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Garden State CLE presents:

New Jersey Search and Seizure Review – 2019

Lesson Plan

Tamra Katcher, Esquire, Instructor

State v. Shaw, ___ N.J. ___ (2019) 2019 WL 2079120

Third Party Intervention

Under the third party intervention doctrine, police may lawfully examine evidence that was seized and presented to them by a third party (non-law enforcement) who has removed it from an area where the initially possessor had an expectation of privacy. Moreover, the examination of the object can support the application for a search warrant.

The third-party intervention doctrine cannot excuse law enforcement's search of a motel room from the warrant requirement. Where a motel owner or employee finds contraband in a guest's room, "the police can use that information to obtain a search warrant and then conduct a search." In the time it takes to get the warrant, police officers can secure the [motel room] from the outside, for a reasonable period of time, if reasonably necessary to avoid any tampering with or destruction of evidence."

State v. Nelson, ___ N.J. ___ (2019) 2019 WL 2017610

Motor Vehicle searches by dogs

In this case, it is established that the initial traffic stop was a lawful response to the Title 39 violations Detective Kazan observed. We must therefore make two determinations: whether the wait for the canine unit's arrival prolonged Nelson's traffic stop, and, if so, whether the delay was justified by independent reasonable and articulable suspicion that Nelson possessed drugs at that time.

Here, after Nelson denied the detectives consent to search his vehicle, the detectives then "added time" to Nelson's traffic stop when they required him to wait thirty-seven minutes for the arrival of the canine unit. It is worth noting that the stop was made on the New Jersey Turnpike, a limited-access highway, thus necessitating a longer period of time for the canine unit to arrive on the scene. Nelson's stop was nonetheless prolonged -- it exceeded the time needed to accomplish the "tasks tied to the traffic infraction[s]."

Was there reasonable suspicion that authorized the police to continue the 37 minute detention to await the drug dog?

Here, already informed by the tip from ATF, the police were confronted with the "overwhelming odor of air freshener" emanating from Nelson's car which, coupled with the detective's observations, taking into account his training and experience, suggested criminal activity. We find that these factors, in conjunction with the other observations the police officer discussed in his testimony, provided him with the reasonable suspicion necessary to prolong Nelson's stop as they awaited the arrival of the canine unit.

State v. Chisum, 236 N.J. 530 (2019)

Prolonged investigative detention

Police responded to a noise complaint in a motel room. Upon arrival, they found a party attended by ten people. The police asked that the music be turned down which was immediately agreed to by the person who rented the room. No summonses were issued by the police. The police then decided to run warrant checks on everyone at the party. This process took about 20 minutes.

Chisum came back positive for an active warrant. A search of his person incident to arrest resulted in the recovery of a pistol.

We find that the police officers' decision to continue to detain all ten occupants of the motel room after the ultimate determination was made not to issue any summonses for a noise violation was unconstitutional. The investigative detention in this instance, like all investigatory detentions, required that the officers reasonably and particularly suspected that the occupants in Room 221 engaged in, or were about to engage in, some form of criminal activity. Because the officers exercised their own discretion and declined to issue a summons for a noise violation, they essentially concluded that the occupants of Room 221 were not engaging in any criminal activity. Moreover, there is no evidence in the record that any occupants in Room 221 were about to engage in some form of criminal activity, particularly once the noise was abated and the mission of the noise complaint was completed. Therefore, the police officers in this instance were no longer allowed to detain the occupants of the motel room to conduct further investigation into those occupants. After the loud music was abated and the police chose not to issue a summons, submitting warrant checks was unnecessary and improper because doing so would do nothing to help confirm or undermine the police officers' decision regarding the noise complaint.

State v. Gathers, 234 N.J. 208 (2018)

Criminal action orders: Buccal swabs

This interlocutory appeal raises two issues: (1) whether the State may rely solely on a hearsay certification to support a motion for an order to compel a buccal swab; and (2) whether the affidavit in this case provided sufficient probable cause to support the search.

Defendant was arrested after shooting himself in the leg with a gun. Eight months after defendant's arrest and five months after his indictment on weapons charges, the State moved for an order compelling defendant to submit to a buccal swab so that his DNA profile could be obtained. In support of the motion, the State submitted a certification from an assistant prosecutor who claimed that the buccal swab was needed "in order to make proper comparisons to the items of evidence which are currently being submitted to the New Jersey State Police." The trial court granted the State's motion. The Appellate Division reversed, finding, in part, that the assistant prosecutor's certification could not establish probable cause sufficient to justify the search because it consisted of "nothing but hearsay" and it failed to demonstrate that the item of evidence -- a gun -- "actually contains DNA."

We affirm the judgment of the Appellate Division. First, although an affidavit of a police officer familiar with the investigation is preferable, a hearsay certification from an assistant prosecutor may support probable cause to compel a defendant to submit to a buccal swab if it sets forth the basis for the prosecutor's knowledge. Second, we hold that an affidavit or certification supporting probable cause to compel a buccal swab must establish a fair probability that defendant's DNA will be found on the evidence.

State v Evans, 235 N.J. 125 (2018)

Strip searches – Plain feel exception adopted

Incident to a lawful arrest, the defendant, Evans was patted him down by the arresting police officer. The officer found $2000 in cash in Evans's pocket and, when he reached the groin area, the officer felt a "rocklike substance." Based on his experiences with narcotics and knowledge of where drugs are sometimes concealed, the officer concluded that the bulge was likely crack cocaine. With his supervisor's permission, the officer conducted a strip search and found crack cocaine and heroin between Evans's underwear and pants.

The Legislature defined a strip search as "the removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts." The strip search statute provides that a person detained or arrested for an offense other than a crime shall not be strip searched unless "[t]he search is authorized by a warrant or consent," subsection (a); the subject of the search "is lawfully confined," subsection (c); or, as is relevant here, "[t]he search is based on probable cause that a weapon, controlled dangerous substance, or evidence of a crime will be found and a recognized exception to the warrant requirement exists." This case holds that the plain feel exception is applicable to strip searches as a recognized exception.

We hold that, "tactile discoveries of contraband" may justify a warrantless search under certain circumstances. Specifically, contraband found during the course of a lawful pat down may be seized without a warrant if the officer "feels an object whose contour or mass makes its identity immediately apparent." Because immediate tactile recognition of contraband is necessary to justify any subsequent search for and seizure of the contraband, moreover, the "plain feel" exception is compatible with the Strip Search Act requirement "that all elements justifying [the strip search] be in place before the search occurs."

State in the Interest of J.A., 233 N.J. 432 (2018)

The attenuation doctrine

While investigating a street robbery of a cell phone, the police made a warrantless entry into a residence in an effort to recover evidence they had spotted from an outside window. The entry was not justified under either the "hot pursuit" or exigent circumstances exceptions to the warrant requirement.

While speaking to the occupants of the residence, one of them voluntarily and without any police urging or request retrieved the evidence the police had seen through the window and turned it over to them for use as criminal evidence.

The attenuation doctrine has three elements: "(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.

In this case, although the initial residential entry by the police was illegal, the recovery of the evidence was so far attenuated from the initial violation of the law that the taint associated with the evidence had been dissipated.

State v. Parker, ___ N.J. Super. ___ (Ap. Div. 2019) 2019 WL 2079089

Motion to suppress hearings

The trial court suppressed evidence in this case based upon the briefs and other papers submitted. No hearing was held as required under Rule 3:5-7(c). The Appellate Division ruled that a hearing on a motion to suppress must be held when there is a dispute between the parties as to the relevant facts of the case.

State v. Rodriguez, ___ N.J. Super. ___ (App. Div. 2019) 2019 WL 1967687

Automobile search for vehicles that will be impounded

The case began with a valid motor vehicle stop. The officer smelled the odor of marijuana in the car and observed a small amount within. The defendant/driver was on the revoked list, was not the owner of the vehicle and no one was available to drive the car away. Distribution levels of drugs were recovered as a result of a police search under the automobile exception. (State v. Witt)

At the motion to suppress, the trial court rejected the State's reliance upon the automobile exception to the constitutional warrant requirement. The court accepted defendant's contention that, as the situation unfolded at the roadside, it was clear that the Jeep was going to be towed and impounded. The court noted in this regard that defendant lacked a valid driver's license, was secured in the back of a police car, and "the registered owner of the vehicle was not available or on sight." The court found "there was no indication to believe that the [Jeep] or its contents would be subject to being removed, tampered with, or otherwise disturbed before a warrant could be obtained." In addition, defendant had declined to give his consent to a search of the Jeep.

We respectfully do not construe Witt to convey such a limitation upon the automobile exception. Nothing in Witt states that a roadside search of a vehicle based upon probable cause cannot be performed if the vehicle is going to be impounded. We instead read Witt as affording police officers at the scene the discretion to choose between searching the vehicle immediately if they spontaneously have probable cause to do so, or to have the vehicle removed and impounded and seek a search warrant later.

[Comment – this case is critical in the DWI context due to the mandatory towing required by John's Law, NJSA 39:4-50.23]

State v. Brown, 456 N.J.Super. 352 (App. Div. 2018)

Strip search – exigent circumstances

Based on their observations of the hand-to-hand transaction, the accuracy of the CI's information, and a tinted window infraction, detectives stopped defendant's vehicle on Route 40. The police asked defendant, who "was visibly shaking" and "seemed very upset[,]" to exit his vehicle. By that time, other officers had arrived, including a K-9 partner, who positively alerted for the presence of narcotics in defendant's vehicle. During the K-9 sniff, defendant "became more nervous as time progressed" and continued reaching for a "distinct bulge" in his groin, "adjust[ing] it slightly." Believing defendant "possibly was adjusting a weapon," Lorady attempted to perform "a protective pat down for [his] safety." Defendant "pulled away" stating, "you can't touch me there." The police officer "couldn't successfully complete the pat down[,] but [he] was able to feel that there was something ... hard" in defendant's groin, in an area that commonly is utilized to conceal weapons.

The officers then handcuffed defendant and transported him to the police station where the arresting officer obtained permission from his supervisor to conduct a warrantless strip search of defendant. The strip search was conducted at noon, in a private interview room, and resulted in the seizure of five bricks of heroin from defendant's groin "right where the police officer had felt [it]."

Although the strip search statute nominally applies to disorderly persons' offenses, the associated attorney general guidelines allow searches for crimes as well.

In this case, defendant's actions in resisting the pat-down search created exigent circumstances justifying the warrantless strip search, and it was not reasonable to expect the officers to apply for a search warrant. Because the arresting officer believed defendant was concealing a weapon, the officer reasonably removed defendant from the side of a busy highway to the police station, and obtained his supervisor's permission to conduct a strip search in accordance with accepted procedures. We therefore conclude that the motion record supports the judge's conclusion that exigent circumstances properly justified the warrantless strip search.

State v. Harris, 457 N.J.Super. 34 (App. Div. 2018)

Plain view of cell phone data from CDW

As part of a murder investigation the police obtained a CDW to search the defendant's cell phone data. Sprint provided a call log for that December time range only, but, without restriction, supplied all Picture Mail records associated with defendant's Sprint account. Although the caption of the CDW included the word "photograph," the warrant by its terms did not seek photographs at all, but rather all calls, local and long distance, made from and to [defendant's phone number] including cellular telephone call detail records, CELL SITE locations, records and content of incoming and outgoing text messages, and subscriber information for [defendant's phone number] ... for the period of December 1, 201[1] through and including December 16, 2011, and the obtaining of subscriber information .

Finding both of the State's witnesses credible, the judge denied defendant's motion to suppress the photograph, ruling that although the CDW did not, by its plain language, cover any photographs, and this photograph was sent beyond the time range provided in the warrant, the photograph was admissible under the plain view exception to the warrant requirement. The judge found the search met all three prongs of the "plain view" exception: the investigating detective was lawfully in the viewing area because he had a warrant for the phone's data; he inadvertently found the photograph because he reasonably assumed the photographs provided were within the requested date range; and the photograph was immediately recognizable as evidence of the crime. The judge concluded that no police misconduct occurred and thus applying the exclusionary rule would serve no deterrent effect.
The detective's ignorance of the technology surrounding electronic files does not excuse opening material not responsive to the CDW. The State could reasonably have had a technology-literate investigator inspect the CD. An officer is not in a lawful viewing place when he opens JPEG files clearly containing photographs provided in response to a CDW that does not authorize the review of photographs. The detective's actions of clicking on the files to open them up are analogous to an officer opening a door or cabinet to view what is inside, essentially to get a better view of the item.

State v. Andrews, 457 N.J.Super. 14 (App. Div. 2018)

The foregone conclusion exception to Miranda

As part of an official corruption investigation, prosecutors seized the defendant's iphones and sought the pass codes necessary to unlock them. The defendant refused, relying on his right to remain silent.

The Fifth Amendment privilege against self-incrimination applies not only to verbal and written communications but also to the production of documents because "[t]he act of produc[tion]" itself may communicate incriminatory statements.

Nevertheless, the "foregone conclusion" principle is an exception to the "act of production" doctrine. For the "foregone conclusion" exception to apply, the State must establish with reasonable particularity: (1) knowledge of the existence of the evidence demanded; (2) defendant's possession and control of that evidence; and (3) the authenticity of the evidence. Therefore, when an accused implicitly admits the existence and possession of evidence, the accused has "add[ed] little or nothing to the sum total" of the information the government has, and the information provided is a "foregone conclusion."

In U.S. v. Doe, the Court held that an order requiring the target of a grand jury investigation "to authorize foreign banks to disclose records of his accounts, without identifying those documents or acknowledging their existence," did not compel a testimonial act for purposes of the Fifth Amendment. The Court found that the defendant's execution of the disclosure form did not convey anything about the existence of any foreign bank account, the defendant's control over any such account, or the authenticity of any records the banks may produce.

Here, as in Doe, the act of disclosing the pass codes to defendant's phones does not convey any implicit factual assertions about the "existence," or "authenticity" of the data on the device. Moreover, in its order, the trial court required defendant to disclose the passcodes in camera before they are communicated to the State. The order thus ensures that any incriminating information would not be disclosed.

The order also ensures that by providing the pass codes, defendant will not be compelled "to restate, repeat, or affirm the truth of the contents of the" devices.

However, by producing the pass code, defendant is making an implicit statement of fact that the iPhone passcodes are within his "possession or control. Defendant is acknowledging he has accessed the phone before, set up password capabilities, and exercised some measure of control over the phone and its contents.

Nevertheless, these testimonial aspects of the pass codes are a "foregone conclusion" because the State has established and defendant has not disputed that he exercised possession, custody, or control over these devices. Therefore, the fact that defendant knows the pass codes to these devices "adds little or nothing to the sum total of the Government's information."

State v. Mandel, 455 N.J.Super. 109 (App. Div. 2018)

Officer struck his head in the vehicle

A police officer stopped defendant's vehicle after he observed it traveling in front of him with dark tinted windows. The officer approached the passenger side of the vehicle and conversed with defendant through the open passenger side window. The officer asked defendant to produce his driver's license, and inquired about his driving record. During this exchange, the officer leaned his head into the open passenger side window in order to better hear defendant's responses over the noise of the passing traffic. While speaking to defendant, the officer smelled the odor of marijuana coming from inside the vehicle. Gilliland informed defendant he smelled marijuana. Based on this observation, the officer searched the car and found a small quantity of marijuana under the passenger seat. Defendant was charged with the disorderly persons offense of marijuana possession, and traffic offenses.

Whether or not a police officer's entry into a vehicle by sticking his head inside is a search under New Jersey law is an open question. However, in this case, there was no evidence that the purpose of the officer placing his head in the window was to sniff the vehicle cabin for marijuana. The MVR corroborated the officer's testimony regarding the need to hear defendant over the traffic noise, and demonstrated that his intrusion into the vehicle was minimal and not unreasonable.