales, 227 NJ 77, 101 (2016)

1.) Lawfully in the viewing area

2.) Probable cause to associate the item in plain view with a violation of the law.

The immediately apparent language has been dropped by the Supreme Court, a holding that was adopted by our own Supreme Court.

a.) See plurality decision in Texas v. Brown, 460 US 730, 738-40 (1983).

b.) [State v. Bruzzese, 94 N.J. 210, 236-38 \(1983\)](#),

c. [Arizona v. Hicks, 480 U.S. 321, 327 \(1987\)](#).

c.) Order to exit vehicle: Passenger

State v. Bacome, ___ NJ ___ (2017)

Background:

Pennsylvania v. Mimms, 434 US 106 (1977)

Maryland v. Wilson, 519 US 408 (1997)

State v. Smith, 134 NJ 599 (1994)

State v. Legette, 274 NJ Super. 278 (Law Div. 1994)

In [*Smith*](#), we determined that a police officer may order a passenger out of a vehicle if the officer can “point to specific and articulable facts that would warrant heightened caution to justify ordering the occupants to step out of a vehicle detained for a traffic violation.” Furtive movements may satisfy the heightened caution standard. The unknown nature of surreptitious movements creates risk for an officer and, in turn, that risk supports the exercise of heightened caution. It would be impractical to require officers to determine whether the movement was to hide a weapon or a box of tissues before taking any precautionary measures. Such a rule would threaten officer safety.

In sum, we find that the detectives' heightened caution justified removal of the passenger from the vehicle, placing the detectives in a position lawfully to observe the contraband in plain view. The evidence, therefore, was appropriately seized under the plain-view exception to the warrant requirement.

d.) Warrantless Home entry during investigative detention

State v. Legette, 227 NJ 460 (2017)

In response to a noise complaint, an officer arrived at Defendant James L. Legette's apartment complex, where he observed defendant standing with another man in a public area. Because defendant began to walk away when the officer identified himself, the officer commenced an investigatory stop, asking defendant for identification. When defendant offered to retrieve identification from his apartment, the officer said he would have to accompany defendant. While in his apartment, defendant removed the sweatshirt he was wearing. The officer seized the sweatshirt and ultimately discovered a handgun in its pocket.

The trial court denied defendant's motion to suppress the handgun, and the Appellate Division affirmed., [concluding] that it was reasonable for police officers to follow arrestees into their homes. For the reasons set forth in this opinion, we decline to extend [cases involving arrestees] to detainees. Although warrantless entries into the home require probable cause, investigatory stops require the lower standard of reasonable suspicion. We therefore hold that, when conducting an investigatory stop, it is not permissible for an officer to follow suspects into their homes.

The State asserts, finally, that there was consent for Dill to enter the apartment. The factual record before us does not support this conclusion. To establish that defendant waived his Fourth Amendment rights, the State must show that defendant had “knowledge of the right to refuse consent.” *State v. Johnson*, [68 N.J. 349, 353–54, 346 A.2d 66 \(1975\)](#). [The arresting officer] exerted his authority over defendant by stopping defendant from walking toward the parking lot. Subsequently, defendant did not respond when [the officer] indicated that he would have to accompany defendant into the apartment. Under these circumstances, the State has not shown that defendant thought he could refuse entry into his apartment. Therefore, we do not find that the search was consensual.

e.) Credentials exception to warrant requirement

State v. Hamlett, NJ Super. (App. Div. 2017)

[Following a motor vehicle stop, the arresting police officer] inquired as to the whereabouts of the vehicle's rental agreement. Defendant replied he was unaware of its location, or whether it included his name. Because defendant was unable to produce a valid driver's license, [the officer] ordered him out of the car. He then patted defendant down for weapons, found none, and placed defendant on the curb. In an effort to avoid unnecessarily prolonging the stop, [the officer] searched for the vehicle's credentials in the side visor and glove compartment, and in an open compartment located near the gear shifter. [The officer] then opened the center console, where he observed 7.25 grams of cocaine, two bricks of heroin, 98.6 grams of marijuana, and \$2,595 in cash. Defendant was arrested, and a search of his person revealed a bag containing additional marijuana, cocaine, and heroin.

We recognized the vitality of the credentials exception to the warrant requirement. “[W]here there has been a traffic violation and the operator of the motor vehicle is unable to produce proof of registration, a police officer may search the car for evidence of ownership. That search “must be ‘confined to the glove compartment or other area where a registration might normally be kept in a vehicle[.]’ ”

More recently, in [*State v. Keaton*, 222 N.J. 438, 442–43, 119 A.3d 906 \(2015\)](#), the Court considered whether the warrantless entry of the defendant's overturned vehicle to obtain motor vehicle credentials, without providing the defendant with an opportunity to consent to the entry or present those credentials beforehand, was unlawful. In [*Keaton*](#), when police arrived at the scene of the one-car accident, the defendant had been removed from the vehicle and was receiving treatment from emergency medical personnel. The trooper never asked the defendant for his credentials or for permission to enter the vehicle. After crawling in a rear window, the trooper saw an open backpack containing a handgun and a small amount of marijuana on the dashboard.

[T]he Court said that “under settled law, the warrantless search of a vehicle is only permissible after the driver has been provided the opportunity to produce his credentials and is either unable or unwilling to do so”.

f.) Protective sweep.

State v. Bryant, 227 NJ 60 (2016)

When a woman called 911 to report that her boyfriend had struck her, officers were dispatched to the address she provided. While two officers stayed with the woman, who was in a car in a nearby parking lot, two other officers knocked on the door of defendant Charles Bryant, Jr.'s home. When defendant answered, an officer instructed him to take a seat on the couch. As defendant followed this instruction, the officers entered. One conducted a protective sweep of the apartment while the other questioned defendant. All of this was done without knowing the name of the woman's alleged attacker or defendant's name, and without any indication that there were either other people or any weapons present in the apartment.

Under such circumstances, we find that the law enforcement officers did not adhere to the rigorous standards for proceeding without a warrant under the protective sweep doctrine. Accordingly, we hold that the evidence obtained as a result of their impermissible search must be suppressed.

Here, there is sufficient evidence in the record to support the trial court's factual finding that [the officer] and [his partner] lacked information when approaching the apartment, including the name or description of the assailant, the number of parties involved, or whether there were weapons involved. Although we accept these findings as true, we cannot conclude from these findings that a protective sweep was justified. Rather, we find that [the officer's] suspicion, at most, was a subjective hunch.

[The officer] did not testify that any visual or auditory signs existed that led him to believe there was another person in the apartment. Moreover, there is no evidence that [the officer] knew defendant. Nor is there any evidence that the officers were suddenly surprised once inside the apartment, that defendant appeared overly nervous, or that his behavior suggested the presence of another person. In fact, [this officer] conducted the sweep without waiting to hear defendant's answer to [his partner's] questions [to the defendant]. There was therefore no opportunity for [the officer] to determine whether any of defendant's statements were inconsistent or dishonest.

In the present case, the officers might have obtained the information they needed by asking defendant preliminary questions, such as: "Were you just in an argument with your girlfriend?" and "Is there anyone else here in the apartment?" Had the officers asked those, or similar, questions and waited for defendant's response, their fears could have been allayed or a reasonable and articulable suspicion formed. [The searching officer's] failure to pose these basic questions, or wait for a response to the other officer's questions, reduced his actions to, at best, nothing more than acting on a hunch. Officers' diligence in asking the correct questions and assessing the response or the responder's demeanor before conducting a protective sweep of the home ensures the proper balance between the rights of citizens to be secure in their homes and the need for law enforcement to protect themselves in these dangerous situations.

The officers here lacked reasonable and articulable suspicion that another party was present, much less that another party posed a danger to officer safety. Because there was no evidence of reasonable and articulable suspicion, the State failed to meet its burden of presenting evidence sufficient to establish an exception to the warrant requirement.

Supporting case law:

[Maryland v. Buie, 494 U.S. 325 \(1990\)](#). (Sweep conducted as incident to an in-home arrest).

[State v. Davila, 203 N.J. 97 \(2010\)](#). (Sweep conducted as a result of a consensual entry)

State v. Cope, 224 NJ 530 (2016) (Sweep as incident to an arrest in house that included an attached porch)

State v. Gamble, 218 NJ 412 (2014) (Extends sweep to motor vehicles based upon reasonable suspicion)