Garden State CLE presents:

New Jersey

Arrest, Search & Seizure Review – 2021

Lesson Plan

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Mistake of Law

State v. Roman-Rosado, ___ N.J. ___ (2021) 2021 WL 3278023

NJSA 39:3-33 provides "No person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration plate or any part of any insert which the director, as hereinafter provided, issues to be inserted in and attached to that registration plate or marker."

Facts: This case involves two motor vehicle stops based upon an obstruction of a license plate caused by a frame. In one instance (Roman-Rosado) the frame's obstruction only partially obscured the state motto, "The Garden State". In a companion case, State v. Carter, the frame completely obscured the motto. These purported violations of NJSA 39:3-33 served a s the basis for a motor vehicle stop and resulted in the seizure of a firearm in one case and illegal drugs in the other.

Introduction: This is a landmark decision wherein the New Jersey Supreme Court has rejected the exception to the warrant requirement that renders an objectively reasonable mistake of law by a police officer as a permissible basis to effect a motor vehicle stop. Heien v. North Carolina, 574 U.S. 54 (2014). Our Supreme unanimously decided in Roman-Rosado that the New Jersey Constitution of 1947 provides more protection to people in our State under Article I, paragraph 7 than is otherwise required under the U.S. Constitution. In this regard, a mistake of law by a police officer, even one

that may be reasonable, does not provide a sufficient basis to effect a motor vehicle stop. It is simply not reasonable to restrict someone's liberty for behavior that no actual law condemns, even when an officer mistakenly, although reasonably, misinterprets the meaning of a statute.

The New Jersey Supreme Court had previously ruled that a reasonable mistake of fact made by a police officer can provide the basis to stop a motor vehicle. That rule of law remains unchanged.

This case also involved a constitutional challenge to parts of NJSA 39:3-33 on the basis of both overbreadth and vagueness. The Court side-stepped the constitutionality of the statute and ruled that an obstruction to a license plate that completely obscures a marking constitutes a violation of the law. However, a partial obstruction that can still be readily discerned does not constitute a violation.

Statutory search & seizure limitations in marijuana cases

Straight possession - N.J.S.A. 2C:35-10a(3)(b)(i)

(i) The odor of marijuana or hashish, or burnt marijuana or hashish, shall not constitute reasonable articulable suspicion to initiate a search of a person to determine a violation of subparagraph (b) of paragraph (3) of this subsection. A person who violates this paragraph shall not be subject to arrest, detention, or otherwise be taken into custody, unless the person is being arrested, detained, or otherwise taken into custody for also committing another violation of law for which that action is legally permitted or required;

Straight possession under age 21 - N.J.S.A. 2C:33-15

Consent

A person under the legal age to purchase alcoholic beverages or cannabis items is not capable of giving lawful consent to a search to determine a violation of this section, and a law enforcement officer shall not request that a person consent to a search for that purpose.

Odor not establishing probable cause or reasonable suspicion

The odor of an alcoholic beverage, marijuana, hashish, cannabis, or cannabis item, or burnt marijuana, hashish, cannabis, or cannabis item, shall not constitute reasonable articulable suspicion to initiate an investigatory stop of a person, nor shall it constitute probable cause to initiate a search of a person or that person's personal property to determine a violation of this subsection. Additionally, the unconcealed possession of an alcoholic beverage, marijuana, hashish, or cannabis item in violation of this subsection, observed in plain sight by a law enforcement officer, shall not constitute probable cause to initiate a search of a person or that person's personal property to determine any further violation of that paragraph or any other violation of law.

Immunity from arrest or detention

A person under the legal age to purchase alcoholic beverages or cannabis items who violates paragraph (1) of this subsection for possessing or consuming an alcoholic beverage, marijuana, hashish, or a cannabis item shall not be subject to arrest, shall not be transported to a police station, police headquarters, or other place of law enforcement operations, and shall not otherwise be subject to detention or be taken into custody by a law enforcement officer at or near the location where the violation occurred, except to the extent that detention or custody at or near the location is required to issue a written warning or write-up, collect the information necessary to provide notice of a violation to a parent, guardian or other person having legal custody of the underage person in accordance with [N.J.S.A. 33:1-81a], or make referrals for accessing community services provided by a public or private agency or organization due to a third or subsequent violation, unless the person is being arrested, detained, or otherwise taken into custody for also committing another violation of law for which that action is legally permitted or required.

Possesion with intent – N.J.S.A. 2C:35-5a(12)(b)(i)

(i) The odor of marijuana or hashish, or burnt marijuana or hashish, shall not constitute reasonable articulable suspicion to initiate a search of a person to determine a violation of subparagraph (b) of paragraph (12) of this subsection. A person who violates this subparagraph shall not be subject to arrest, detention, or otherwise be taken into custody, unless the person is being arrested, detained, or otherwise taken into custody for also committing another violation of law for which that action is legally permitted or required;

NJSA 2C:35-5b(12)(b) On and after the effective date of P.L.2021, c. 19 (C.2C:35-23.1 et al.), marijuana in a quantity of one ounce or less including any adulterants or dilutants, or hashish in a quantity of five grams or less including any adulterants or dilutants, is, for a first offense, subject to a written warning, which also indicates that any subsequent violation is a crime punishable by a term of imprisonment, a fine, or both, and for a second or subsequent offense, is guilty of a crime of the fourth degree;

Discussion question for prosecutors – Does the legislature have the constitutional authority to determine by statute what constitutes a reasonable search?

Example, See New Jersey Strip Search Act, N.J.S.A. 2A:161A–1 to –10.

Residential entry & hot pursuit

Lange v. California, 141 S. Ct. 2011 (2021)

a.) Facts - This case arises from a police officer's warrantless entry into petitioner Arthur Lange's garage.

Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer began to follow Lange and soon after turned on his overhead lights to signal that Lange should pull over. Rather than stopping, Lange drove a short distance to his driveway and entered his attached garage. The officer followed Lange into the garage. He questioned Lange and, after observing signs of intoxication, put him through field sobriety tests. A later blood test showed that Lange's blood-alcohol content was three times the legal limit.

Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not categorically justify a warrantless entry into a home.

The Court's Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. When the totality

of circumstances shows an emergency—a need to act before it is possible to get a warrant—the police may act without waiting. Those circumstances include the flight itself. But pursuit of a misdemeanant does not trigger a categorical rule allowing a warrantless home entry.

b.) Prior Supreme Court decision on this issue in Welsh v. Wisconsin, 104 S. Ct. 2091 (1984) was also for a petty, civil DWI offense and did not involve hot pursuit, thus no exigent circumstances.

c.) New Jersey view expressed in State v. Bolte, 115 N.J. 579, 598 (1989) is consistent with *Lange.* Generally speaking, petty offenses will not justify the entry of a residence without a warrant in the absence of exigent circumstances. The diminishing BAC level of a suspect drunk-driver is not an exigency sufficient to allow a warrantless residential entry. As the Court noted:

> Although the facts in this record do not demonstrate that there was a serious threat to public safety in the course of arresting officer's pursuit of defendant, we do not regard *Welsh* as precluding application of the "exigent circumstances" exception in such a factual context. Obviously, less intrusive measures should be used whenever possible including, as the Appellate Division suggested, an attempt at a consensual entry or a telephonic warrant. If such measures fail, and if the threat to public safety is substantial, the "hot pursuit" of a defendant who poses a threat to public safety may in certain contexts constitute an exigent circumstance sufficient to support a warrantless home entry under current United States Supreme Court decisions.

Community caretaking exception in Residences

Caniglia v. Strom, 141 S. Ct. 1596 (2021)

a.) Facts - During an argument with his wife, petitioner Edward Caniglia placed a handgun on the dining room table and asked his wife to "shoot [him] and get it over with." His wife instead left the home and spent the night at a hotel. The next morning, she was unable to reach her husband by phone, so she called the police to request a welfare check. The responding officers accompanied Caniglia's wife to the home, where they encountered Caniglia on the porch. The officers called an ambulance based on the belief that Caniglia posed a risk to himself or others. Caniglia agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. But once Caniglia left, the officers located and seized his weapons. Caniglia sued, claiming that the officers had entered his home and seized him and his firearms without a warrant in violation of the Fourth Amendment. The District Court granted summary judgment to the officers. The First Circuit affirmed, extrapolating from the Court's decision in *Cady v. Dombrowski*, a theory that the officers' removal of Caniglia and his firearms from his home was justified by a "community caretaking exception" to the warrant requirement.

b.) Holding - Neither the holding nor logic of Cady v. Dombrowski, 93 S. Ct. 2523 (1973) justifies such warrantless searches and seizures in the home. *Cady* held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. In reaching this conclusion, the Court noted that the officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents. But searches of vehicles and homes are constitutionally different, as the *Cady* opinion repeatedly stressed. The very core of the Fourth Amendment's guarantee is the right of a person to retreat into his or her home and "there be free from unreasonable governmental intrusion." Recognition of the existence of "community caretaking" tasks, like rendering aid to motorists in disabled vehicles, is not an open-ended license to perform them anywhere.

c.) New Jersey view – State v. Witczak, 421 N.J.Super. 180, 196-97 (App. Div. 2011)

From the decisions of our Supreme Court regarding the community caretaker exception in the home context, we extrapolate the following themes. First, the analysis employs an objective reasonableness standard, which is the touchstone of the Fourth Amendment. Second, for the exception to apply, the police must act to fulfill a genuine community caretaker responsibility. And third, there must be evidence of some form of exigency that compels the police to ensure the safety and wellbeing of the citizenry at large. In short, it must be determined whether the police were motivated by giving assistance or by investigating a crime in their initial entry into the home.

Protective Sweep

State v. Radel, 465 N.J.Super. 65 (App. Div. 2020)

a.) Facts – The State's evidence revealed that police interest in defendant started with an assistant prosecutor's January 7, 2016 call to local police about an October 27, 2015 order, which apparently sprang from defendant's March 2015 conviction for unlawful possession of a weapon. The order directed "members of Little Falls Police Department [to] respond to the defendant's home, for the limited purpose of retrieving any and all firearms, including one Beretta. One of the officers testified that after the phone call from the prosecutor's office he did some research and learned defendant was the target of two outstanding municipal arrest warrants.

The police assembled a team of six officers for the purpose of going to defendant's neighborhood and arresting him on the outstanding municipal arrest warrants.

Within a few minutes, other officers saw a person, who matched their photos of defendant, wearing a blue jacket as he exited the front door of a neighboring home carrying a laundry basket. This home was not the residence referenced in the seizure order. As defendant placed the laundry basket in the backseat of a vehicle parked in the driveway, an officer – in his words – was "on" him, seizing defendant and placing him face down as he applied handcuffs. Defendant did not resist. Once defendant was in custody, the police concluded a protective sweep of the residence was necessary out of a concern there might be others inside, along with the handgun they had come to retrieve.

After entering the dwelling where the defendant appeared to be staying, police observed in plain sight a black handgun in a glass cabinet, a ballistics vest, and drug paraphernalia. No other person was inside. Some officers then left to seek out a search warrant while others remained behind to secure the premises until the warrant was obtained.

A judge issued a search warrant and the subsequent search led to the seizure of weapons and other evidence that were the subject of defendant's unsuccessful suppression motion. The linchpin of the judge's denial of the motion was his finding that the officers engaged in a legitimate protective sweep of the residence.

b.) Foundation of protective sweep exception - Law enforcement officers are lawfully within the private premises for a legitimate purpose, which may include consent to enter; and (2) the officers on the scene have a reasonable and articulable suspicion that the area to be swept harbors an individual posing a danger.

Even though a protective sweep does not have to be "incident to an arrest," the case law presupposes that law enforcement officers who believe themselves or others in potential danger would actually be in the premises or location to be swept.

c.) Analysis - The first prong requires that the officers have a legitimate purpose for being within the private area to be swept. The officers were in the vicinity to either obtain the handgun described in the October 27 forfeiture order or to execute the municipal warrants calling for defendant's arrest. The October 27 order was for the neighboring property and it did not explicitly authorize a search. And, the municipal warrants only provided authority to arrest defendant. Once the arrest was accomplished, the arrest warrants were fulfilled, and the officers had no further legitimate purpose for remaining on the property and no need to conduct a protective sweep.

Reasonable suspicion to justify a motor vehicle stop.

State v. Nyema, 465 N.J.Super. 181 (App. Div. 2020)

Reasonable suspicion standard – Delaware v. Prouse, 99 S. Ct. 1391 (1979) (a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law)

Probable cause standard – Whren v. United States, 116 S. Ct. 1769, 1773 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.")

a.) Facts - Police officers seized the evidence following an investigatory stop of an automobile in which defendant was a passenger. The arresting officer testified he stopped the car because he had been advised two black men had robbed a store. The officer used a spotlight mounted to his car to illuminate the interiors of passing vehicles as he traveled to the store. In one car, he observed three black men who did not react to the light. The officer stopped the car based on those observations. We hold that these undisputed facts do not establish a reasonable articulable suspicion that the men in the car had robbed the store.

The officer testified he stopped the vehicle based on three pieces of information: (1) a store had been robbed by two black men; (2) the car was within three quarters of a mile from the store, traveling away from it; and (3) the three black men in the car did not react to the spotlight he pointed into their vehicle. He acknowledged that the vehicle was not speeding. Indeed, he did not testify that he stopped the vehicle for any motor vehicle infraction. Consequently, it was undisputed that Horan stopped the car in connection with the robbery of the 7-Eleven.

b.) Analysis - The question is whether, under the totality of the circumstances, the officer had a reasonable articulable suspicion that the three men in the vehicle had just robbed the 7-Eleven. The men's non-reaction to the light does not add much to a reasonable articulable suspicion. The officer acknowledged that when he pointed his spotlight into defendant's car, he observed the three men for only one or two seconds while he was driving by in the opposite direction. Consequently, the officer really only had two pieces of information: (1) the 7-Eleven had been robbed by two black men who fled on foot; and (2) a vehicle with three black men was driving away from the 7-Eleven sometime after the robbery had been reported.

That information articulates a hunch, but it does not articulate reasonable suspicion that the three men robbed the 7-Eleven. The officer had no physical description of the suspects at the time he made the stop. Indeed, he only learned that the suspects had reportedly worn dark clothing after he made the stop. He also had no description of a vehicle. In that regard, the officer testified that he had been told that the suspects had fled on foot and he used his general experience to assume that they may have run to a getaway car.

Reasonable expectation of privacy in the common areas of a boarding house.

State v. Williams, 244 N.J. 327 (2020) affirmed per appellate Division decision in

State v. Williams, 461 N.J.Super. 1 (App. Div. 2019)

a.) Facts – A Trenton police officer who was investigating a shoot incident entered a boarding house, walked through a common hallway and detected the odor of marijuana coming from the defendant's room. He requested the occupant (the defendant) to open the door. This transaction resulted in the arrest of the defendant and the seizure of a pistol. The central issue in this appeal is whether a resident of a boarding or rooming house has a reasonable expectation of privacy in common areas (e.g. hallways) beyond his or her bedroom door. This case makes a broad distinction between expectations of privacy in a board house as opposed to an apartment house.

b.) Analysis - Based on the facts elicited at the suppression hearing, we conclude the State failed to establish that arresting officer was in a lawful viewing area when he observed the marijuana because defendant had a reasonable expectation of privacy in the common hallway of the boarding or rooming house, as that area was not proven to be clearly open to the public. We stress that our decision is limited to the specific facts of this case, and further conclude the cases cited by the State, which primarily address either curtilage, or common areas of apartment buildings or similar self-contained multi-unit dwellings, are of limited utility in resolving the issues on appeal. Those cases are factually and legally inapposite as the living arrangements at issue in those cases are dissimilar to defendant's boarding or rooming house, which officer described as resembling a single or multi-family home.